HIGH COURT OF AUSTRALIA

GAUDRON, McHUGH, KIRBY, HAYNE AND CALLINAN JJ

LILJANA STANOEVSKI APPELLANT

AND

THE QUEEN RESPONDENT

Stanoevski v The Queen [2001] HCA 4
8 February 2001
S251/1999

ORDER

1. Appeal allowed.

2. Set aside the judgment of the Court of Criminal Appeal dated 24 February 1998.

3. In lieu thereof order that :

(a) the appellant's appeal to that Court be allowed;

(b) the appellant's conviction be set aside; and

(c) there be a new trial of the appellant.

On appeal from the Supreme Court of New South Wales

Representation:

T A Game SC with S J Odgers and A S Kostopoulos for the appellant (instructed by Greg Walsh & Co)

T L Buddin SC with R A Hulme for the respondent (instructed by Solicitor for Public Prosecutions (New South Wales))

CATCHWORDS

Stanoevski v The Queen

Evidence – *Evidence Act* 1995 (NSW) – Character evidence – Accused raised own good character – Judicial discretion to allow cross-examination of accused on alleged past misdeeds not directly related to facts in issue – Whether discretion to allow cross-examination miscarried.

Words and phrases – "good character" – "credibility" – "leave, permission or direction" – "unfairness".

Evidence Act 1995 (NSW), ss 55, 56, 102, 104, 106, 112, 135, 192.
Legal Profession Act 1987 (NSW), s 155.

1 GAUDRON, KIRBY AND CALLINAN JJ. This appeal raises questions about the meaning and application of s 192 of the *Evidence Act* 1995 (NSW) ("the Act") to the adducing of, and cross-examination on, character evidence.

The facts

2 The appellant had been in practice as a solicitor on her own account at Bankstown and Rockdale in Sydney for some years before January 1993. On 24 February 1997 she was charged, that she did, between 20 January 1993 and 5 February 1993, conspire with Glory Mae Wailes and Mira Kutlesovska to cheat and defraud NRMA Insurance Limited ("the insurer") of a sum of money.

3 Evidence at her trial, which took place in the District Court (Viney DCJ) of New South Wales in Sydney in February and March 1997, was given by, among others, Ms Wailes, that she had been working as the appellant's secretary when the appellant asked her to arrange for someone to take her car which was insured with the insurer so that the appellant could make a claim upon the insurer for the loss of it. In due course Ms Wailes asked another secretary in the office, Mira Kutlesovska to take the car. Ms Wailes' evidence was that the car was then taken and left at her home. On 4 February 1993 the appellant reported to the police that the car had been stolen. About a week later it was found at Ms Wailes' home. Ms Wailes and Ms Kutlesovska were also charged with conspiracy to cheat and defraud, pleaded guilty to that offence and were sentenced for it.

4 From the outset of the appellant's trial it was apparent that her character would loom large in her defence. Counsel for the appellant at an early stage of the trial informed the trial judge that he would be leading evidence of the appellant's good character. The Crown Prosecutor then foreshadowed that he would be relying upon a report entitled "Preliminary Report by Investigator" ("the report") to respond to any character evidence adduced by the appellant. The report was then tendered and received on the limited basis that the trial judge might ascertain what it contained and understand how it might be used. It will be necessary to say something further about this report later but we simply note now that it purported to be a report of an investigation on behalf of the Law Society of New South Wales of an allegation made by Ms Wailes after the hatching of the alleged conspiracy. The allegation was that the appellant had forged the signatures of a client, J Fowler, which she had then witnessed on a document or documents to be filed in unrelated proceedings in the Family Court of Australia. Counsel for the appellant at the trial objected to the use in any way of the material in the report at the trial.

5 After argument, the trial judge ruled that if the defence adduced evidence of good character cross-examination of the appellant would be permitted on matters the subject of, and the documents contained in, the report.

6 In giving his reasons his Honour said that the report came down to the opinion of a handwriting expert and a statutory declaration by Ms Wailes. He then quoted the expert's opinion which, at best, could only be described as highly equivocal:

> " As a result of this examination I made the following observations:
>
> The writer of Liljana's signatures possesses the writing skill to produce the questioned J Fowler's signatures. There are some isolated similarities between Liljana's signatures and the J Fowler's signatures on the questioned document referred to in item 1. At the best these similarities only indicate that the writer of the Liljana's signatures cannot be eliminated from having produced the questioned J Fowler's signatures."

7 His Honour then summarised the objections that had been made by the appellant's counsel, including that the use of it by the prosecutor would cause incurable unfair prejudice to his client and could well result in a trial within a trial over the issues raised.

8 His Honour said:

> " The difficulty is this of course, that it is a matter for the accused whether she raises her good character in a positive way. If nothing is said the jury is entitled to assume that she is a person who doesn't have convictions.
>
> The evidence thus far is that at the relevant time she was a practising solicitor, however, if she positively raises the fact of her good character then the Crown is left with this problem and I call it a problem because I would have thought he would be obliged to bring these matters to her notice. Seized, as it is, with the material in the file from the Law Society investigator, it seems to me the Crown would be obliged to put those matters to the accused and so far as the Court is concerned, although it may create some degree of prejudice to the accused, nonetheless the defence is aware of the situation and it is a matter for them whether they wish to take the step of the accused positively referring to good character.
>
> It seems to be though that in all the circumstances the course is open to me to admit the cross-examination referred to if that eventuality arises. So I will have to reject Mr Skinner's application that that sort of cross-examination be forbidden.

Subject to further developments in the trial I would grant the leave to the Crown unless some other matter arises that would cause me to hold a different view."

9 In the argument which led to the ruling that we have just quoted the Crown Prosecutor referred his Honour to ss 102[1], 104[2] and 106[3] of the Act.

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1 "**The credibility rule**

Evidence that is relevant only to a witness's credibility is not admissible."

2 "**Further protections: cross-examination of accused**

(1) This section applies only in a criminal proceeding and so applies in addition to section 103.

(2) A defendant must not be cross-examined about a matter that is relevant only because it is relevant to the defendant's credibility, unless the court gives leave.

(3) Despite subsection (2), leave is not required for cross-examination by the prosecutor about whether the defendant:

(a) is biased or has a motive to be untruthful, or

(b) is, or was, unable to be aware of or recall matters to which his or her evidence relates, or

(c) has made a prior inconsistent statement.

(4) Leave must not be given for cross-examination by the prosecutor about any matter that is relevant only because it is relevant to the defendant's credibility unless:

(a) evidence has been adduced by the defendant that tends to prove that the defendant is, either generally or in a particular respect, a person of good character, or

(b) evidence adduced by the defendant has been admitted that tends to prove that a witness called by the prosecutor has a tendency to be untruthful, and that is relevant solely or mainly to the witness's credibility.

(5) A reference in subsection (4)(b) to evidence does not include a reference to evidence of conduct in relation to:

(Footnote continues on next page)

These sections are all contained within Pt 3.7 of the Act which has the heading "Credibility" and which enacts various provisions in relation to the reception of credibility evidence and the circumstances in which cross-examination about it may be permitted. No reference appears to have been made in the argument to Pt 3.8 of the Act which is concerned with character and s 192 which specifies the matters which a court must take into account in deciding whether to grant leave or permission to permit cross-examination, and the adducing of evidence when permission or leave is required for either of these to be done.

(a) the events in relation to which the defendant is being prosecuted, or

(b) the investigation of the offence for which the defendant is being prosecuted.

(6) Leave is not to be given for cross-examination by another defendant unless:

(a) the evidence that the defendant to be cross-examined has given includes evidence adverse to the defendant seeking leave to cross-examine, and

(b) that evidence has been admitted."

3 "**Exception: rebutting denials by other evidence**

The credibility rule does not apply to evidence that tends to prove that a witness:

(a) is biased or has a motive for being untruthful, or

(b) has been convicted of an offence, including an offence against the law of a foreign country, or

(c) has made a prior inconsistent statement, or

(d) is, or was, unable to be aware of matters to which his or her evidence relates, or

(e) has knowingly or recklessly made a false representation while under an obligation, imposed by or under an Australian law or a law of a foreign country, to tell the truth,

if the evidence is adduced otherwise than from the witness and the witness has denied the substance of the evidence."

10 The first time that character evidence was adduced in the trial was in the prosecution case when the appellant's counsel asked a police officer, Detective Senior Constable Lindsay McGillicuddy, to confirm (which he did) that the appellant had no prior convictions.

11 The appellant elected to give evidence. She swore that she had never been convicted of any offence and that this was the first time that she had been accused of something of this nature, "a dreadful crime".

12 The appellant's counsel then sought to make a pre-emptive strike against the cross-examination foreshadowed by the Crown Prosecutor and the subject of the ruling by the trial judge, by referring to the report and asking the appellant what had happened in relation to it. She said that a full investigation of her practice had been undertaken and that statutory declarations (being declarations containing allegations by Ms Wailes of forgery) were just "blatant lies", and that the allegations were totally untrue and outrageous.

13 The cross-examination of the appellant at the trial occupies some 102 pages of transcript. Some 15 or so pages of it are almost entirely taken up with matters contained in the report. By reason of the nature of the cross-examination parts of the contents of the report inevitably found their way into evidence. No thought seems to have been given to the consequence that the jury had placed before them secondary evidence of the contents of documents in circumstances in which the documents themselves were not admissible and which the jury would not see.

14 The appellant denied forgery and any impropriety in respect of the documents in the report, including those which she had witnessed. She did however accept that some purported signatures of the client J Fowler did not look like the signature of her client. The interrogation by the Crown Prosecutor with respect to the documents was wide ranging. It included invitations to the appellant to explain Ms Wailes' motivations, suggestions that the appellant was making false allegations about Ms Wailes, and an attempt by the prosecutor to have the appellant explain why Ms Wailes might herself have forged the documents. The cross-examination also involved an inquiry into the appellant's practice over the years with respect to affidavits and other documents. It culminated in an unsuccessful attempt by the prosecutor to tender the "Family Court documents".

15 The appellant in her case called a number of independent character witnesses who extolled her honesty and integrity. One of these was a solicitor, Mr Walsh. He was cross-examined by the prosecutor on the correct procedure for swearing an affidavit. He said it would be an unwise practice, but perhaps

not an improper one for a solicitor to witness a signature on a document brought by a secretary to a client, something that the appellant had conceded in cross-examination might have happened.

16 During his speech to the jury counsel for the appellant submitted that there was no evidence of any complaint by the solicitor to the Law Society of New South Wales. Counsel was not permitted to suggest to the jury that the prosecution could have called evidence about this matter.

17 In his summing up to the jury the trial judge emphasised that a question was not evidence and had no evidentiary value. He pointed out that there was no evidence that the appellant had forged the signature of J Fowler. He added that it was fair to say that:

> "the accused conceded that she might have purported to witness a signature when the client was not present, on the basis that the accused had been told that the client had had the document explained to her, had signed it, and perhaps left. And the accused had, as a matter of convenience, simply witnessed the signature in the absence of the client."

18 After some further discussion of the witnessing of documents his Honour said this:

> "If we all accepted some sort of slap-dash approach then sworn documents would have no effect and the whole purpose of sworn documents would be lost."

19 His Honour went on to say that if a solicitor operated in such a slap-dash way then that could affect the jury's assessment of her good fame and character but that he wanted to make clear to them that they were not deciding whether she was guilty of some form of professional misconduct. Somewhat later his Honour emphasised that even if the jury took the view that the accused was a person of bad character or not of good character that could not be used to strengthen the Crown case against her.

Decision of the Court of Criminal Appeal

20 The appellant was convicted and sentenced on 27 June 1997 to a fixed term of imprisonment of nine months to be served by way of home detention from 27 June 1997 and expiring on 26 March 1998. She appealed to the Court of Criminal Appeal of New South Wales (Gleeson CJ, Ireland and Bruce JJ). Gleeson CJ agreed with the judgment of Bruce J and made some additional observations. His Honour said:

" Once character is raised as an issue 'every element in an accused person's past tending to establish or refute his good character' becomes technically admissible, although there may arise questions of discretion...[4]".

21 We interpolate at this point that since the decision of this Court in *Melbourne v The Queen*[5], whether to give a direction at all, or the form of it if given in relation to character evidence will require close attention to the relevance of the evidence to the offence, and to the issue or issues to which the evidence relates. And, subject to statutory dictates to the contrary, more than questions of discretion may therefore be involved in decisions to reject or admit evidence of bad character. Gleeson CJ was of the opinion that there was no error of discretion in permitting the cross-examination of the appellant about possible forgery. His Honour referred to the practical difficulty confronting the appellant in defending the allegation and was of the opinion that the jury had been properly directed on the use of the character evidence. His Honour also pointed out that no objection was taken by the appellant's counsel to the directions of the trial judge in relation to character: it was her decision, for tactical reasons, following a correct ruling by the trial judge, to raise the issue in her evidence in chief, and, in effect therefore, she had to suffer the consequences of that tactical decision. Finally, his Honour added, cross-examination of the issue was kept within manageable bounds.

22 Bruce J (with whom Ireland J also agreed) after setting out the facts and summarising the course of the trial dealt with the arguments of the appellant in that Court which were somewhat different from those which were presented here. Although it was argued in the Court of Criminal Appeal that the trial judge's discretion had miscarried in allowing the cross-examination, again no reference seems to have been made to s 192 of the Act. Bruce J was of the opinion that there had been no error in the exercise of the trial judge's discretion and that undue prejudice outweighing probative value had not been caused by the cross-examination: in short that s 135[6] of the Act had not been infringed.

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4 *R v Stalder* [1981] 2 NSWLR 9 at 19.

5 (1999) 198 CLR 1 at 14 [32], 16-17 [36]-[37], 19 [44], 20-21 [48]-[50] per McHugh J, 42-43 [109] per Gummow J and 51-52 [138]-[140] per Hayne J.

6 "**General discretion to exclude evidence**

The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

(a) be unfairly prejudicial to a party, or

(Footnote continues on next page)

The appeal to this Court

23 In this Court the argument for the appellant had a somewhat different focus from that which it had been given in the Court of Criminal Appeal.

24 The appellant's first submission was that if the cross-examination which the appellant had foreshadowed was to be regarded as directed towards proof of facts in issue it could only have been undertaken if leave were granted pursuant to s 112[7] of the Act, and this in turn would require the application of s 192(2). It was submitted that regard had not been had to that latter section and that accordingly the exercise of the discretion it demanded be exercised miscarried.

The provisions of the Act on character evidence

25 Other matters were argued, but the submission that we have just summarised, is, in our opinion, correct, and is sufficient to dispose of this appeal. We will return to it shortly. But before saying why we consider that to be so we should make some comments about other sections of the Act which were touched upon in argument.

26 Section 55[8] of the Act provides that evidence that could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact

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(b) be misleading or confusing, or

(c) cause or result in undue waste of time."

7 "**Leave required to cross-examine about character of accused or co-accused**

A defendant is not to be cross-examined about matters arising out of evidence of a kind referred to in this Part unless the court gives leave."

8 "**Relevant evidence**

(1) The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.

(2) In particular, evidence is not taken to be irrelevant only because it relates only to:

(a) the credibility of a witness, or

(Footnote continues on next page)

in issue in the proceeding is relevant: and that evidence is not taken to be irrelevant only because, for example, it relates only to the credibility of a witness. Neither that section nor those sections which deal with character evidence throw any light on the answer to the question whether good character evidence of relevance to propensity only is to be regarded as a fact in issue within the meaning of s 55.

27 Section 56[9] provides that except as otherwise provided relevant evidence is admissible in a proceeding.

28 Credibility and character are dealt with in separate parts of the Act as if they were (with one exception) discrete topics[10].

29 The nature of character evidence was recently discussed at some length by this Court in *Melbourne v The Queen*[11]. All members of the Court there affirmed that character evidence may be relevant to an accused's propensity to commit a crime, or to the credibility of an accused, or to both of these questions[12].

30 In this case, when the issue of character evidence was first raised, the argument seems to have proceeded upon the basis that the evidence of good character was directed towards the accused's credibility only. But as the case proceeded it became clear that the appellant sought to rely upon evidence of her good character in whatever respects, and to whatever extent she possibly could. Little attention seems to have been paid to the possibility that different implications might arise from the reception of such evidence depending whether

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(b) the admissibility of other evidence, or

(c) a failure to adduce evidence."

9 "**Relevant evidence to be admissible**

(1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.

(2) Evidence that is not relevant in the proceeding is not admissible."

10 Section 104(4).

11 (1999) 198 CLR 1.

12 (1999) 198 CLR 1 at 14 [30] per McHugh J, 27-29 [72]-[76] per Gummow J, 46-47 [120] per Kirby J, 55 [152] per Hayne J and 69 [200] per Callinan J.

it went to credibility or character[13]. However, for reasons which will appear, it will not be necessary to resolve some of the questions that may arise in other cases in which character evidence is admitted.

31 Section 102, in Pt 3.7, provides that evidence that is relevant only to a witness' credibility is not admissible, but s 103[14] provides an exception in a case in which credibility evidence has substantial probative value. In deciding whether the evidence has substantial probative value the court must have regard inclusively to whether the evidence tends to prove that the witness knowingly or recklessly made a false representation when the witness was under an obligation to tell the truth, and the period that has elapsed since the acts or events to which the evidence relates were done or occurred.

32 Section 104 applies only to criminal proceedings and provides that evidence which is relevant only to a defendant's credibility must not be the subject of cross-examination unless the court gives leave. Leave is not however necessary in some situations not relevant to this case.

33 Reference is made to "character" in s 104(4). It provides that leave must not be given for cross-examination by the prosecutor about any matter that is relevant only because it is relevant to the defendant's credibility unless the defendant has adduced evidence of good character, or has adduced evidence tending to prove the untruthful tendency of a witness for the prosecution.

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13 See the discussion in *Phipson on Evidence*, 15th ed (2000) at 16.02-16.04 of the circumstances in which character evidence goes to a direct issue or issues.

14 "**Exception: cross-examination as to credibility**

(1) The credibility rule does not apply to evidence adduced in cross-examination of a witness if the evidence has substantial probative value.

(2) Without limiting the matters to which the court may have regard in deciding whether the evidence has substantial probative value, it is to have regard to:

(a) whether the evidence tends to prove that the witness knowingly or recklessly made a false representation when the witness was under an obligation to tell the truth, and

(b) the period that has elapsed since the acts or events to which the evidence relates were done or occurred."

34 Probative value is defined in the Dictionary, which was enacted as part of the Act, in this way:

> "***probative value*** of evidence means the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue."

35 It is not necessary in this case to attempt to distinguish between probative value and substantial probative value, the expression used in s 103, although presumably the adjective "substantial" calls for something more than mere probative value.

36 Part 3.8 of the Act, which is concerned with character evidence, applies only in a criminal proceeding. Section 110[15] provides that the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced by the defendant of good character, or evidence that a defendant is not generally a person of good character adduced in rebuttal of character evidence.

37 Section 112 requires that leave of the court be obtained before a defendant may be cross-examined about matters arising out of character evidence.

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15 "**Evidence about character of accused persons**

(1) The hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced by a defendant to prove (directly or by implication) that the defendant is, either generally or in a particular respect, a person of good character.

(2) If evidence adduced to prove (directly or by implication) that a defendant is generally a person of good character has been admitted, the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or by implication) that the defendant is not generally a person of good character.

(3) If evidence adduced to prove (directly or by implication) that a defendant is a person of good character in a particular respect has been admitted, the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or by implication) that the defendant is not a person of good character in that respect."

38 This case does not call for the Court to attempt to harmonize Pts 3.7 and 3.8 of the Act: nor is it necessary to give a meaning to the phrase in s 112 "matters arising out of evidence"; whether that phrase is intended to refer to something other than credibility evidence strictly so called, or to other matters or topics touched upon, or resulting from the reception of the character evidence itself.

39 Part 3.11 of the Act deals with discretionary exclusions of evidence. Section 137[16] restates the former statutory[17] and common law rule[18], and provides that in a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant.

40 The last section that needs to be noticed is s 192:

"**Leave, permission or direction may be given on terms**

(1) If, because of this Act, a court may give any leave, permission or direction, the leave, permission or direction may be given on such terms as the court thinks fit.

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16 "**Exclusion of prejudicial evidence in criminal proceedings**

In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant."

17 See *Evidence Act* 1898 (NSW), s 74:

"**Exclusion of evidence in criminal proceeding**

This Part does not affect the power of a court in a criminal proceeding to exclude evidence that has been obtained illegally or would, if admitted, operate unfairly against the defendant."

18 See, for example, *R v Lee* (1950) 82 CLR 133; *Driscoll v The Queen* (1977) 137 CLR 517 at 541 per Gibbs J; *Phillips v The Queen* (1985) 159 CLR 45; *R v Swaffield* (1998) 192 CLR 159 at 191-193 [62]-[65] per Toohey, Gaudron and Gummow JJ; *R v Christie* [1914] AC 545; *Harris v DPP* [1952] AC 694 at 707 per Viscount Simon.

(2) Without limiting the matters that the court may take into account in deciding whether to give the leave, permission or direction, it is to take into account:

(a) the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing, and

(b) the extent to which to do so would be unfair to a party or to a witness, and

(c) the importance of the evidence in relation to which the leave, permission or direction is sought, and

(d) the nature of the proceeding, and

(e) the power (if any) of the court to adjourn the hearing or to make another order or to give a direction in relation to the evidence."

Failure to advert to a statutory discretion

41 Section 192 applies to this case, and in particular to the exercise by the trial judge of his or her discretion under s 112 of the Act. It should be noted that the leave required under s 112 is not leave to adduce evidence, but to cross-examine about the character of a defendant. In addition to matters which may be relevant in a particular case, in all cases the court must take into account the matters prescribed by s 192(2). It is clear here that the trial judge (probably because his attention does not seem to have been drawn to it) did not take into account all of those matters, some of which would inevitably have been relevant to the way in which his discretion ought to be exercised had he adverted to them.

42 Paragraphs (a), (b) and (c) were of importance here. As to par (a) a great deal of time was in fact taken up by the pursuit of a collateral issue, not just in cross-examination, but also in chief, addresses and the judge's summing up. Whether its pursuit added unduly to the length of the hearing was a matter to be taken into account and might well have affected his Honour's decision.

43 The cross-examination on the report raised a very grave possibility of unfairness to the appellant within the meaning of s 192(2)(b). By giving permission for that cross-examination to take place the trial judge was allowing the undertaking of an extensive collateral inquiry by the prosecutor. That inquiry necessarily raised a contest of credibility between the appellant and her co-conspirator, Ms Wailes, on a matter on which the latter had not been cross-examined and upon which evidence neither in chief nor in cross-examination should have been led. The risk, in our opinion, indeed the

certainty of unfairness, was compounded by the repeated references to signatures and some of the contents of documents which could not be admitted into evidence, were rightly rejected by the trial judge, and were not seen by the jury. An unfortunate example is a recitation by the prosecutor of the effect of part of the statutory declaration made by Ms Wailes and contained in the report. The repeated invitations to the appellant to speculate about Ms Wailes' actions and motivations in relation to the documents were similarly unfair. They also provide an example of the extent to which an attenuated attempt to rebut evidence of good character can be distracting from the main issues with which the jury should be concerned.

44 Section 192 is not exhaustive as to the matters to be taken into account. Plainly the weight to be accorded to the evidence sought to be adduced, whether in cross-examination or otherwise, is a matter of considerable relevance. The trial judge quoted the expert's opinion in the report but yet does not seem to have taken into account how little, if any value it had, that is to say, its feather weight.

45 The reasons and statutory basis for the report were not referred to in argument. It probably came into existence pursuant to Div 5 of Pt 10 of the *Legal Profession Act* 1987 (NSW) which does not require an investigator, or the Council of the Law Society of New South Wales or the Commissioner to do more than be satisfied of a reasonable likelihood of improper illegal conduct[19]. It does not require an investigator to reach a firm conclusion that the subject of the investigation is in fact guilty.

46 The opinion of the handwriting expert, was, as we have already pointed out, at best, equivocal and a person merely reading the statutory declarations of Ms Wailes, the alleged co-conspirator, as the author of the report did, without the benefit of cross-examination on them could hardly have been in a position to form any sound opinion of their reliability and to prefer claims made in them to the denials of the appellant. The author of the report nonetheless purported to be able to do this. Because the report and the material contained in it could be accorded little or no weight we do not think that it was a proper platform from which to attack the appellant's character in cross-examination. Another way of putting this is to say that the report was not important enough to be the subject of cross-examination within the meaning of s 192(2). That, coupled with the singularity of the event with which it dealt and its remoteness in time and difference in nature from the very serious charge levelled at the appellant also tended in our opinion to diminish the importance of the evidence that any cross-examination upon it might produce.

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19 Section 155.

Conclusion: error and miscarriage of justice

47 It follows that matters of the kind which s 192(2) provides should be considered were of relevance to this case and to the trial judge's decision to permit the prosecutor to cross-examine as he did. In not taking properly these, and matters of weight and relevance into account, and in not therefore exercising his discretion in accordance with s 192 of the Act, the trial judge fell into error. There was, in our opinion, a further error in the trial judge's ruling. The possession by the prosecution of information of the kind contained in the report did not, as the trial judge held, "oblige" the prosecutor to put the subject matter of it to the appellant. Whether to use the material in the report was a matter for the prosecutor's own personal decision[20]. Not to seek to use it, for the reasons we have stated, would have been an entirely proper one. The prosecutor however acted quite properly in seeking permission in advance here of the course he might take, and in subsequently acting in the way in which the trial judge said he was "obliged" to act.

48 Nothing turns in this case upon the fact that the appellant's counsel adduced some evidence about matters referred to in the report. That course was effectively forced upon the defence by reason of the ruling that the trial judge had earlier made.

49 The respondent was asked on the hearing of this appeal to justify his submission that even if errors of the kind which have been identified did occur there had been no substantial miscarriage of justice. In response the respondent submitted that the case was a strong one, and that the trial judge's directions could be regarded as having dealt adequately with the character evidence, albeit that the respondent conceded that character was an important aspect of the appellant's case.

50 The respondent has failed, in our opinion, to discharge the onus of showing that no substantial miscarriage of justice has occurred. The appellant was entitled to a trial according to law. She has not had that. It cannot be said that the appellant has not lost a real chance of an acquittal[21]. Forensically, the

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20 See *Richardson v The Queen* (1974) 131 CLR 116 at 119 per Barwick CJ, McTiernan and Mason JJ; *Whitehorn v The Queen* (1983) 152 CLR 657 at 674 per Dawson J.

21 See, for example, *Mraz v The Queen* (1955) 93 CLR 493; *M v The Queen* (1994) 181 CLR 487; *BRS v The Queen* (1997) 191 CLR 275.

issues in respect of which the trial miscarried were very important issues. We do not share the view propounded by the respondent that the case was necessarily a strong one.

Orders

51 The appeal should be allowed. The judgment of the Court of Criminal Appeal should be set aside. In lieu thereof, we would order that the appeal to that Court be allowed, the conviction of the appellant be set aside, and that a new trial be ordered. It will be a matter for the prosecution whether such a retrial is to take place having regard to the fact that the appellant has already served the sentence of imprisonment imposed upon her, that the alleged events occurred seven years ago, the disruption and expense to the appellant of a second trial, and the public interest considerations involved in such a matter[22].

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22 *MacKenzie v The Queen* (1996) 190 CLR 348 at 376-377.

52 McHUGH J. In my opinion, this appeal must be allowed.

53 The appellant was convicted in the District Court of New South Wales of conspiring with two other persons to cheat and defraud NRMA Insurance Limited of a sum of money. The appellant was a practising solicitor. She put herself forward as a person of good character. The prosecution asserted that the appellant was not a person of good character and, to prove that that was so, sought leave to cross-examine her on matters mentioned in a report prepared by a Law Society investigator.

54 By reason of s 112 of the *Evidence Act* 1995 (NSW) ("the Act"), the prosecution needed the leave of the trial judge to cross-examine the appellant on matters in the report which suggested that she was not of good character. In the course of the Crown case, the learned judge gave a preliminary ruling on the issue of leave. He said that, if the appellant adduced evidence of good character, he would grant leave to the prosecution to cross-examine the appellant on the matters in the report "unless some other matter arises that would cause me to hold a different view". Later, after the appellant had given evidence of good character, the judge gave the prosecution leave to cross-examine her on the matters in the report.

55 Section 192 of the Act directed the judge to have regard to certain matters in determining whether leave to cross-examine should be granted. However, his Honour, over the objection of the appellant's counsel, gave leave without considering these matters – indeed without being referred to them. Because that is so, the appellant was cross-examined in breach of the Act. Her trial was flawed by a "wrong decision of any question of law" within the meaning of s 6 of the *Criminal Appeal Act* 1912 (NSW). Her conviction cannot stand unless the prosecution can establish that her conviction has not resulted in a miscarriage of justice.

56 Two ways are open to the prosecution to show that no miscarriage of justice occurred. First, no miscarriage of justice occurred if the trial judge could not reasonably have refused to grant the prosecution leave to cross-examine the appellant on her claim of good character. Second, no miscarriage of justice occurred if the appellant would have been convicted even if leave to cross-examine had been refused.

57 I think that it is likely that, if the judge had been referred to the matters in s 192, he would still have given leave to cross-examine the appellant on the matters in the report. But if he had refused to give leave, no one could say that his decision was unreasonable. Accordingly, the first ground for contending that no miscarriage occurred must fail. If the judge had been referred to s 192, he may or may not have granted leave to cross-examine on the matters in the investigator's report.

58 The second ground for contending that no miscarriage of justice occurred must also be rejected. As counsel for the prosecution conceded in this Court, the appellant's good character was at the forefront of the case. The character evidence was more important than in many criminal cases because her case depended essentially on a denial of the evidence of an accomplice who had pleaded guilty to the same conspiracy with which the appellant was charged. The appellant's credibility was at the heart of her case. Any undermining of the evidence tending to establish that the appellant was of good character – evidence which the prosecution conceded was "formidable" – was likely to affect the jury's determination as to whether the prosecution had proved its case beyond reasonable doubt.

59 As a result of the leave that the judge gave, the appellant conceded in cross-examination that, while acting in a Family Law matter, she may have purported to witness a signature on an affidavit when the signatory was not there. Indeed, prosecuting counsel put to her that she had forged the signature, an assertion that the appellant denied. The learned judge directed the jury that there was no evidence that the appellant had forged the signature. But he also directed the jury that, if they found that the appellant had purported to witness a signature when she had not done so, that could "affect your assessment of her claim to be of good fame and character".

60 The cross-examination concerning the Family Law matter makes it impossible to find that the grant of leave to cross-examine on character did not result in a miscarriage of justice. There is a real chance that her credibility was undermined as the result of her concession about witnessing the affidavit, a concession that was obtained in breach of the Act.

61 The appeal must be allowed. Counsel for the appellant contended that, because the appellant had served her sentence and the prosecution case was not strong, the proper order was to quash the conviction and enter a verdict of acquittal. However, as a matter of law, the only order to which the appellant is entitled is an order quashing her conviction. There is no feature of the case, apart from the expiry of the sentence, that could justify the entry of an acquittal. There is evidence upon which a jury could reasonably find that the appellant was guilty of a conspiracy to defraud. And there was no conduct or change of case on the part of the prosecution that would make it unfair or oppressive for the appellant to be retried on the charge. It is a matter for the prosecuting authorities, and not for this Court, to determine whether the public interest requires that the appellant should be retried.

Order

62 The appeal must be allowed, the conviction quashed and a new trial ordered.

63 HAYNE J. I agree with Gaudron, Kirby and Callinan JJ that the appeal should be allowed, the judgment of the Court of Criminal Appeal set aside and, in lieu, there be orders that the appeal to that Court is allowed, the conviction of the appellant quashed and a new trial had.

64 Practical necessity requires that there be some limits to the range of matters which can be investigated at a trial. Pursuit of every collateral issue would unreasonably prolong trials with little or no countervailing advantage. The common law sought to chart a course between two competing considerations: first, avoiding juries "being beguiled by the evidence of witnesses who could be shown to be, through defect of character, wholly unworthy of belief"[23] and second, seeking "to prevent the trial of a case becoming clogged with a number of side issues"[24]. As a result, "[m]any controversies which might … obliquely throw some light on the issues must in practice be discarded because there is not an infinity of time, money and mental comprehension available to make use of them."[25]

65 Evidence of the good character of an accused has, however, not been treated as a collateral issue of the same kind as arises if a witness other than the accused is asked questions about collateral matters. At common law such evidence is treated as going to the probability that the accused committed the crime charged[26] and perhaps as going to the credibility of the accused[27]. But as *Melbourne v The Queen*[28] reveals, questions of evidence about the "character" and the "credibility" of an accused raise difficult issues about what exactly is meant by these terms.

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23 *Toohey v Metropolitan Police Commissioner* [1965] AC 595 at 607 per Lord Pearce.

24 *Toohey v Metropolitan Police Commissioner* [1965] AC 595 at 607 per Lord Pearce.

25 *Toohey v Metropolitan Police Commissioner* [1965] AC 595 at 607 per Lord Pearce. See also *Palmer v The Queen* (1998) 193 CLR 1 at 22-24 [51]-[57] per McHugh J; *Piddington v Bennett and Wood Pty Ltd* (1940) 63 CLR 533.

26 *Attwood v The Queen* (1960) 102 CLR 353 at 359; *Simic v The Queen* (1980) 144 CLR 319 at 333.

27 *Melbourne v The Queen* (1999) 198 CLR 1 at 14 [30] per McHugh J, 46 [120] per Kirby J, 54-55 [150]-[151] per Hayne J.

28 (1999) 198 CLR 1.

66 The *Evidence Act* 1995 (NSW) seeks to deal with these issues in Pts 3.7 and 3.8. The matter which gives rise to the present appeal was conducted at trial, and on appeal, as depending upon the operation of the character provisions in Pt 3.8 of the Act and, in particular, s 112. The matter having been conducted in this way, it is undesirable to go beyond noting that the questions of possible intersection or overlap between the operation of the two parts of the Act, which were touched upon in the course of argument of the appeal in this Court, need not be decided in this case.

67 It is enough to say that, in the course of argument at trial, attention was not directed to the operation of s 192 of the Act. The trial judge did not consider the several matters which that section required to be taken into account in exercising, as he did, the discretion under s 112 to give leave to the prosecutor to cross-examine the appellant about matters arising out of evidence given about her character. That discretion was, therefore, exercised without taking account of relevant considerations and the discretion miscarried. It cannot be said that the cross-examination which was allowed would inevitably have been permitted had the various matters referred to in s 192 been taken into account. It follows that it cannot be said that the appellant did not, as a result, lose a real chance of acquittal[29] and, thus, this is not a case in which the proviso applies[30].

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29 *Mraz v The Queen* (1955) 93 CLR 493 at 514.

30 *Criminal Appeal Act* 1912 (NSW), s 6(1).