HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, GUMMOW AND KIRBY JJ

BARRY JOHN CASSELL APPELLANT

AND

THE QUEEN RESPONDENT

Cassell v The Queen [2000] HCA 8
Date of Order: 18 November 1999
Date of Publication of Reasons: 10 February 2000
S110/1999

ORDER

Appeal dismissed.

On appeal from the Supreme Court of New South Wales.

Representation:

J C Papayanni for the appellant (instructed by Peter C Prior & Co)

A M Blackmore for the respondent (instructed by S E O'Connor, Director of Public Prosecutions (New South Wales))

CATCHWORDS

Cassell v The Queen

Criminal law – False evidence – Independent Commission Against Corruption – Whether hearing conducted by Assistant Commissioner was a "hearing before the Commission" – Evidence of delegation by Commissioner.

Independent Commission Against Corruption Act 1988 (NSW), ss 30, 87.

1 GLEESON CJ, GAUDRON, McHUGH AND GUMMOW JJ. This appeal, from the Court of Criminal Appeal of New South Wales, was heard and determined on 18 November 1999. The Court ordered that the appeal be dismissed, and stated that reasons for the order would be given at a later date.

2 The matter has a long history. However, the question for decision in this appeal is narrow. In order to explain how it arises, it is necessary to state some features of the background.

3 In September 1989, the appellant gave evidence before Assistant Commissioner Roden, in the course of a hearing, or purported hearing, held by the Independent Commission Against Corruption of New South Wales, for the purposes of an investigation then being conducted by the Commission. The investigation concerned certain conduct of councillors and employees of the Tweed Shire Council. The nature of the evidence given by the appellant is presently immaterial.

4 Subsequently, the appellant was charged with offences against s 87 of the *Independent Commission Against Corruption Act* 1988 (NSW) ("the Act"). That section provides:

> "A person who, at a hearing before the Commission, gives evidence that is, to the knowledge of the person, false or misleading in a material particular is guilty of an indictable offence."

5 The offences were of a kind which could be dealt with summarily. The appellant was charged before a magistrate in the Local Court, entered pleas of guilty, and was convicted and sentenced. He then appealed against the convictions and sentences. The appeals came on for hearing in the District Court of New South Wales before Judge Downs QC. The appeals involved a hearing *de novo* of the charges against the appellant. At the conclusion of the case for the prosecution, counsel for the appellant submitted that there was no prima facie case. Judge Downs ruled against that submission. Counsel then requested the judge to state a case for the opinion of the Court of Criminal Appeal pursuant to s 5B of the *Criminal Appeal Act* 1912 (NSW).

6 There were five questions raised by the case stated. The Court of Criminal Appeal (Smart, Ireland and Dunford JJ) answered each question adversely to the appellant[1]. This appeal is concerned with the answer to only one question.

7 The question was whether Judge Downs erred in holding that the evidence before him "was sufficient to prove that there had been a valid hearing under

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1 (1998) 45 NSWLR 325.

[the Act] in which evidence had been given by the appellant sufficient to support a conviction for an offence under Section 87 of [the Act]". The Court of Criminal Appeal answered that question in the negative, concluding that there was sufficient evidence to establish that the evidence given by the appellant (which, for the purpose of the argument, was assumed to have been, to the appellant's knowledge, false or misleading in a material particular) was given "at a hearing before the Commission" within the meaning of s 87 of the Act.

8 It is important to bear in mind the nature of the jurisdiction which the Court of Criminal Appeal was exercising. Section 5B of the *Criminal Appeal Act* enables a case to be stated on a question of law arising in an appeal to the District Court. The Court of Criminal Appeal was, therefore, addressing a contention, raised in the course of a submission that there was no prima facie case against the appellant, to the effect that, as a matter of law, the evidence adduced in the prosecution case was insufficient to sustain a finding that there had been a hearing before the Commission within the meaning of s 87 of the Act. It was not deciding whether it would itself reach such a conclusion, or whether there were factual considerations tending against such a conclusion.

9 Division 3 of Pt 4 of the Act is concerned with the subject of hearings. It includes s 30, which provides:

> "(1) For the purposes of an investigation, the Commission may hold hearings.
>
> (2) The hearing shall be conducted by the Commissioner or by an Assistant Commissioner, as determined by the Commissioner.
>
> (3) At each hearing, the person presiding shall announce the general scope and purpose of the hearing.
>
> (4) A person appearing before the Commission at a hearing is entitled to be informed of the general scope and purpose of the hearing."

10 No question presently arises concerning any alleged failure to comply with sub-ss (3) and (4).

11 Certain other features of the Act may be noted. The Act, in s 4, constitutes the Commission. It provides for the appointment, by the Governor, of a Commissioner (s 5), and one or more Assistant Commissioners (s 6). The role of an Assistant Commissioner is to "assist the Commissioner, as the Commissioner requires" (s 6(3)). The expression "officer of the Commission" is defined to mean the Commissioner, an Assistant Commissioner, a member of the staff of

the Commission, or a person engaged to provide the Commission with services, information or advice (s 3).

12 Section 4 provides, in sub-s (4), that a reference in the Act to a hearing before the Commission includes a reference to a hearing before the Commissioner or another officer of the Commission having authority in the circumstances. The primary source of authority for an Assistant Commissioner to conduct a hearing is s 30. Although counsel for the appellant referred to s 107 of the Act, which empowers the Commission, and the Commissioner, to delegate functions to an Assistant Commissioner or an officer of the Commission, that provision is not of present relevance.

13 The evidence before Judge Downs proved the formal institution of the investigation by the Commissioner, Mr Temby QC. Evidence tendered and received, without objection, identified him as the Commissioner. Similarly, evidence tendered and received, without objection, identified Mr Roden as an Assistant Commissioner.

14 The circumstances in which the appellant, (who was represented by senior counsel), attended before Assistant Commissioner Roden, in the course of the investigation instituted by Commissioner Temby, and the terms of his evidence, appeared from the evidence of employees of the Commission, including Mr Hunter, and employees of the recording service engaged by the Commission. Mr Hunter identified Assistant Commissioner Roden, who was presiding, Mr Toomey QC, who was counsel assisting the Commission in the investigation, the appellant, and others. Tape recordings of the proceedings were produced from the records of the Commission, and tendered as exhibits. The hearing was proved to have taken place at the premises of the Commission, and to have been assisted by staff of the Commission.

15 In the light of that evidence, Judge Downs held, and the Court of Criminal Appeal agreed, that there was sufficient evidence to establish that the occasion on which the appellant gave his evidence was a "hearing before the Commission" within s 87 of the Act.

16 There was no evidence which cast any doubt upon the regularity of the proceedings in question.

17 Although counsel for the appellant announced to Judge Downs, at the commencement of the hearing, that he would put the prosecution to "strict proof of all matters", if the matters to which he was referring included the appointment of Mr Temby and Mr Roden to their respective offices, he did not do so. He allowed evidence to be given without objection that they were respectively the

Commissioner and an Assistant Commissioner. That having occurred, it is too late now to complain that their appointments were not formally proved. In any event, as was pointed out by Latham CJ and McTiernan J in *R v Brewer*[2]:

> "Acting in a public office is evidence of due appointment to that office, not only in civil proceedings but also in a criminal case."

18 Further, with reference to the requirement of "strict proof", it is trite that, whatever force this expression may have as a forensic flourish, there is not some standard of persuasion which is fixed intermediate between the satisfaction beyond reasonable doubt required upon a criminal inquest and the reasonable satisfaction which in a civil issue may, not must, be based upon a preponderance of probability[3].

19 Even if it had appeared that there was some defect in the appointment of the Commissioner or the Assistant Commissioner, (which is not the case), the prosecutor may well have been entitled to rely upon the principle of the common law that where an office exists but the title to it of a particular person is defective the "acts of a de facto public officer done in apparent execution of his office cannot be challenged on the ground that he has no title to the office"[4].

20 It was argued on behalf of the appellant that there was no evidence, and no available inference, that the Commissioner had determined, under s 30(2), that the hearing should be conducted by the Assistant Commissioner.

21 There is nothing in the Act which requires a determination under s 30(2) to be in writing or to be attended by any formality. Once the Commissioner has instituted an investigation, the Commissioner may choose to conduct a hearing personally, or may take advantage of the assistance which an Assistant Commissioner is appointed to render. (The matter of delegation of functions to other officers of the Commission, or to other persons whose services have been engaged does not presently arise). What is involved is an internal administrative

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2 (1942) 66 CLR 535 at 548.

3 *Briginshaw v Briginshaw* (1938) 60 CLR 336.

4 cf *GJ Coles & Co Ltd v Retail Trade Industrial Tribunal* (1986) 7 NSWLR 503 at 525 per McHugh JA.

arrangement, similar to the arrangements that operate in courts in connection with the assignment of judges to hear cases[5].

22 It was proved that Commissioner Temby instituted the investigation in question, and that hearings were conducted for the purposes of the investigation. The hearings were staffed by employees of the Commission, assisted in a variety of ways by persons whose services were engaged by the Commission, conducted at the premises of the Commission, and presided over by a person whose primary statutory duty was to assist the Commissioner. The inference that the Assistant Commissioner was conducting the hearing because the Commissioner had determined that he should do so was clearly available.

23 For those reasons it was proper to dismiss the appeal.

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5 cf *Rajski v Wood* (1989) 18 NSWLR 512.

24 KIRBY J. It is a fundamental principle of the criminal law in Australia that, save for those rare exceptions where a legislature has provided otherwise, the burden rests on the prosecution to prove beyond reasonable doubt every element necessary to establish the criminal offence charged. No authority is required for this proposition. This Court has a duty to safeguard the principle against attempted erosion.

25 From time to time, application of the principle, sometimes called the golden thread of the criminal law[6], causes inconvenience to prosecutors, irritation to decision-makers and puzzlement in the general community. But the principle is fundamental. It stands guard for the liberty of the individual in a contest with the concerted power of the state. Other legal systems have adopted different institutions, rules and procedures for the conduct of criminal trials. These may sometimes appear more rational, effective and efficient. But the high measure of individual liberty which is enjoyed in Australia is, in part, attributable to the stringent limits which the law places upon the state when it prosecutes an individual for a crime. It must then prove every fact necessary to support the legal elements of the offence. If it fails in this endeavour, whether by error or oversight, the prosecution must fail. The charge must be dismissed. The prosecution cannot repair an absence of evidence to establish an essential ingredient of the offence by appealing to assumptions concerning the presumed rectitude of the conduct of the prosecution and its witnesses. Nor may it rely on the failure of the accused to disprove the missing ingredients, for that would be to shift the onus from the prosecution to the accused and this is impermissible.

26 Criminal trials, and the appeals which arise from them, are conducted according to rules which are quite different from those applicable to civil proceedings[7]. Many criminal prosecutions fail only because of legal technicalities, not substantive merits. There could be no clearer instance of this than the recent decision in *Byrnes v The Queen*[8]. The casebooks contain many such instances. They represent repeated illustrations of the commitment of our criminal justice system to the rigorous application of the law. Before a person who is accused of a crime in Australia may be deprived of liberty, reputation or otherwise punished, our legal system insists that the offence charged must be proved. This means proof of every ingredient which is necessary in law to

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6 *Woolmington v The Director of Public Prosecutions* [1935] AC 462 at 481.

7 Although even in civil matters, depending on the circumstances and the consequences of default, strict requirements must sometimes be observed to ensure the validity of the proceedings: eg *Barwick v Law Society of New South Wales* [2000] HCA 2.

8 (1999) 73 ALJR 1292; 164 ALR 520.

establish its existence. Particularity not generality rules. Precision and accuracy; not vague notions of commonsense.

27 I state these elementary propositions at the outset of these reasons in order to explain the differing approach which I take to this appeal. It would be easy enough to succumb to a sense of irritation with the technicalities involved in the objections which have been raised in these proceedings before they reached this Court. But irritation is not a substitute for proper legal analysis. The absence of merit (other than legal merit) is irrelevant if the law is on the accused's side. Cases in which an accused escapes punishment by reason of some technicality may call attention to the possible need for legal change[9] or the need for greater care in prosecution practice. It is not, in my respectful opinion, a proper response to defects once exposed, to disregard them or to weaken the cardinal principle of the criminal law to which I have referred.

28 On 18 November 1999 this Court dismissed this appeal. In my view, the appeal should have been allowed. The approach and conclusion of the Court of Criminal Appeal of New South Wales were erroneous.

The facts

29 In September 1989 Mr Barry Cassell (the appellant) gave certain testimony in proceedings (to use a neutral word) conducted in a hearing room of the Independent Commission Against Corruption ("the Commission"). This is a statutory corporation constituted by s 4(1) of the *Independent Commission Against Corruption Act* 1988 (NSW) ("the Act"). Following the testimony, in July 1991, four informations were laid against the appellant in the Local Court of New South Wales. These charged him with offences against s 87 of the Act. That section states:

> "A person who, at a hearing before the Commission, gives evidence that is, to the knowledge of the person, false or misleading in a material particular is guilty of an indictable offence."

30 The offence so provided carries a maximum penalty of a fine or imprisonment for five years, or both. Judicial authority exists which suggests that a person convicted of the offence should ordinarily receive a custodial

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9 As *Byrnes v The Queen* did. See also *Lipohar v The Queen* (1999) 168 ALR 8 at 49.

sentence[10]. It could not be disputed that the charge was therefore a serious one potentially affecting the liberty of the appellant.

31 In the Local Court the appellant was convicted and sentenced. He appealed to the District Court of New South Wales[11]. His appeal was heard *de novo* by Judge Downs QC. Judge Downs allowed the appeal and quashed the convictions. The Crown applied to the Court of Criminal Appeal for review of the orders made by Judge Downs[12]. That Court quashed the purported order of Judge Downs and remitted the matter to the District Court for reconsideration[13]. The hearing before Judge Downs resumed in June 1997. The appellant raised a number of objections to the sufficiency of the evidence which had been led by the Crown to prove the alleged offences. Upon each of the appellant's objections, Judge Downs ruled in favour of the Crown. The appellant asked his Honour to state a case for the opinion of the Court of Criminal Appeal. This he did.

32 The case stated ("stated case") recounts certain factual findings, submissions made for the appellant, the reasons of Judge Downs for rejecting the appellant's submissions and the questions of law reserved for opinion. Amongst the facts found were the terms of reference identifying the "investigation"[14] which the Commissioner appointed under the Act (Mr Ian Temby QC) had signed, the evidence of court reporters and monitors who had recorded and transcribed the several master tapes of the proceedings at which the appellant's testimony had been given, and the evidence of a Mr Kevin Hunter, an employee of the Commission. Mr Hunter deposed that he was a hearing room officer who had been present in the hearing room of the Commission on 6 and 7 September 1989 when the appellant gave evidence. Mr Hunter further deposed that he had subsequently listened to the audio cassette tapes and identified those tapes (six in number) and the voices on them as "Mr Toomey, Counsel assisting Mr Roden, Assistant Commissioner and the appellant". The evidence of the court reporters and monitors and of Mr Hunter was given and accepted by Judge Downs. In the stated case, his Honour also recorded, relevantly, that he had been advised at the outset of the appeal "that Counsel for the appellant required strict proof of all

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10 eg *R v Anthony Aristodemou* unreported, Court of Criminal Appeal (NSW), 30 June 1994 at 4; *R v Nelson Rowatt Chad* unreported, Court of Criminal Appeal (NSW), 13 May 1997 at 4-5.

11 *Justices Act* 1902 (NSW), s 122(1).

12 Who had refused the Crown's request for a stated case pursuant to the *Criminal Appeal Act* 1912 (NSW), s 5B.

13 *Director of Public Prosecutions v Cassell* (1995) 80 A Crim R 160 at 173.

14 The Act, s 30(1).

matters"[15]. He recorded the relevant submission "that there had not been a hearing by the Commissioner [sic] in accordance with the Act"[16]. He asked the Court of Criminal Appeal whether he had erred in law, relevantly, in holding that:[17]

> "The evidence was sufficient to prove that there had been a valid hearing under the ICAC Act in which evidence had been given by the appellant sufficient to support a conviction for an offence under Section 87 of the said Act."

33 The Court of Criminal Appeal[18] considered and disposed of the stated case, rejecting objections to rulings by Judge Downs with which this Court is not concerned. It then reached question 5 (above) which it answered in the negative. Special leave to appeal to this Court was granted to the appellant, but limited to a challenge to the answer to that question.

The issues

34 The reasons of the Court of Criminal Appeal were delivered by Smart J. After recording the appellant's submission that the prosecution should fail because there was no evidence of a determination that the hearing by the Commission should be conducted by an Assistant Commissioner or that the Commissioner had delegated any function to the Assistant Commissioner[19], Smart J proceeded to give the appellant's objection short shrift[20]:

> "Evidence was not required of these matters. Section 6 [of the Act] provides for the appointment of an assistant commissioner and for him to exercise the functions conferred or imposed on an assistant commissioner under the Act. Section 30 provides for a hearing to be conducted by the Commissioner or by an assistant commissioner as determined by the Commissioner. There was evidence of Mr Roden acting as an assistant commissioner, presiding at a hearing in a hearing room of the Commission

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15 Stated case, Statement of Facts, par 4(a).

16 Stated case, Statement of Facts, par 11(iv).

17 Stated case, Questions of Law, par 5.

18 *R v Cassell* (1998) 45 NSWLR 325 (Smart, Ireland and Dunford JJ).

19 (1998) 45 NSWLR 325 at 338.

20 (1998) 45 NSWLR 325 at 339.

> and conducting a hearing and the Commission's reporting service … providing the tape and the transcript.…
>
> The presumption of regularity applies."

35 During argument in this Court, three bases were propounded to support the holding of the Court of Criminal Appeal. These were:

(a) That on the basis of the findings made by Judge Downs, it was open to him to infer that the Assistant Commissioner was lawfully conducting a "hearing" of the Commission within the meaning of s 87 of the Act;

(b) That if, contrary to (a) there was no evidence that the Commissioner had "determined" that the hearing should be conducted by an Assistant Commissioner[21] or that it was otherwise a "hearing" before the Commission, the evidentiary gap could be cured by the rule of evidence or law known as the presumption of regularity[22]. This was applicable either in its general operation or in a particular application to the acts of a public official purporting to perform the duties of a public office; and

(c) That if all else failed, the prosecution was entitled to rely on the common law doctrine governing the acts of a de facto officer where it is discovered that a person who has purported to exercise a public office had no lawful authority to do so. In some cases that person's acts will nonetheless be upheld so as to avoid the greater mischief that would be done were such acts to be treated as void[23].

36 The Crown relied on (a) and, if necessary, (b) to support the decision of the Court of Criminal Appeal. Neither party submitted that the de facto officers' doctrine was relevant. That issue was raised by the Court. In my view, none of the suggested solutions to the evidentiary defect rescues the prosecution. As the prosecution had been put to strict proof, there was no excuse, in respect of matters not conceded at the trial, for the failure to prove the lawfulness of the "hearing before the Commission". Such a hearing was a central element to the

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21 The Act, s 30(2).

22 *Omnia praesumuntur rite et solemniter esse acta*.

23 Dixon, "De Facto Officers", in *Jesting Pilate*, 2nd ed (1997) at 229; Campbell, "De Facto Officers", (1994) 2 *Australian Journal of Administrative Law* 5; *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 73 ALJR 1324 at 1357; 165 ALR 171 at 216-217; *G J Coles & Co Ltd v Retail Trade Industrial Tribunal* (1986) 7 NSWLR 503 at 519-520, 527.

offences of which the appellant was charged. Failure to prove it was fatal to the success of the prosecution.

Inference cannot repair the evidentiary gap

37 The complaint of the appellant was that the Crown had failed to establish the authority of the Assistant Commissioner to conduct the "hearing" of the Commission. The only offence for which s 87 of the Act provides is that of giving knowingly false or misleading "evidence" and doing so "at a hearing before the Commission". Making false or misleading statements to another person will often (depending on the circumstances) be morally objectionable and ethically reprehensible. But it only takes on the character of the offence for which s 87 provides if it is "evidence" which is given "at a hearing before the Commission". These are therefore essential elements of the offence. Unless they are proved, a person cannot be convicted and punished for the crime for which the section provides.

38 Obviously, a proceeding before a person who happened to be an Assistant Commissioner would not necessarily amount to "a hearing before the Commission". Thus, if that person conducted a private inquiry on behalf of a church, synagogue or other body, the mere fact that he or she was an Assistant Commissioner of the Commission would be irrelevant so far as s 87 was concerned. Likewise, the mere fact that such a person conducted such an inquiry in the premises of the Commission would not of itself constitute it "a hearing before the Commission". Something more is necessary to turn the inquiry into "a hearing before the Commission". That something is the authority of the person hearing the inquiry to do so as the Commission. Only such authority accords to the "hearing" the statutory character which attracts the serious consequences to the giving of evidence which is false or misleading to the extent described.

39 The offence in s 87 is a modern statutory variety of perjury. That was an offence at common law. It involved making, on oath in a judicial proceeding, a false statement concerning a matter material to the proceeding, while knowing that the statement was false or not believing it to be true[24]. Because serious consequences commonly flow from judicial proceedings if they are decided on false testimony, it is the character of the proceeding that is essential to the crime of perjury, both at common law and in its modern statutory forms[25]. That is why proof of the character of the "hearing" is indispensable to proof of the offence.

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24 *R v Traino* (1987) 45 SASR 473 at 475 per King CJ.

25 See eg *Crimes Act* 1900 (NSW), s 327.

This is as true of the offence against s 87 of the Act as it is of the offence of perjury, whether at common law or by statute.

40 It is thus not a matter of tedious irrelevancy for the appellant (who has insisted upon strict proof of all elements of the offence not conceded) to insist that the Crown should have established that the occasion upon which he was alleged to have given "evidence" known to be false or misleading was, in the relevant legal sense, "a hearing before the Commission". Although it is correct to say, as the Crown did before this Court, that the signal of the requirement of strict proof could not control the way the Crown established its case, it was not irrelevant. Even before modern statutory requirements were introduced, imposing upon accused persons the obligation to notify some defences[26], it was not uncommon in criminal proceedings for issues to be defined and admissions made in a way that would sometimes relieve the prosecution of the obligation to prove particular elements of the offence. No such concession was made in this case as to the "hearing". On the contrary, the appellant made it clear that the prosecutor should examine with special care the elements of the offence, and if any element were not proved, that he, the applicant, would rely on that fact.

41 It was common ground that the prosecution had not proved any "determination" by the Commissioner that Assistant Commissioner Roden should conduct the "hearing" in question. However, it was submitted for the Crown that the absence of proof of such a "determination" did not deprive the Assistant Commissioner of the relevant "authority in the circumstances"[27]. The first argument went thus. Nothing in the Act required that such "determination" observe any formality. There was no requirement there or in any other Act[28] that the "determination" be reduced to writing. It might therefore have been made orally. Proof of it could arise by oral evidence or inference as much as by tender of a written "determination", assuming one to exist.

42 The Crown argued that many issues in a criminal trial must be left to inference. A number of considerations in the evidence before Judge Downs were cited to support the derivation of an inference that the Commissioner had

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26 For example in several Australian jurisdictions notice must be given of the name and address of a witness to give evidence of an alibi. See *Crimes Act* 1900 (NSW), s 405A; *Crimes Act* 1958 (Vic), s 399A; Criminal Code (Qld), s 590A.

27 The Act, s 4(4).

28 cf *Interpretation Act* 1987 (NSW), s 49(2)(b) which is a general provision that requires that a delegation of a power pursuant to an Act to any person or body "shall be in, or be evidenced by, writing signed by the delegator or, if the delegator is a body, by a person authorised by the body for that purpose".

"determined" that an Assistant Commissioner should conduct the "hearing" of the Commission. The facts said to be relevant included (1) that the proceedings took place at the Commission's premises involving Commission staff; (2) that they were recorded at the request of the Commission, inferentially at its cost and for its purposes, the master tapes being deposited after the hearing at the office of the Commission; (3) that Mr Hunter (whose evidence was accepted) identified the voices of counsel assisting, the Assistant Commissioner and the appellant; (4) that Mr Hunter identified the person presiding as having been Mr Roden, described as Assistant Commissioner; (5) that Mr Hunter also gave evidence that Mr Temby was the Commissioner at the time of his engagement by the Commission and by inference at the time of the hearing; and (6) that the foregoing evidence was not objected to and the appellant failed to call any contrary evidence to cast doubt on the inferences available from it.

43 In *Doney v The Queen*, this Court referred (in the context of a jury trial) to "the inferences involved in the acceptance of direct or testimonial evidence"[29]. The Court continued[30]:

> "[I]t is appropriate here to draw attention to the fact that the drawing of inferences extends beyond circumstantial evidence because the purpose and the genius of the jury system is that it allows for the ordinary experiences of ordinary people to be brought to bear in the determination of factual matters. It is fundamental to that purpose that the jury be allowed to determine, by inference from its collective experience of ordinary affairs, whether and, in the case of conflict, what evidence is truthful. …
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> [T]he weight to be given to that evidence is as much a matter to be determined by inference based on the jury's collective experience of ordinary affairs as is the question whether evidence is truthful. …
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> It follows that, if there is evidence (even if tenuous or inherently weak or vague) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury for its decision. Or, to put the matter in more usual terms, a verdict of not guilty may be directed only if there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty."

44 The Crown submitted that where, as in an appeal to the District Court by way of rehearing, fact-finding is committed to a judge sitting without a jury, by analogy, the same rules applied. Where there was evidence, even tenuous, weak

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29 (1990) 171 CLR 207 at 214.

30 (1990) 171 CLR 207 at 214-215.

or vague evidence, of an essential fact, it was for the judge to determine its sufficiency to establish a fact in issue. Assuming it to be necessary to prove a "determination" that the Assistant Commissioner should conduct the "hearing", the foregoing facts were sufficient, so it was argued, to sustain the conclusion which Judge Downs had reached. No error of law was revealed in his process of reasoning.

45 There are a number of fallacies in this submission. The starting point to expose them is an understanding of the scheme of the Act. That scheme must be viewed against the earlier explanation of the importance, for offences of this character, of the proof of the nature of the "hearing" which is the basis for the seriousness which the law attaches to the giving of false or misleading evidence. So serious is the offence that it is designated by the Act as "indictable"[31]. However, in this case, the decision had been made to deal with it summarily[32].

46 The phrase "at a hearing before the Commission" in s 87 of the Act immediately poses the question as to who might constitute the Commission for such a hearing. Two sections of the Act are relevant. By s 4(3), it is provided that the "functions of the Commission are exercisable by the Commissioner, and any act, matter or thing done in the name of, or on behalf of, the Commission by the Commissioner, or with the authority of the Commissioner, shall be taken to have been done by the Commission." Obviously, this sub-section is of no help in the present prosecution, it being established by the uncontested evidence of Mr Hunter that the Commissioner was Mr Temby and that he was not identified as a person who conducted the "hearing". Accordingly, it could not be proved by this means that these were acts "taken to have been done by the Commission".

47 Nor, in the absence of proof of authority given by the Commissioner, could the alternative requirement of s 4(3) of the Act be satisfied to render the conduct of the hearing as something "done by the Commission". The next succeeding sub-section, s 4(4) provides:

> "A reference in this Act to a hearing before the Commission or anything done or omitted by, to or in relation to the Commission includes a reference to a hearing before, or a thing done or omitted by, to or in relation to, the Commissioner or another officer of the Commission having authority in the circumstances."

48 This sub-section appears particularly relevant to s 87 because it uses the phrase contained in that section, viz "a hearing before the Commission". The

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31 s 87.

32 The Act, s 116(2).

definition is inclusive. However, it primarily envisages a hearing before the Commission as established by the Commissioner. That was not the present case. As to a case where the Commissioner did not conduct the hearing, the Act specifically envisages that the "hearing before the Commission" could be conducted by "another officer of the Commission having authority in the circumstances". Clearly, this expression means "authority" under the Act, ie as expressly stated in the Act or derived from a general power to delegate "authority in the circumstances" to another officer of the Commission.

49 The second relevant section of the Act is s 30. It appears in Div 3 (Hearings) of Pt 4 (Functions of Commission). So far as is pertinent, s 30 provides:

> "(1) For the purposes of an investigation, the Commission may hold hearings.
>
> (2) A hearing shall be conducted by the Commissioner or by an Assistant Commissioner, as determined by the Commissioner."

50 Once again, s 30 follows the scheme of the Act which sub-ss (3) and (4) of s 4 appear to envisage. The hearing may be held by "the Commission". Primarily, such a hearing is to be conducted by the Commissioner. But where it is not conducted by the Commissioner, a hearing of the Commission may only be conducted "by an Assistant Commissioner, *as determined by the Commissioner*" (emphasis added). The Act therefore envisages a precondition to the conduct of a Commission "hearing" by someone other than the Commissioner, namely that the Commissioner should have "determined" that the hearing should be conducted by someone other than himself or herself, and then only by an Assistant Commissioner where the hearing is for "the purposes of an investigation".

51 Provision is made in s 6(1) of the Act for one or more Assistant Commissioners to be appointed by the Governor, with the concurrence of the Commissioner. Once appointed, such an Assistant Commissioner "has and may exercise the functions conferred or imposed on an Assistant Commissioner by or under" the Act[33] including to "assist the Commissioner, as the Commissioner requires"[34]. In s 107 of the Act there is a general power of delegation by the Commission or by the Commissioner to "an Assistant Commissioner or an officer of the Commission" of specified functions. Although the functions that

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33 s 6(2).

34 s 6(3).

may be delegated to an Assistant Commissioner are wide, certain functions may not be delegated[35].

52 What follows from these provisions of the Act? It is clear that Parliament has created the Commission with the primary understanding that its important functions will be exercisable by the Commissioner. Some functions, both of the Commission and of the Commissioner, may be exercised by Assistant Commissioners. Yet the care that has been taken to create the separate statutory office-holders with defined and limited powers suggests a legislative insistence that the performance of functions of the Commission by someone other than the Commissioner should only take place following a "determination" that such a course was appropriate to the discharge of the particular function in question. No other construction of the Act would uphold the primacy which it accords to the position of the Commissioner and, in particular, to the conduct of the hearings of the Commission. In that case, the Commissioner must either conduct the hearing himself or herself, or determine that it shall be conducted by an Assistant Commissioner.

53 The word "determined" itself suggests a formal decision by the Commissioner, as the donee of the statutory power in question. Otherwise, Parliament could have omitted the phrase "as determined by the Commissioner" and left it to informal internal arrangements of the Commission. The express requirement of a determination implies the need for the Commissioner to turn his or her attention to the conduct of the hearing, its nature and significance and the powers likely to be required to complete the hearing. Whilst it is true that the Act does not expressly require that the determination should be made in writing, it is difficult to conceive that proper administrative practice would involve anything else. Were a determination to be made orally, it would still have to be a formal step because statutory consequences attach to it. To be valid, it must therefore be capable of proof. The determination cannot, in my view, be dismissed as an irrelevancy or verbal surplusage.

54 The foregoing analysis of the Act suggests the following conclusions where a "hearing" is alleged to be "before the Commission" for the offence provided in s 87 of the Act, and the Commission is not constituted by the Commissioner. Where an Assistant Commissioner has purported to act for and as "the Commission", it is essential (unless it be conceded) to show either that he or she has done so, first, "as determined by the Commissioner" (s 30(2)), or secondly, as the delegate of the Commission or of the Commissioner (s 107) including in the exercise of the powers of the Commission or the Commissioner at or in connection with a hearing (s 107(5)(e)). Otherwise, it will not be proved that the Assistant Commissioner has exercised functions conferred or imposed by

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35 s 107(4).

the Act (s 6(2)). The Assistant Commissioner might intend, wish or mistakenly believe that he or she is acting as the Commission. There may indeed be an instrument of appointment as an Assistant Commissioner. But the office-holder will not be proved to constitute "the Commission" for the purpose of a hearing to which alone the serious consequences of the Act, including those provided by s 87, attach.

55 In times gone by, the books were full of cases involving the writ of *quo warranto*. That was a writ addressed to subordinate judicial and (as we would now describe them) administrative office-holders, such as the Assistant Commissioner, who had purported to exercise powers that did not, in law, belong to them or are not in law established as so belonging[36]. Holding an instrument of appointment to an office and attempting to act in a lawful way is not enough. In the context of the Act, specific authority to conduct the hearing as the Commission must be demonstrated if so required. Here, the appellant made it clear that he did require such demonstration. In this particular respect, he never waived that insistence. Yet proof of that ingredient was not forthcoming.

56 The unwillingness of courts of the common law tradition to infer essential ingredients of an offence, where the Crown has failed to prove them, is demonstrated by many cases, old and new. In *R v John Willis*[37], the prisoner was indicted for perjury on an information against a named person described as the keeper of a beer-house for knowingly permitting drunkenness on the premises contrary to the tenor of the licence. Vigilant counsel for the accused noted that the prosecutor had failed to produce the licence of the beer-house keeper. Counsel submitted that there was no proof of the jurisdiction of the justices to convict his client of perjury. This submission was upheld by Cleasby B[38]. For want of proof of an element of the offence, the jury were directed to return a verdict of not guilty. His Lordship contented himself with reference to the Latin maxim "*De non apparentibus et de non existentibus eadem est ratio*"[39]. This rule[40] declared that if the party with the burden of proof (and in particular the

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36 *R v Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518 at 527 per Knox CJ, 537 per Isaacs J, 583-584 per Starke J. In New South Wales the writ has been abolished: *Supreme Court Act* 1970 (NSW), s 12. However equivalent remedies are available.

37 (1872) 12 Cox CC 164.

38 (1872) 12 Cox CC 164 at 165.

39 "About things which are not proved and things which do not exist, the rule is the same".

40 *Caudrey's Case* (1591) 5 Co Rep 1a at 5b [77 ER 1 at 7].

Crown, with the heavy burden it assumes) does not, by evidence, prove an ingredient essential to its case, the Court will not presume the same to exist. On the contrary, it will presume that it does not[41].

57 The rule is not a relic of earlier, more technical times. At least so far as criminal proceedings are concerned it still expresses the law. The issue was considered by this Court in *Day v The Queen*[42]. There, the prisoner was charged with escaping from lawful custody. The Crown proved the calendar containing details of the prisoner's conviction and sentence. The calendar did not name the prison in which the sentence was to be served. There was no evidence that an order had been made under the relevant legislation[43] for the removal of the prisoner to the institution from which he later escaped. The conviction was upheld by this Court. Although there was a division of opinion, no member of the Court questioned the fundamental principle that the Crown had to prove the facts necessary to establish every element of the offence. The point of difference within the Court concerned whether, in the context of the legislation, the calendar admitted into evidence sufficiently established the authority for the confinement of the accused in any prison in the State. The majority held that the lawfulness of the custody was established by the calendar[44]. In his dissent, Brennan J concluded that the calendar was insufficient[45]:

> "[T]he Crown could not establish the lawfulness of the applicant's custody … unless the Director had made an order in accordance with s 53. There was no evidence of such an order, and in the absence of that evidence a central fact in the Crown case was not proved."

58 There is nothing in *Doney v The Queen*[46] which suggests, still less requires, a contrary conclusion. In the first place, the Court was there dealing with the inferences open to a jury which gives no reasons. We are here dealing with the reasoned opinion of a judge of the District Court who identified the precise matters upon which he relied. Whilst the evidentiary considerations listed undoubtedly showed that a proceeding had taken place and before a person who

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41 *R v The Bishop of Chester* (1786) 1 TR 396 at 404.

42 (1984) 153 CLR 475 per Gibbs CJ, Mason, Wilson and Dawson JJ, Brennan J dissenting.

43 *Prisons Act* 1903 (WA), s 53.

44 (1984) 153 CLR 475 at 481.

45 (1984) 153 CLR 475 at 489.

46 (1990) 171 CLR 207 at 214-215.

had been appointed an Assistant Commissioner, it did not fill the evidentiary gap about which the appellant complains. There was not a jot of evidence that, in the particular case, there had been a "determination" or a "delegation" or any other "authority" given to the Assistant Commissioner to conduct a particular "hearing" as "a hearing before the Commission". Yet only such a hearing would attract the penal consequences to which the appellant was exposed.

59 A moment's reflection on many other court decisions confirms this conclusion. In countless instances, people in authority have done things only to face a challenge in a criminal trial asserting the lack of proof of an essential authority required by statute. Take *Scott v Baker*[47] as an example. There the prosecution failed to establish that a breath test device was, in accordance with the legislation[48] "carried out, by means of a device of a type approved for the purpose … by the Secretary of State". Section 2(1) of the *Road Safety Act* 1967 (UK) required that the test be administered by a "constable in uniform" who was required to have "reasonable cause … to suspect him of having committed a traffic offence". The reasoning that now finds favour in this appeal would suggest that proof of the Ministerial approval could be inferred in such a case. After all, could it seriously be suggested that a constable in uniform stopping a vehicle and possessed of a breath measuring instrument would be using an instrument other than one approved for the purpose by the Minister? Could it not be inferred that no other implement would be issued and used by such an official? Such is the reasoning that is fundamentally destructive of the requirement that the Crown must prove every element of any offence which it charges. The English judges unanimously rejected that approach. Lord Parker CJ held that the validity of the test was central to the offence. It depended on the approval of the device used by the Secretary of State. This had to be established by the Crown[49].

60 Why was so much trouble taken at the hearing before Judge Downs to prove the authenticity of the transcript before the Commission? If inference is to be given full rein, why not simply tender the transcript, point to its seeming authenticity and suggest that it was hardly likely that the Commission would tamper with its own record? Why, for proof of judicial proceedings, was special legislation deemed necessary[50]? The answer to these questions is that, at least until now, strict proof of the elements of an offence has meant just that. In my

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47 [1969] 1 QB 659.

48 *Road Safety Act* 1967 (UK), s 7(1).

49 [1969] 1 QB 659 at 673-675.

50 *R v S* (1953) 53 SR (NSW) 460 at 473 per Street CJ referring to *Evidence Act* 1898 (NSW), s 23.

opinion, any change to that rule would require the specific authority of Parliament, not a new approach on the part of this Court.

61 The deployment of inference, which is actually no more than speculation, to repair the omissions of the prosecution (particularly where it is on notice of the need to avoid them) is not a path that I would take. That path leads not only to sloppy prosecutions. More importantly, it leads to the fallacy of assuming that public authorities would only ever act lawfully so that judges and juries may infer that such was the case on a particular occasion. Such a path, extended, diminishes the vigilance of the courts to safeguard the presumption of innocence. The present is a small case. Yet this Court must decide small cases with an eye upon how the principle established will be applied in many other cases, some of them more significant[51].

62 There being no evidence whatsoever upon that issue of fact, essential to establishing an ingredient of the offence charged, no amount of inference could fill the gap. The scheme of the Act, the longstanding approach of the common law, and the authority of this Court on the question all require that the first basis propounded by the Crown to support the decision below be rejected.

The presumption of regularity is inapplicable

63 The foregoing conclusion necessitates consideration of the second submission advanced by the Crown. This was that the presumption of regularity would suffice to fill the gap in the evidence left by the want of proof of the "determination" of the Commissioner or other delegation of "authority" to the Assistant Commissioner to conduct the hearing of the Commission in question. It will be remembered that this was the foundation for the opinion of the Court of Criminal Appeal. The presumption upon which the Crown relied was variously expressed. In part, it was a specific presumption of the regular appointment of the Assistant Commissioner to conduct the particular hearing. But in part it was the more general principle that, in relation to public official acts, the apparent discharge of a public office gives rise to the presumption that all conditions necessary to the exercise of the power, or the doing of the Act, have in fact been fulfilled.

64 So far as the first, and narrower presumption is concerned, the Crown relied upon *R v Brewer*[52], where Latham CJ and McTiernan J observed:

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51 *Lucerne v Collins* [1967] 1 NSWR 407 at 413.

52 (1942) 66 CLR 535 at 548.

> "Acting in a public office is evidence of due appointment to that office, not only in civil proceedings but also in a criminal case. The presumption that his appointment was duly made is not met by any rebutting evidence".

65 That case concerned a conviction of the accused of an offence against the *Secret Commissions Act* 1905 (Cth). The trial judge (Starke J), after taking the jury's verdict, reserved the entry of judgment. He posed for the Full Court certain questions of law. For reasons not presently material, Latham CJ and McTiernan J (who constituted the majority) determined that no offence against the Act was shown[53]. This conclusion required that a verdict of not guilty be entered. Accordingly, their Honours' remarks on the point now under consideration were not strictly necessary to the conclusion in the case. In any event, the supposed principle is stated by the Crown as one of the common law. The content of any such presumption would have to depend, in the case of a statutory offence, upon the requirements of the statute in question. By the foregoing analysis of the Act in issue in this appeal, and for the particular crime charged here, it could not be assumed that *Brewer* established a rule of universal application. In my view, the remarks in that case are of no help to the assessment of the work which the presumption of regularity might do to repair an omission of proof by the prosecution of an essential ingredient of a crime.

66 Whether in some circumstances a general presumption of regularity, or some more limited form of that presumption relating to the holding of a public office[54], is applicable in a criminal prosecution is a matter of some little controversy[55]. In *Dillon v The Queen*[56], in an appeal from the Court of Appeal of Jamaica, the Privy Council was concerned with another case of escape from lawful custody. A police constable was convicted of permitting a prisoner to escape. The Crown had failed to prove that the detention of the prisoner was lawful. The majority of the Court of Appeal of Jamaica[57] had held that this element could be presumed by the application of a maxim equivalent to a general presumption of the regularity of official acts[58]. The Privy Council disagreed and

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53 (1942) 66 CLR 535 at 552.

54 *Wigmore on Evidence* (1981), vol 9, par 2535.

55 See eg *Selby v Pennings* (1998) 19 WAR 520; Griffin and Goldring, "Proof of the Due Exercise of Delegated Powers; Application of the Presumption of Regularity", (1974) 48 *Australian Law Journal* 118.

56 [1982] AC 484.

57 *Dillon v The Queen* unreported, 5 March 1977.

58 "*Omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium*": *Dillon v The Queen* [1982] AC 484 at 486.

upheld the appeal. Their Lordships concluded that the convictions should be quashed. Lord Fraser of Tullybelton, delivering the opinion of their Lordships, said[59]:

> "Their Lordships are of opinion that it was essential for the Crown to establish that the arrest and detention were lawful and that the omission to do so was fatal to the conviction of the defendant. … The lawfulness of the detention was a necessary pre-condition for the offence of permitting escape, and it is well established that the courts will not presume the existence of facts which are central to an offence. …
>
> Moreover this particular offence is one which touches the liberty of the subject, and on which there is, for that reason also, no room for presumptions in favour of the Crown. If there were to be a presumption that any person de facto in custody was there lawfully, the scales would be tipped in favour of the fait accompli in a way that might constitute a serious threat to liberty. It has to be remembered that in every case where a police officer commits the offence of negligently permitting a prisoner to escape from lawful custody, the prisoner himself commits an offence by escaping, and it would be contrary to fundamental principles of law that the onus should be upon a prisoner to rebut a presumption that he was being lawfully detained, which he could only do by the (notoriously difficult) process of proving a negative.
>
> On the other hand, there is not likely to be any difficulty for the Crown in proving the lawfulness of the detention, when it exists. … Their Lordships are therefore of opinion that the presumption ought not to have been admitted in this case."

67 Several other cases in England[60] and in this country, both in State[61] and federal courts[62], have rejected reliance upon the presumption of regularity in criminal and quasi-criminal proceedings. On the other hand, there are decisions where the opposite has been suggested[63]. On the one occasion that the question was presented for decision in this Court, in *Day v The Queen* the majority, whilst

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59 [1982] AC 484 at 487-488.

60 *Scott v Baker* [1969] 1 QB 659.

61 *Lucerne v Collins* [1967] 1 NSWR 407; *Selby v Pennings* (1998) 19 WAR 520 and cases there cited.

62 *Schlieske v Federal Republic of Germany* (1987) 14 FCR 424.

63 eg *R v Templeton* [1956] VLR 709 at 713.

noting *Dillon* and the differences of view which had arisen[64], reserved the question. Brennan J, who was in dissent, had to consider the availability of the presumption of regularity. He rejected it, accepting that the Crown was unable to rely upon it for the reasons given in *Dillon*[65].

68 If I had to decide the point as one of general principle, I would, like Brennan J, incline to the view that *Dillon* was correctly decided and that the presumption of regularity is unavailable in criminal proceedings to cure gaps in the evidence relevant to proof of the essential elements of an offence. To the reasons given by those who have gone before, I would add one suggested by a practical remark of Wallwork J in *Selby v Pennings*[66]. Obliging prosecutors to prove all elements in the offence, without reliance on presumptions of regularity, is a protection to the accused of special significance in cases heard before a magistrate. The accused in many such cases "do not have the know-how or the finance to mount a collateral challenge"[67] in higher courts in which the scope and application of any applicable presumption might be explored. In the present case, it would have been comparatively simple for the Crown to prove the authority of the Assistant Commissioner to conduct the hearing as the Commission. The documentary or oral evidence for that purpose, if it was available, would not have been difficult to come by. To cast a burden of *disproof* upon the accused in a matter so obviously within official knowledge, is not only contrary to the basic principles of the criminal trial. It is also unreasonable, inefficient and, as stated in *Dillon*[68], notoriously difficult for those without ready access to the records to prove a negative.

69 It is not essential in this case finally to resolve the question of the presumption. Everyone who embarks upon examination of the rule is led to a conclusion that the case law is remarkably inconsistent, certainly in the many non-criminal cases where the presumption has been invoked[69]. Whatever might be the availability of the presumption generally, it could not, in my view, operate in the present case. The accused had signalled the requirement of strict proof. The Act envisaged only limited circumstances in which the Assistant

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64 (1984) 153 CLR 475 at 484-485 per Gibbs CJ, Mason, Wilson and Dawson JJ.

65 (1984) 153 CLR 475 at 489.

66 (1998) 19 WAR 520.

67 (1998) 19 WAR 520 at 543.

68 [1982] AC 484 at 487.

69 Griffin and Goldring, "Proof of the Due Exercise of Delegated Powers; Application of the Presumption of Regularity", (1974) 48 *Australian Law Journal* 118.

Commissioner might constitute the Commission for the purpose of a hearing. The case is one potentially with very serious consequences for an accused. Proof of the requisite determination or authority is relatively straightforward. It is in the possession of the authorities and by inference readily available to the Crown. Even if the presumption were available in some circumstances, it would not be applied in this case to cure what is an inability, a deliberate omission or a careless oversight in the proof of an element of the offence in the Crown's case.

The de facto officers' doctrine is inapplicable

70 Finally, it is possible to deal briefly with the suggestion that this was a case for the application of the common law "doctrine" protective of the official acts of de facto officers later found to lack lawful authority. Because this possibility was raised at the last minute and embraced only in the most tentative way by the Crown, I am disinclined to explore it at length.

71 It suffices to say that there are three reasons why I do not consider that the "doctrine" could be invoked here. First, this is not a case where anyone can doubt the legitimacy of the appointment of Mr Roden as an Assistant Commissioner under the Act. The question was not whether he had lawful authority to conduct a hearing as the Commission but whether, in proof of the offence with which the appellant stands charged, the Crown had proved the existence of that authority in this particular case. The de facto officers' doctrine is generally invoked to cure a problem which arises out of an accidental and unexpected want of lawful authority. That has not been established in the present case. It is perfectly possible that Mr Roden not only held an instrument appointing him as an Assistant Commissioner under the Act, but also that he was duly authorised to conduct the Commission's hearing. But the Crown simply failed to establish the latter. It does not need to reach for the de facto officers' doctrine[70]. It merely needed to prove the particular "determination" or "authorisation" of Mr Roden by the Commissioner, as the Act contemplates.

72 Secondly, as a doctrine of the common law, the one in question here must bend to the scheme and purpose of the Act. In a prosecution of an accused person for an offence against s 87, it is the Act which requires that it be proved by the Crown that the false or misleading evidence was given "at a hearing before the Commission". No common law doctrine could relieve the Crown of that requirement if, as I believe, it was necessary by the Act. The de facto officers' doctrine is a possible refuge in exceptional and generally extraordinary

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70 *G J Coles & Co Ltd v Retail Trade Industrial Tribunal* (1986) 7 NSWLR 503.

circumstances[71]. It does not exist to be invoked to repair mere evidentiary omissions in the proof of a particular criminal case.

73 Thirdly, even assuming that the de facto officers' doctrine were applicable to the present circumstances, it was not a matter to be raised for the first time in a final appeal to this Court in proceedings already so long protracted. Had it been raised earlier, it is at least possible that factual questions might have arisen concerning the authority of Mr Roden to which attention could have been given. At the least, it is a matter which this Court should be cautious about embarking upon, in the absence of consideration of its implications for the case, both at trial and in the Court of Criminal Appeal.

74 The omission to establish that, for the purpose of the "hearing", Assistant Commissioner Roden constituted the "Commission" remains. Neither inference, nor the presumption of regularity, nor the de facto officers' doctrine supplies the evidence which the Crown omitted to prove. Because the gap concerned an element of the offence with which the appellant was charged, the appeal should have been allowed. It is not necessary to consider the other point (assuming it to be before the Court) concerning the proof that the testimony in issue was "evidence" given after the administration of the oath[72]. There was, in any case, no substance in that point. But there was substance in the primary point which the appellant argued. An important principle is at stake which occasions this dissent.

Orders

75 I would have allowed the appeal. The orders of the Court of Criminal Appeal should have been varied to provide the answer "yes" to the fifth question in the stated case.

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71 *In re Aldridge* (1893) 15 NZLR 361. The New Zealand Court of Appeal upheld the validity of a conviction and sentence imposed by a barrister after the Privy Council held in *Buckley v Edwards* [1892] AC 387 that he had not been validly appointed a judge of the Supreme Court of New Zealand. See also *G J Coles & Co Ltd v Retail Trade Industrial Tribunal* (1986) 7 NSWLR 503 at 525-526.

72 The original tapes of the evidence before the Commission were tendered in the District Court and, as exhibits in the proceedings, were before this Court.