HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

ANTHONY STEPHEN GREY APPELLANT

AND

THE QUEEN RESPONDENT

Grey v The Queen [2001] HCA 65
15 November 2001
S2/2001

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Criminal Appeal of New South Wales dated 3 March 2000 and in lieu thereof order that:*

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

   b) *the appellant's convictions be quashed and a new trial be had of each of the counts of which he was convicted.*

On appeal from the Supreme Court of New South Wales

Representation:

P Byrne SC with P J D Hamill and T S Corish for the appellant (instructed by Legal Aid Commission of New South Wales)

N R Cowdery QC with A M Blackmore for the respondent (instructed by S E O'Connor, Solicitor for Public Prosecutions)

CATCHWORDS

Grey v The Queen

Criminal law – Evidence – Crown witness with prior convictions – Accused unaware that Crown witness had received favourable treatment by the Crown in consideration of testimony against the accused – Whether absence of disclosure to the accused of the favourable treatment of the Crown witness caused the trial of the accused to miscarry – Substantial miscarriage of justice.

Evidence Act 1995 (NSW), s 165(1)(d), (2).
Criminal Appeal Act 1912 (NSW), s 6(1).

1 GLEESON CJ, GUMMOW AND CALLINAN JJ. The issue in this case is whether a criminal trial miscarried because the accused was not provided with a copy of a letter of comfort which had been given by an investigating police officer to a person who had had an involvement in the events giving rise to the charges against the appellant and was a key prosecution witness against him at his trial.

The facts

2 On 10 August 1998, the appellant was arraigned and pleaded not guilty to five counts of stealing a motor vehicle and four counts of dishonestly disposing of a motor vehicle. The indictment also contained alternative counts of receiving stolen motor vehicles. A trial before Rummery DCJ and a jury proceeded over the next 13 days. On 26 August 1998 the jury returned verdicts of guilty on each of the nine charges.

3 The facts in relation to each of five Ford motor vehicles the subject of the counts are essentially the same. A vehicle was stolen when it was left unattended. It was then "re-birthed", that is to say, it was, by the substitution of the identification number of a wrecked or otherwise unroadworthy vehicle, given a new and apparently different identity. Afterwards the appellant sold it.

4 Simpson J (dissenting) in the Court of Criminal Appeal of New South Wales to which the appellant subsequently appealed[1], described the role of a Crown witness, Mr Reynolds, in this way:

> "Reynolds was an important, even critical, Crown witness in relation to each count in the indictment. His evidence was to the effect that in 1992 he ran a motor vehicle wrecking yard in Yennora and that during that year he had sold a number of wrecked vehicles to the appellant. He said these were not in driveable condition at the time of sale. It was the Crown case that the appellant used parts from these vehicles to reconstitute the stolen vehicles.
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> Reynolds was extensively cross-examined by counsel for the appellant at trial, apparently with the intention of establishing in the jury's mind the reasonable possibility that he, not the appellant, was responsible for the thefts and the conversions, and that the appellant had innocently acquired the vehicles from him and disposed of them.

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1 *Grey* (2000) 111 A Crim R 314 at 319-320 [22]-[27]. The appeal was against both conviction and sentence. The appeal against sentence was abandoned.

> The lines of the dispute were therefore clearly drawn, and drawn in such a way that Reynolds' credibility was a serious and important issue. He himself had pleaded guilty in 1993 to a series of charges of a similar nature and had been sentenced to nine months imprisonment to be served by way of periodic detention. So much was known to the appellant's legal advisers, and was used by them in cross-examination on the issue of his credibility. What was not known to the appellant's legal advisers was that in his sentencing proceedings the officer in charge of the investigation, Det Bandouvakis, had provided to the court a letter outlining assistance that Reynolds had given, both in admitting his own guilt, but also, importantly, in relation to police inquiries into 'the activities of a group in the central west of this State, involving the theft and the conversion of Ford motor vehicles, on a widespread basis'. Detective Bandouvakis was the informant in the charges against the appellant.
>
> An available inference from the passage extracted above is that the investigation to which reference was made was the investigation which resulted in the present charges.
>
> Reynolds was sentenced by Judge Nield on 30 September 1993. Although his Honour's remarks on sentence have, apparently, never been transcribed and the tapes have been destroyed, the Crown prosecutor's note taken at the time of sentence records that the judge ordered that the Bandouvakis letter be placed in a sealed envelope and that, but for the contents of the letter, Reynolds would have been sentenced to a term of full-time custody. Plainly, therefore, Reynolds received, with the support of the prosecution authorities, a very significant benefit resulting from the information he gave Det Bandouvakis.
>
> [T]he Crown prosecutor at the trial [was unaware] of the letter … [He] said that if he had known of it he would have told the appellant's counsel about it. Detective Bandouvakis clearly knew of the letter, and he was the informant on the record in the appellant's trial …. "

5 Grove J, with whom Sully J agreed, was of the opinion that the outcome of the appeal turned on the application of the fresh evidence rule[2] to the letter of comfort provided to Mr Reynolds but not disclosed to the appellant until after the trial. In so disposing of the appeal, his Honour was responding to an argument that had been put by the Crown to the effect that[3]:

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2 *Mickelberg v The Queen* (1989) 167 CLR 259 at 301 per Toohey and Gaudron JJ.

3 *Grey* (2000) 111 A Crim R 314 at 318 [15].

"Given the availability of Reynolds to be cross-examined at committal proceedings and the examples of the thrust of cross-examination set out above; to which might be added the explicit knowledge that Reynolds had been charged, convicted and sentenced; with great respect to the contrary view, I find it hard to postulate that reasonable diligence would not have detected that Reynolds had sought and obtained some favourable consideration for his assistance to authority in his own sentencing proceedings. The precise detail of the content of the letter of comfort may have required a judicial order in order to enable access, but the circumstance that benefit for assistance was granted was not subject to any inhibition from disclosure."

6 Simpson J took a different view. Her Honour said this[4]:

"The fundamental question which emerges from all the guidelines and rules, and, independently, from ordinary notions of fairness, is whether the undisclosed document could be said to have had sufficient relevance to a material issue in the proceedings. The material issue was Reynolds' credibility. As I have said his evidence was important, if not critical, to the prosecution case, given the issues as they emerged. The fact that he gave to the police information about the very matters with which the appellant was charged, resulting in a reduction in his own sentence, was highly relevant to his credibility. Having given the information in 1993, he was obliged at the risk of himself being resentenced, to maintain his position when the appellant was tried: *Criminal Appeal Act* 1912 (NSW), s 5DA. I am of the view that the unavailability to the defence of the evidence might have caused the appellant to lose a fair chance of acquittal: *Mraz v The Queen*[5]."

7 Her Honour, unlike the majority, did not think that any answers given by Mr Reynolds in cross-examination would have signalled to the experienced counsel who represented the appellant at the trial, of the likely, indeed even possible existence of a letter of the kind which had been written by the investigating police officer. We would observe of this point that her Honour's view of this matter receives support from the contents of the letter referring to the rarity of the course taken by the police officer, which includes this:

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4 *Grey* (2000) 111 A Crim R 314 at 322 [35].

5 (1955) 93 CLR 493.

> "I have been a member of the New South Wales Police Service for the past 15 years, and this is only the third occasion I have seen fit to give evidence on behalf of a prisoner, awaiting sentence. I do so on this occasion because of the prisoner's demeanour when spoken to and the veracity of the information supplied by him."

The appeal to this Court

8 The first ground of appeal upon which the appellant relies in this Court is that the majority of the Court of Criminal Appeal erred: first, in dealing with the issue raised on the appeal, by reference to the principles applying to the reception of "fresh evidence" on appeal rather than as a case of lack of disclosure by the Crown; and, secondly, in failing to have regard to, or to determine the question whether the failure of the Crown to disclose relevant information in its possession caused the trial to be unfair and therefore to miscarry. The appellant submits that had he been aware of the letter and had it had been tendered to the Court, the trial judge would have been obliged to sum up differently from the way in which he did, and that a direction of the kind for which s 165 of the *Evidence Act* 1995 (NSW) ("the Act") provides would have had to have been given.

9 The respondent concedes that the reliance by the majority in the Court of Criminal Appeal on *Mickelberg v The Queen*[6] and other cases relating to fresh evidence was misplaced, and that the appeal should have been determined by reference to the principles governing the obligation of the Crown to make disclosure in a criminal case. Nonetheless, the respondent submits, whether the case is to be regarded as a case relating to the admission of fresh evidence, as one in which an irregularity occurred during its course, or in which a mistake was made by counsel, the ultimate question, whether there had been a miscarriage of justice in all the circumstances of the case, should be answered in the negative.

10 The respondent submits, in effect, that the case against the appellant was a very strong, if not to say, overwhelming one. The appellant was a resident of Dubbo and was in possession of the five recently stolen cars. Each had been left unattended in and around Dubbo and not far from where the appellant lived. The appellant sold each car soon after its theft. On one occasion the appellant gave a false account of the history of a vehicle in the course of selling it to a purchaser.

11 There was no doubt that the appellant was aware that Mr Reynolds would be a witness against him. He was cross-examined about his role at the committal

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6 (1989) 167 CLR 259 at 301 per Toohey and Gaudron JJ.

hearing on 23 June 1994. The cross-examination of Mr Reynolds included these exchanges:

> "Q And when did the police first speak to you in relation to the matters of Mr Grey?
>
> A I was brought in for a statement in January this year.
>
> Q In January of this year?
>
> A This year yes.
>
> Q Did they speak to you about Mr Grey's matters before January 1994?
>
> A They had, I couldn't give you dates on, on when it had happened and not specifically Mr Grey they had asked me matters of the vehicles certainly before then.
>
> Q About the vehicles?
>
> A Yeah the vehicles that were tagged in the police book.
>
> Q Was it only in relation to the five vehicles that the prosecutor has referred you to in evidence today or were you asked by police about a whole host of vehicles?
>
> A Yes I have been asked about many vehicles, there were vehicles that I was charged with, that happened in between February '92 and March '92.
>
> Q They were the vehicles you were charged in relation to?
>
> A Yes.
>
> Q Well now how many vehicles were involved in the matters that you were charged with?
>
> A There were eight vehicles.
>
> Q Eight vehicles?
>
> A Mm."

12 And later in his cross-examination, Mr Reynolds answered questions as follows:

"Q Were you spoken to by the police in respect of any other matters where you may have been charged but you were not charged?

A Where I may have been charged?

Q Yes, there were other instances where involving motor vehicles or breaches of regulations that, that you breached that you could have been charged but you weren't charged you were only charged with the matters that you've appeared before the court for?

A I don't quite understand the question, if you're saying have I done other things that were wrong?

Q Yes?

A I'm sure I have in relation to my books but --

Q In relation to other motor vehicles?

A I've been a police witness on other occasions, I've had basically in a similar situation someone else had done something and I was just a --

Q A witness as you are now?

A As I am now.

Q So how many times have you been a witness and how many cases have you been involved in?

A Well I was involved in one in Goulburn when I first started, I was involved in my own case where I was convicted and this one.

Q Any other cases in the future that you've anticipated with --

A I certainly hope not.

Q You see I put this to you that in relation to the silver Fairlane that Mr Grey went down to collect that vehicle and buy it off you and there were no number plates fitted to the vehicle?

A That's right yep the number plates were at that time held by the police.

Q For the silver Fairlane?

A Mm.

Q Why was that?

A Because those number plates were on one of the vehicles that I was charged with.

Q That is when Mr Grey went down to purchase it?

A There were no number plates on the vehicle that's right."

13 On 19 May 1997, a "No Bill" application was made and contained submissions which made reference to the unreliability of Mr Reynolds as the principal Crown witness. For example, this was submitted:

> "It appears from the evidence that Reynolds' main aim in giving evidence was to avoid implicating himself in the offences allegedly committed by our clients. Grave suspicion attaches to Reynolds … There is strong suspicion that the police have conspired with Reynolds and given him protection from prosecution … Police obtained a search warrant and took action against our clients 'on the word of Reynolds'. No formal statement was obtained from Reynolds by police until <u>after</u> our clients had been arrested and charged." (original emphasis)

14 Cross-examination at the trial impugned the credit of Mr Reynolds on various bases, including that he had kept his record books in a poor state and incomplete condition, that he was never investigated or charged in respect of the vehicles the subject of the appeal, that he had possession of stamps which could be used for stamping engine and chassis numbers, and that other aspects of his banking and record keeping were highly suspicious.

15 In substance then, it was the submission of the respondent that notwithstanding the prosecution's failure, inadvertent as it was, to disclose that Mr Reynolds had been given the letter of comfort that he had, the appellant had not really been deprived of a full opportunity to discredit Mr Reynolds who was, it was conceded, a key Crown witness against him.

16 In our opinion, this submission cannot be accepted. Mr Reynolds was presented by the Crown as a reliable witness and, by implication, a witness whose involvement, if any, in the events in respect of which the appellant was charged was non-existent or entirely innocent. This was a disingenuous basis upon which to present Mr Reynolds. As the letter of comfort makes clear, he had in fact had a widespread and deep involvement in the theft and conversion of Ford motor vehicles. The letter recorded this:

> "At the present time the prisoner is assisting us with our inquiries in relation to the activities of a group in the Central West of this State, involving the theft and conversion of Ford motor vehicles, on a widespread basis."

17 But what was worse, and what underlined the presentation of Mr Reynolds as a reliable witness, was the further assertion in the letter in these words:

> "There is no evidence to indicate that the prisoner is an active participant in this current inquiry."

18 It is not difficult to imagine a fertile area of cross-examination that could have been tilled by the appellant on the basis of this false statement to whose makers Mr Reynolds was patently beholden. The letter should have been provided to the appellant, as is correctly conceded in this Court by the respondent. Its revelation and admission into evidence could have put a quite different complexion on the case for the appellant and the way in which it was conducted.

19 In the trial judge's summing up, there are only five references to the evidence of Mr Reynolds. The first suggests that it might be understandable that Mr Reynolds might not have remembered details of various matters of which he was asked when he gave evidence. The second, third and fourth of these are unremarkable and of no significance, and the fifth is a brief summary of the criticisms that had been made of him by the appellant's counsel in his address. The form in which the last reference was made gives an indication of the extent to which the trial judge also, may have been misled by the manner of the presentation of Mr Reynolds by the Crown.

20 What the trial judge said in this connexion was:

> "The defence says all these source vehicles had a connection with Leon Reynolds. They were acquired from him and you would be loathe to accept the evidence of Leon Reynolds. You would be uncomfortable about relying upon that and you would, because of that discomfort, have some reasonable doubt and if you do you have to, as a matter of law, resolve that of course as you know in favour of the accused.
>
> In addition the Crown says that the police here did not do their investigation work very well. For some reason they did not investigate Mr Reynolds in the way they should have. They did not really do their homework and you get some insight into the kind of manner of people that they are from what you have learned from the evidence was their manner of executing the search warrant at the Grey house."

21 Not only would the trial judge not have commented as he did about Mr Reynolds had the appellant been apprised of the letter of comfort, but, also, his Honour would almost certainly have been asked and been probably obliged to give a direction to the jury in terms of s 165(1)(d) and (2) of the Act[7], which relevantly provide as follows:

> **"Unreliable evidence**
>
> (1) This section applies to evidence of a kind that may be unreliable, including the following kinds of evidence:
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> …
>
> (d) evidence given in a criminal proceeding by a witness, being a witness who might reasonably be supposed to have been criminally concerned in the events giving rise to the proceeding,
>
> …
>
> (2) If there is a jury and a party so requests, the judge is to:
>
> (a) warn the jury that the evidence may be unreliable, and
>
> (b) inform the jury of matters that may cause it to be unreliable, and
>
> (c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it."

22 Clearly, the letter could properly found a submission at the trial by the appellant that Mr Reynolds was a witness who might reasonably be supposed to have been criminally concerned in the events giving rise to the counts alleged against the appellant. And it is likely, although it is unnecessary to reach a conclusion in this respect, that the judge would have been bound to direct the jury in accordance with s 165(2) of the Act as there do not seem to be any good reasons for not doing so.

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7 Section 165(3) also provides:

> "The judge need not comply with subsection (2) if there are good reasons for not doing so."

23 For the reasons that we have given, there has been a miscarriage of justice in this case. It was not a miscarriage to which the fresh evidence rule applied. It is one thing to say that the defence knew or could have found out about various aspects of unsavoury behaviour on the part of Mr Reynolds but an altogether different thing to say that it knew of the special relationship between Mr Reynolds and the police. And although it might also be possible to say that a lucky (if extremely risky) question of him might have elicited an answer which revealed the existence of the letter of comfort and perhaps even its contents, there was no reason why the defence in a criminal trial should be obliged to fossick for information of this kind and to which it was entitled. Nor can we accept, in any event, as the Court of Criminal Appeal held, that reasonable diligence before or during the trial would have unearthed the letter.

24 The outcome of the appeal depends upon the application of s 6(1) of the *Criminal Appeal Act* 1912 (NSW), which provides as follows:

> **"Determination of appeals in ordinary cases**
>
> (1) The court on any appeal under section 5(1) against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal; provided that the court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

The only question is whether, as the respondent submits, the appeal should be dismissed because no substantial miscarriage of justice has actually occurred.

25 The language of s 6(1) is similar to the language of s 4(1) of the *Criminal Appeal Act* 1907 (UK), which established the Court of Criminal Appeal in England. It has analogues, or virtual analogues, enacted between 1912 and 1924 in the other Australian States. Its history after its original enactment is traced in the judgment of Brooking JA in *R v Gallagher*[8] in which his Honour remarks on the difficulty of drawing a distinction between a (mere) miscarriage of justice,

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8 [1998] 2 VR 671.

and a "substantial" miscarriage of justice, being the two expressions which appear in the sub-section, a difficulty upon which many judges before him have commented. In *Wilde v The Queen*[9], Brennan, Dawson and Toohey JJ however stated the effect of the authorities to be[10]:

> "Those authorities establish that where there has been a departure from the requirements of a properly conducted trial, it cannot be said that there has been no substantial miscarriage of justice if the applicant has thereby lost 'a chance which was fairly open to him of being acquitted' to use the phrase of Fullagar J in *Mraz v The Queen*[11] or 'a real chance of acquittal' to use the phrase of Barwick CJ in *Reg v Storey*[12]. Unless it can be said that, had there been no blemish in the trial, an appropriately instructed jury, acting reasonably on the evidence properly before them and applying the correct onus and standard of proof, would inevitably have convicted the accused, the conviction must be set aside: see *Driscoll v The Queen*[13]; *Reg v Storey*[14]; *Gallagher v The Queen*[15]. Unless that can be said, the accused may have lost a fair chance of acquittal by the failure to afford him the trial to which he was entitled, that is to say, a trial in which the relevant law was correctly explained to the jury and the rules of procedure and evidence were strictly followed: see *Mraz v The Queen*[16]. The loss of such a chance of acquittal cannot be anything but a substantial miscarriage of justice. The question whether the jury would inevitably have convicted falls to be determined by the Court of Criminal Appeal. It is a question which the Court of Criminal Appeal must answer according to its assessment of the facts of the case. In this case the Court of Criminal Appeal answered it adversely to the applicant, and there is nothing to show that the answer was wrong."

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9 (1988) 164 CLR 365.

10 (1988) 164 CLR 365 at 371-372.

11 (1955) 93 CLR 493 at 514.

12 (1978) 140 CLR 364 at 376.

13 (1977) 137 CLR 517 at 524.

14 (1978) 140 CLR 364 at 376.

15 (1986) 160 CLR 392 at 412-413.

16 (1955) 93 CLR 493 at 514.

26 The strongest point that the respondent makes is that it is very unlikely that the appellant could have innocently been in possession of, and have been able to sell five indisputably stolen motor vehicles. It is a powerful point. The respondent nonetheless was bound to facilitate fair process by providing to the appellant all materials to which he was entitled to have access. This did not happen.

27 Because of the over-arching importance of Mr Reynolds' evidence at the trial and the weight that the prosecution placed upon his reliability, we are unable to say that, had the letter been made available to the appellant so that he could cross-examine on it and introduce it into evidence, he would inevitably have been convicted. He has lost thereby a fair chance of acquittal.

Order

28 The appeal to this Court should be allowed. The order of the Court of Criminal Appeal should be set aside. In place of that order, it should be ordered that the appeal to the Court of Criminal Appeal be allowed, the conviction be quashed and the appellant be retried on each of the counts on which he was convicted.

29 KIRBY J. This is an appeal from a judgment of the New South Wales Court of Criminal Appeal[17]. That Court, by majority[18], dismissed an appeal by Mr Anthony Grey ("the appellant") against his conviction on five counts of stealing motor vehicles and four counts of disposing of the stolen vehicles.

30 On any view, the prosecution case against the appellant was very strong. However, after the appellant's conviction, it was discovered that the prosecution's principal witness was an informer for the police who had, for that reason, secured advantages in criminal proceedings in which he had received a lenient sentence. In the Court of Criminal Appeal[19], and in this Court, it was conceded by the prosecution that the failure to draw these facts to the attention of those representing the appellant at his trial amounted to a breach of the prosecution's duty to disclose to the defence a relevant matter[20]. The issue in this appeal is whether the majority erred in the Court below in concluding that, notwithstanding such breach and any miscarriage that it occasioned, the case was one in which the proviso to s 6(1) of the *Criminal Appeal Act* 1912 (NSW) should be applied, with the result that the appellant's conviction was confirmed.

The course of the proceedings

31 On 7 December 1993, the appellant was arrested and charged with fourteen offences involving stealing or alternatively receiving five motor vehicles and subsequently disposing of those vehicles knowing the same to have been stolen. The appellant's wife was charged with disposing of the fifth vehicle. She was tried jointly with the appellant. She was convicted and sentenced on the charge. This Court is not concerned with her case.

32 The key witness in the prosecution case was Mr Leon Reynolds. The prosecution relied on his testimony to describe what it alleged was a course of

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17 *Grey* (2000) 111 A Crim R 314.

18 Grove and Sully JJ; Simpson J dissenting.

19 *Grey* (2000) 111 A Crim R 314 at 315.

20 cf *McIlkenny* (1991) 93 Cr App R 287 at 312; Hinton, "Unused Material and the Prosecutor's Duty of Disclosure" (2001) 25 *Criminal Law Journal* 121; O'Connor, "Prosecution Disclosure: principle, practice and justice" [1992] *Criminal Law Review* 464. The obligation is a universal one although its content may sometimes be controversial: Harom and Karaginannakis "The Disclosure of Exculpatory material by the Prosecutor to the Defence under Rule 68 of the ICTY Rules" in May, *Essays on ICTY Procedure and Evidence* (2001) at 315.

conduct by which it could be inferred that the appellant had stolen a series of five Ford motor vehicles in the Dubbo district in New South Wales, and then engaged in "rebirthing"[21] them. This process has already been detailed in the reasons of Gleeson CJ, Gummow and Callinan JJ ("the joint reasons")[22]. In respect of at least four of the five vehicles, Mr Reynolds was the supplier to the appellant of the source vehicle comprising a wreck or vehicle of small value. Mr Reynolds denied having taken any part in the substitution of the engine numbers on the stolen vehicles. The appellant, who was not a motor trader, admitted to making some money on the resale of reconditioned vehicles. But he claimed that he was innocent of any wrongdoing.

33 There was no direct evidence of the appellant's participation in the thefts of any of the stolen vehicles. However, the prosecution relied on circumstantial evidence. It also relied on the doctrine of recent possession[23].

34 A committal hearing of the charges against the appellant took place in June 1994. At this, the appellant's defence suggested that Mr Reynolds was the person responsible for the "rebirthing" of the five vehicles. In May 1997, a detailed no bill submission was addressed to the Director of Public Prosecutions ("DPP"). This document was subsequently placed before the Court of Criminal Appeal and was before this Court. In it, the appellant complained that Mr Reynolds had criminal convictions for dishonesty arising out of his dealings in the motor industry; that he had been involved in illegal activity "at the very time as the commission" of the offences alleged against the appellant; that Mr Reynolds' main aim in giving evidence "was to avoid implicating himself in the offences allegedly committed by our client[s]"; that Mr Reynolds had defective records and was "accustomed to 'switching' engine and chassis numbers"; and that police were covering up and protecting Mr Reynolds. The no bill submission asked "why was not Reynolds charged with at least aiding and abetting or being an accessory to our client … when he [Reynolds] allegedly supplied the engine and chassis numbers to [the appellant]?"

35 Notwithstanding this letter, the DPP, in July 1998, decided that the matter should proceed to trial. That trial took place in August 1998 before Rummery DCJ and a jury. In the course of the trial, Mr Reynolds was called to give evidence for the prosecution[24]. He was cross-examined on behalf of the appellant concerning his criminal record and to suggest that he had the

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21 *Grey* (2000) 111 A Crim R 314 at 319 [21].

22 Joint reasons at [3].

23 *Trainer v The King* (1906) 4 CLR 126 at 133-135.

24 *Grey* (2000) 111 A Crim R 314 at 318 [15], 319 [22].

experience, mechanical implements, prior involvement and motivation to play the necessary role in altering the engine numbers of the five vehicles later registered, sold and disposed of by the appellant and his wife. However, it was not put directly to him that he was in fact responsible for the alterations of the engine numbers. The only explanation offered for that omission was the suggestion that, without strong evidence to support such an allegation, counsel was restrained by ethical rules from making that accusation against a witness.

36 The appellant's case at trial was that he was simply involved in making "a bit of extra money" from the selling of vehicles acquired from Mr Reynolds. He had purchased a number of them and paid for them through his bank account as, it was suggested, he would not have done if he had been aware that the vehicles had been stolen. The appellant gave no evidence at his trial. However, he made an unsworn statement to the jury. In it he denied that he had known that the vehicles were stolen. Of his dealings with Mr Reynolds he said:

> "I never suspected there was anything wrong with any of the vehicles, but - that I purchased off him, there was nothing wrong with buying the vehicles off him. There was no reason to suspect anything. I got on really well with Leon [Reynolds], I thought he was a pretty good fellow at the time."

37 According to the appellant, as far as he was aware, Mr Reynolds would merely transfer parts of vehicles from a wreck, thereby creating "a better vehicle from the two". He stated that later, when police began seizing the vehicles he had sold, he contacted Mr Reynolds. For the first time Mr Reynolds told him: "There could be some problems with some of the vehicles I sold you". He attributed to Mr Reynolds the statement: "If the police look deep enough, there could be a matter of 130 vehicles involved, European cars, Japanese, Fords, Holdens". He justified his sale of the vehicles far from Dubbo (where he and his wife lived) on the footing that such vehicles fetched more money in other places.

38 After a lengthy retirement, the jury found the appellant guilty of the charges. He was convicted and sentenced. After his appeal was dismissed by the Court of Criminal Appeal, he was granted bail by a judge of the Supreme Court of New South Wales pending a decision of this Court. Now, by special leave, he has appealed to this Court.

The prosecution's principal witness

39 As was stated in the no bill submission, and as was put during cross-examination at the trial, Mr Reynolds was convicted of criminal offences in relation to car thefts extending back to 1992. In respect of such offences Mr Reynolds appeared for sentence on 30 September 1993 before Nield DCJ in the District Court of New South Wales. He pleaded guilty and was sentenced to imprisonment for nine months, such sentence to be served by way of periodic

detention. The recording of the judge's remarks on sentencing Mr Reynolds was deleted some time between 1993 and the time that their substance came to light after the appellant's conviction and sentence[25]. However, the prosecutor, present in court at the time of Mr Reynolds' sentence, noted on the file an apparent summary of what the sentencing judge had said. This note was produced to the Court of Criminal Appeal. It read: "Save for prior good character, rehabilitation and Exhibit G would have imposed full time gaol"[26].

40 The exhibit referred to ("Ex G") was not known to the appellant's representatives at his trial. Nor was it contained in the brief of the prosecutor. The co-creator of the document was Detective Sergeant Bandouvakis of the New South Wales Police Service. He also gave evidence in the prosecution case against the appellant. Indeed, he was the informant against the appellant, as he had been, in 1992, in respect of the charges against Mr Reynolds. Det Sgt Bandouvakis did not disclose to the prosecutor in the appellant's trial the letter or the arrangements which Ex G showed he had made prior to Mr Reynolds' sentencing. It is the omission to disclose the existence of this letter to the representatives of the appellant that gave rise to the principal argument before the Court of Criminal Appeal. It now presents the issue before this Court.

41 The letter, Ex G, described as a "letter of comfort"[27] is dated 23 September 1993. It concludes with the statement set out in the joint reasons[28]. However, I think it is useful to reproduce the substantial elements of the letter:

> "Prior to these matters coming to light, the prisoner [Reynolds] provided information which resulted in the recovery of two stolen vehicles, in the Yennora and Guildford areas. One person was arrested in respect of one of the vehicles and served a nine month custodial sentence. The other suspect fled the country, before inquiries could be finalised.
>
> At the present time the prisoner is assisting us with our inquiries in relation to the activities of a group in the Central West of this State, involving the theft and conversion of Ford motor vehicles, on a widespread basis.
>
> To date we have recovered four stolen motor vehicles with an estimated value of $60,000.00. The cars have been recovered intrastate

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25 *Grey* (2000) 111 A Crim R 314 at 315 [2], 319 [26].

26 *Grey* (2000) 111 A Crim R 314 at 315 [2].

27 *Grey* (2000) 111 A Crim R 314 at 315 [2].

28 Joint reasons at [7].

> and interstate. The prisoner has stated he is prepared to make further inquiries, in an effort to identify further vehicles which have been stolen and converted by the persons involved in this operation. There is no evidence to indicate that the prisoner is an active participant in this current inquiry.
>
> The prisoner stated he wished to finalise these present matters as soon as possible. He entered a plea of guilty, at the first opportunity, and has maintained that plea ...."

42 In an affidavit read before the Court of Criminal Appeal, counsel who had appeared for the appellant at the trial declared that at no time prior to, or during, the trial was he aware that Mr Reynolds was a police informer. Counsel stated that it was only in August 1999 that he was given a copy of documents and discovered that Mr Reynolds had provided assistance to police as mentioned in Ex G. Counsel stated that, despite the representations made on the no bill submission which he had drafted, he had never been informed by police or the prosecutor of Mr Reynolds' role as a police informer. The Crown Prosecutor at the appellant's trial also prepared an affidavit that was read to the Court of Criminal Appeal. It deposed that he too had been unaware of the matters in Ex G. He stated that it was his belief that, had he been in possession of knowledge about the letter, he would have disclosed that knowledge to the defence.

The decision of the Court of Criminal Appeal

43 In the Court of Criminal Appeal, the presiding judge, Grove J (with whom Sully J agreed)[29], defined the "essential issue" as being "whether the absence of communication of the fact that assistance to police was one factor in gaining leniency for Reynolds demonstrates miscarriage of justice in the appellant's trial"[30]. The cross-examination of Mr Reynolds at the trial was, in Grove J's opinion, unmistakable in its suggestion that at the relevant time, he possessed implements that could be used for the purpose of stamping engine and chassis numbers; that such implements had not been produced to police; that at the time of the offences alleged against the appellant Mr Reynolds faced severe financial difficulties; that his car yard in Yennora, a Sydney suburb, was capable of holding a large number of vehicles; that there were discrepancies in logbooks that he was required to keep relating to the sale and disposal of the subject vehicles; and that during the time he had conducted the wrecking business Mr Reynolds

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29 *Grey* (2000) 111 A Crim R 314 at 315 [3].

30 *Grey* (2000) 111 A Crim R 314 at 315 [3].

had used the implements to place engine and chassis numbers upon certain vehicles, in particular Ford motor cars, and that this process was "not easy"[31].

44 In the context of this conduct of the appellant's trial, Grove J was of the opinion that the additional ammunition that knowledge of Ex G would have provided to the appellant was "limited". It was confined to Mr Reynolds' "general credit rather than to the facts of the case"[32]. Although the assistance that Mr Reynolds had given to police and its relevance to his gaining leniency in his own sentencing had not emerged during cross-examination at the appellant's committal[33], Grove J quoted part of the committal evidence to demonstrate that effectively, Mr Reynolds had already been questioned extensively as to his credit and as to evidence he had given in other cases[34].

45 In the light of the actual conduct of the appellant's defence, Grove J therefore concluded that Ex G should be treated as "fresh or new evidence" and subjected to the tests applicable to such evidence when it emerges for the first time following a criminal conviction[35]. His Honour was of the opinion that reasonable diligence would have detected the fact that Mr Reynolds had sought, and obtained, favourable consideration for his assistance to the authorities. In any case, Grove J concluded that "the addition of one additional factor to the many others addressed to the central Crown witness" did not give rise "to a significant possibility that the jury, acting reasonably, would have acquitted the appellant"[36].

46 The dissenting judge, Simpson J, confirmed the concession made by the trial prosecutor, that the substance of the arrangements disclosed in Ex G should have been made known to the appellant. She did this by referring to the duties imposed on Crown prosecutors who are members of the New South Wales Bar Association by the rules of that body[37]. Her Honour also referred to the

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31 *Grey* (2000) 111 A Crim R 314 at 316 [7].

32 *Grey* (2000) 111 A Crim R 314 at 316 [8].

33 *Grey* (2000) 111 A Crim R 314 at 316 [12].

34 *Grey* (2000) 111 A Crim R 314 at 317 [12].

35 *Grey* (2000) 111 A Crim R 314 at 318 [14].

36 *Grey* (2000) 111 A Crim R 314 at 318 [16].

37 *Grey* (2000) 111 A Crim R 314 at 322 [33]. Rule 66 provides: "A prosecutor must disclose to the opponent as soon as practicable all material available to the prosecutor or of which the prosecutor becomes aware which constitutes evidence relevant to the guilt or innocence of the accused, unless such disclosure, or full

(Footnote continues on next page)

published guidelines issued by the DPP concerning prosecution policy in New South Wales, including in relation to the disclosure of information about informers[38]. Pursuant to the *Director of Public Prosecutions Act* 1986 (NSW), s 14, guidelines have been issued to police by the DPP requiring disclosure by them to the Office of the DPP of relevant information and material. This includes any information concerning any proposed witness that might be of relevance either to the prosecution or to the defence[39].

47 In light of these considerations, Simpson J decided that information concerning the arrangements entered between police and Mr Reynolds was relevant to the proper evaluation of Mr Reynolds' testimony[40] and so should have

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disclosure, would seriously threaten the integrity of the administration of justice in those proceedings or the safety of any person."

38 The DPP's prosecution guidelines are published in Watson, Blackmore and Hosking, *Criminal Law (NSW)* (1996), vol 2 at 2-13551. Relevantly, Prosecution Guideline No 16 at 2-13560 provides: "The Office [of the DPP] maintains an index of informers. An informer is a person (not being a victim or a primary witness) who has given assistance to police or investigators as a consequence of knowledge that has come into his or her possession through direct personal contact with an alleged offender … With the assistance of the Office index the accused should be informed in advance of the trial of:

…

(b) whether or not the Police Service … have any information which might assist in evaluating the informer's credibility, particularly as to (i) motivation … (v) the extent to which public officers have given evidence or written reports on behalf of the informer (eg to courts, …);

(c) whether any … benefit has been claimed, offered or provided;

…

(f) whether any discount on sentence has been given for assistance in the matter …".

The position in other Australian jurisdictions is surveyed in Hinton, "Unused Material and the Prosecutor's Duty of Disclosure" (2001) 25 *Criminal Law Journal* 121 at 123-128.

39 *Grey* (2000) 111 A Crim R 314 at 321 [31]. Portions of Simpson J's reasons are set out in the joint reasons at [6].

40 *Grey* (2000) 111 A Crim R 314 at 322 [34].

been disclosed both to the prosecution and the defence. Whilst her Honour was prepared to accept that the failure to disclose was not occasioned by bad faith[41] it was, in her opinion, significant. This was because Mr Reynolds' credibility was "the material issue" in the prosecution case[42]. Because the information he gave to police concerned "the very matters with which the appellant was charged"[43], this made disclosure of police arrangements with him "highly relevant to his credibility". The failure to provide that information to the appellant had therefore caused the loss of a fair chance of acquittal[44].

48 The suggestion that the issue was to be approached on the footing that Ex G was "new evidence", which ought to have been discovered by the appellant's representatives before his trial, was rejected by Simpson J[45]. In light of her conclusion that the convictions had to be quashed and a new trial ordered, her Honour did not address the alternative ground relied upon by the appellant, by leave, namely that, if reasonable diligence by his representatives ought to have uncovered Ex G, he was entitled to relief on the footing of incompetent legal representation[46]. That ground, although mentioned in the majority reasons[47] was not decided by them, except by inference. All of the judges rejected the appellant's complaint that the trial judge had erred in declining to give a direction to the jury based on s 165 of the *Evidence Act* 1995 (NSW)[48].

The test for application of the proviso

49 Appeal being a statutory process for the correction of error[49], it is necessary, for the appeal to succeed, to persuade this Court that the reasons given

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41 *Grey* (2000) 111 A Crim R 314 at 320 [27].

42 *Grey* (2000) 111 A Crim R 314 at 322 [35].

43 *Grey* (2000) 111 A Crim R 314 at 322 [35].

44 *Grey* (2000) 111 A Crim R 314 at 322 [35] citing *Mraz v The Queen* (1955) 93 CLR 493.

45 *Grey* (2000) 111 A Crim R 314 at 322-323 [36].

46 Relying on *R v Birks* (1990) 19 NSWLR 677: see *Grey* (2000) 111 A Crim R 314 at 324 [42].

47 *Grey* (2000) 111 A Crim R 314 at 315 [1].

48 *Grey* (2000) 111 A Crim R 314 at 315 [1], 318 [18], 324-325 [44]-[50].

49 *Lowndes v The Queen* (1999) 195 CLR 665 at 671 [13], 679 [40].

by the Court of Criminal Appeal for dismissing the appellant's appeal disclose a relevant error. With respect to the majority of that Court, I consider that their Honours erred in classifying the problem to be resolved in terms of the rules applicable to the reception of new or fresh evidence discovered following conviction of a criminal offence. Such rules apply to limit the reception of evidence whose absence has occasioned a miscarriage of justice[50]. Where evidence was available at the trial or, with reasonable diligence could have been available, there will ordinarily be no miscarriage of justice in the failure to adduce it[51]. However, the assumption behind this rule is, relevantly, that the accused either had the evidence available, or could and should have discovered it, so that a belated reliance upon it ought not to be permitted.

50 In the present case the appellant's complaint is that Ex G, or some indication of its contents, ought to have been provided by police to the DPP and by the prosecution to the appellant's legal representatives. To treat this case simply as one amenable to the rules governing "fresh" or "new" evidence following a criminal trial is effectively to convert the prosecutor's duty to disclose into an accused's obligation to find out. Because the DPP has conceded that there was a duty to disclose which was not fulfilled, the reasoning of the majority of the Court of Criminal Appeal is incorrect. If the police and prosecution duties had been properly discharged, the appellant's representatives would have been supplied with Ex G or information as to its contents. The appellant would thus have had the necessary materials available to him. No occasion would then have arisen for the present arguments.

51 Nevertheless, the ultimate conclusion for the majority in the Court of Criminal Appeal appears to have rested on their Honours' application of the proviso[52]. This provision often leads to differences of judicial opinion[53]. Is this appeal simply a case upon which minds might differ in considering the suggested miscarriage of justice that arose in the course of the appellant's trial against the strength of the prosecution evidence against him? Or can error be discerned in

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50 *Gallagher v The Queen* (1986) 160 CLR 392 at 395, 402, 410; *Mickelberg v The Queen* (1989) 167 CLR 259 at 301.

51 *Ratten v The Queen* (1974) 131 CLR 510 at 516-517; *Lawless v The Queen* (1979) 142 CLR 659 at 666, 675-677; *Mickelberg v The Queen* (1989) 167 CLR 259 at 301.

52 *Grey* (2000) 111 A Crim R 314 at 318 [16].

53 *Zoneff v The Queen* (2000) 200 CLR 234 at 267-268 [85]-[89]; *Gilbert v The Queen* (2000) 201 CLR 414 at 422 [21], 431 [52]; *KRM v The Queen* (2001) 75 ALJR 550 at 565 [72], 575 [128]-[129]; 178 ALR 385 at 404, 418.

the majority's reasons so that Simpson J was correct to reject the application of the proviso?

52 This is not a case where the verdicts of the jury were unreasonable, based on the evidence adduced before them. Still less is it one where those verdicts were not supported having regard to the evidence. Nor, subject to what will later be said about s 165 of the *Evidence Act* (the application of which, in turn, depended on the factual foundation for the ruling), is this a case where a wrong decision on any question of law has occurred in the course of the trial. Accordingly, the jurisdiction and power of the Court of Criminal Appeal invoked by the appellant under the *Criminal Appeal Act* was that a "miscarriage of justice" had been demonstrated because of the failure of the prosecution to disclose to him Ex G or its substance. If such a "miscarriage of justice" is shown, the Court of Criminal Appeal is primarily required to allow the appeal[54].

53 This Court has pointed out many times[55] that the proviso appears in a section that does not negate the fundamental principle of the administration of criminal justice in Australia. This is that no person should be convicted of a serious crime except (where applicable) by the verdict of a jury after a fair trial held according to law[56]. If the trial ceases to be a fair trial according to law, the verdict of guilty, and the criminal conviction that follows it, is intrinsically flawed. It is then no part of the function of a court of criminal appeal to hold that the accused is "so obviously guilty that the requirement of a fair trial according to law can be dispensed with"[57]. The proviso has no application to such a case. Nevertheless, in a "relevantly fair trial"[58], error, impropriety or unfairness may occur that does not deprive the trial of its essential attributes as such. In those cases, the evaluation required by the proviso must be performed.

54 In the present appeal, the appellant submitted that the absence of access to Ex G (or knowledge about its contents) rendered his trial fundamentally unfair so that no question of the proviso arose. Alternatively, he submitted that, if the proviso were applicable, this Court, like Simpson J, would conclude that the prosecution had failed to show from the evidence or the inferences available from

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54 *Criminal Appeal Act* 1912 (NSW), s 6(1); *Fleming v The Queen* (1998) 197 CLR 250 at 257 [16]. The terms of the "proviso" are set out in the joint reasons at [24].

55 eg *Wilde v The Queen* (1988) 164 CLR 365 at 375.

56 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 29, 56, 72; *Brown* [1995] 1 Cr App R 191 at 198.

57 *Wilde v The Queen* (1988) 164 CLR 365 at 375. See also at 373.

58 *Wilde v The Queen* (1988) 164 CLR 365 at 375.

that evidence, that the jury would inevitably have convicted the appellant[59]. This Court was reminded that once a miscarriage of justice is demonstrated, it is the prosecution that bears the burden of persuasion that the accused had not lost "a chance which was fairly open to him of being acquitted"[60] or "a real chance of acquittal"[61].

55 In cases where credibility is in issue and where the jury's assessment of the truthfulness of a vital prosecution witness might be important for their verdict, the admission of inadmissible evidence, the rejection of admissible evidence or the unavailability of significant and relevant evidence that later comes to light may, in a particular case, occasion such a miscarriage of justice that a guilty verdict should not stand. In *Driscoll v The Queen*[62], Gibbs J (with whom Mason and Jacobs JJ agreed) said:

> "The case against the applicant may well have been thought to be a strong one. However, ultimately it depended on questions of credibility. It is possible that the jury accepted the police evidence as to the records of interview, and gave weight to that evidence in reaching their final conclusion, and that they would not have been satisfied to accept that evidence if the testimony of [a witness] as to his conversation with [police] had been admitted. Having regard to that circumstance, and to the possible effect of the admission of the inadmissible evidence, I find it impossible to say that the errors have not affected the result or that the jury would certainly have returned the same verdict if the errors had not occurred. I am not satisfied that no substantial miscarriage of justice has occurred …."

56 It follows that, whilst the proviso affords relief against the consequences that would otherwise flow from a demonstration of mistakes or imperfections that have occurred in the trial process (where such mistakes or imperfections can properly be viewed as immaterial or insignificant) and whilst courts of criminal appeal are required by the proviso to consider for themselves the evidence and the inferences properly available therefrom, it is not the purpose of the proviso to

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

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

61 *R v Storey* (1978) 140 CLR 364 at 376. See also *Driscoll v The Queen* (1977) 137 CLR 517 at 524; *Wilde v The Queen* (1988) 164 CLR 365 at 372.

62 (1977) 137 CLR 517 at 542-543; cf *Wilde v The Queen* (1988) 164 CLR 365 at 382. Note the analogous consideration of the importance of excluded evidence, critical for credibility, in the context of civil trials: *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 146.

substitute for trial by jury, in effect, trial "with the Court of Criminal Appeal as the tribunal of fact"[63]. Furthermore, if at the end of the consideration of an application in which a miscarriage of justice is shown there is a proper doubt that the conviction was "inevitable" or that the accused may have lost a fair chance of acquittal, the impugned conviction cannot be sustained. These are the high standards that our system of criminal justice upholds[64]. They are the standards reflected in the terms of the proviso itself.

The strong case for the prosecution

57 Having accepted that Ex G (or information as to its contents) ought to have been disclosed to the appellant before his trial, the DPP assumed the burden of supporting the conclusion of the majority of the Court of Criminal Appeal. He argued that the appellant's convictions were inevitable; that they rested on the evidence adduced in a meticulous prosecution case; and that, weighed against the material in that case, and the attacks that had already been made on the credibility of Mr Reynolds, the non-disclosure of Ex G or its contents was far from a substantial, material or significant evidentiary consideration, seen in the context of the trial as a whole. This submission cannot be accepted. It is necessary for this Court to grapple with the evidence and thereby to consider the application of the proviso. In this I agree in the approach of the joint reasons[65].

58 As described in the evidence, there were very strong common features to the offences of which the appellant was convicted. Those offences were alleged to have taken place between April and November 1992. Each of the five vehicles involved was proved to have been stolen in the Dubbo district. All were said to have been unregistered when purchased or obtained by the appellant. All were registered either by the appellant or his wife just before their sale to innocent purchasers. Each registration and sale occurred in a part of New South Wales distant from Dubbo where the appellant and his wife lived. Each vehicle was later found to have undergone alteration of its original engine number. Although the appellant claimed he had purchased vehicles of small value from Mr Reynolds, he sold the reconditioned vehicles shortly afterwards for much larger sums. In the case of most of the vehicles, later expert analysis of the engine numbers tended to confirm the presence of residual engine numbers substantially corresponding with those of the stolen vehicles.

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63 *Wilde v The Queen* (1988) 164 CLR 365 at 384.

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

65 Joint reasons at [24]-[27].

59 In respect of all of the vehicles described in the evidence, save for the vehicle the subject of the third set of charges, the appellant had certainly acquired from Mr Reynolds, a vehicle described as the "source". It was proved that such source vehicles originally bore an engine number later found to be consistent with the restamped engine number on the "rebirthed" stolen vehicles. Vehicle three, however, was in a different class. The appellant had purchased a gold Fairlane at auction in Dubbo. He therefore did not acquire this vehicle from Mr Reynolds. However, according to the appellant's unsworn statement to the jury, there was superficial damage to the vehicle when he bought it and he contacted Mr Reynolds who said he could have it repaired. Mr Reynolds proposed that the appellant should purchase another vehicle from him for around $2,000 which Mr Reynolds would use as a source of parts to put the gold Fairlane into good condition. To allow this to be done, the appellant said that he hired a trailer, picked up the gold Fairlane and dropped it at Mr Reynolds' premises in Sydney. Mr Reynolds had the vehicle in his custody for about two months. He later informed the appellant that he had finished his work on it. Mr Reynolds then offered to sell the appellant another vehicle so that he could secure enough money to pay for the registration of the gold Fairlane, whose price, unregistered, would be significantly less than if it were registered. The appellant said that he took this advice and later sold vehicle number three for $9,000. He then paid Mr Reynolds $5,200 in cash, being $4,000 for restoring the vehicle and $1,200 for the sedan used as a source vehicle.

60 Against the background of this evidence and the appellant's unsworn statement, the DPP submitted that the conviction of the appellant was inevitable. It rested more on the meticulous proof of the pattern of source and stolen vehicles than upon the testimony of Mr Reynolds inculpating the appellant. All of the vehicles had been stolen from the Dubbo district. All of them had been subjected to a process of renumbering their engine or chassis. In each case, the new numbers were consistent with those of a source vehicle. All of them had eventually been sold at a place distant from the Dubbo district. The keys supplied with the vehicles were cut in Dubbo. The person who stood to gain most financially from the sale of the vehicles was the appellant. The common pattern of conduct made it reasonable to test the appellant's protestation of innocence by reference to any one of the transactions. When the appellant's statement to the jury about the complex dealing in relation to the third vehicle in the series was examined, there was no objective evidence to support the involvement of Mr Reynolds in that venture. If the appellant's explanation of how that vehicle came to acquire a false engine number were disbelieved, that fact would cast doubt upon the appellant's unsworn statement about the other vehicles. It was too coincidental that all of the stolen vehicles came from the Dubbo district. To establish that it was Mr Reynolds in Yennora who conceived and executed the "rebirthing" of the stolen vehicles required acceptance of the hypothesis that he had miraculously acquired a stream of vehicles from Dubbo, imprinted them with the false numbers from his source vehicles and then sold them to the appellant who disposed of them for a large profit for himself.

61 Stacked up against such a strong prosecution case, the DPP argued that no real inroad would have been made (beyond that already attempted) by demonstrating that Mr Reynolds had obtained police favours in his own sentencing by his promise to cooperate with police, including in respect of the proceedings against the appellant. The cross-examination of Mr Reynolds in the trial had adequately identified the hypothesis that the appellant's defence presented to the jury, namely that it was Mr Reynolds, not he, who effected the theft and alteration of the five vehicles. No error was therefore demonstrated in the decision of the Court of Criminal Appeal to apply the proviso and confirm the appellant's convictions.

Deprivation of material relevant to testing witness credibility

62 The argument that deprivation of access to Ex G, or its contents, represented such a fundamental departure from the requirement of fair trial as to make the proviso inapplicable in this case should be rejected. Within the evidence adduced, the trial was conducted with fairness and accuracy.

63 Because of the concession Ex G or its contents should have been disclosed to the defence by the prosecutor, and would have been disclosed if it had been known, it is clear that a miscarriage occurred. It was a miscarriage that affected the justice of the trial. This is so because it deprived the appellant of knowledge of a relationship between the investigating police and Mr Reynolds. Such knowledge was relevant both to the appellant's endeavours, by cross-examination, to discredit Mr Reynolds' testimony but also to the request for a direction to the jury sought from the trial judge pursuant to s 165 of the *Evidence Act*.

64 There was no contest that Mr Reynolds was a central witness for the prosecution. In effect, two theories were propounded for the course of events established by the evidence and three theories were available for that purpose.

65 The first theory was that propounded by the prosecution. It was that the appellant had been involved in stealing (or receiving) the five motor vehicles in question, and then (except possibly in the case of vehicle number three) using a source vehicle, acquired from Mr Reynolds to provide a new engine number substituted in the stolen vehicles. According to this theory, Mr Reynolds was (as he claimed in his evidence) completely innocent either of the theft or of the renumbering. All that he did was to supply a vehicle that later became the source of the false identity for the stolen vehicle. On this theory, the renumbering was done by, or for, the appellant who then sold the vehicle for substantial personal gain.

66 The second theory was that propounded by the appellant. This was that he was innocent of any criminal wrongdoing. He merely acquired reconditioned

vehicles from Mr Reynolds. He later discovered that the vehicles bore the engine numbers of other vehicles also originally in Mr Reynolds' possession. The theft and renumbering were entirely Mr Reynolds' doing.

67 A third theory, suggested in the no bill submission to the DPP, but not pressed at the trial, was that Mr Reynolds was at least an accessory to, or had aided and abetted any offences committed by the appellant. Thus, contrary to Mr Reynolds' assertions, he was the perpetrator of the renumbering of the "reconditioned" vehicles acquired by the appellant.

68 Mr Reynolds was the one person who, with the appellant, was connected to all five vehicles. He was also the only person, save for the appellant and perhaps his wife, who knew the condition and the status of each "reconditioned" vehicle that was acquired by the appellant from the Yennora yard. In this sense, Mr Reynolds' credit was critical to the jury's resolution of the competing theories of the cases advanced respectively by the prosecution and the defence. By the time the matter came to trial, there was no point in disputing the thefts or the substituted engine numbers. The issue for trial thus became whether the prosecution had shown that the offences had been committed by the appellant or whether the jury had a reasonable doubt that one or some or all of the vehicles, the subject of the counts, had been "rebirthed" by Mr Reynolds without the knowledge or involvement of the appellant.

69 It is true that Mr Reynolds was cross-examined about his conviction and sentence and also concerning his capability to restamp the engine numbers and his possession of implements capable of doing that. But, in default of having Ex G, or knowledge about its contents, the appellant's counsel was deprived of the valuable knowledge that Mr Reynolds was an informant for the police; that, in that capacity, he had supplied information incriminating the appellant; that the supply of that information stood to Mr Reynolds' personal advantage in his own sentencing proceedings; that he was committed to assisting police with inquiries into the theft and conversion of Ford motor vehicles in New South Wales "on a widespread basis"; that in return for such cooperation he had secured the exceptional support of the police officer who was also later involved in the prosecution of the appellant; and that, as a result, he had avoided the full time custodial sentence that would otherwise have been imposed upon him.

70 Had trial counsel been aware of the foregoing, it would not only have provided a fertile source for cross-examining Mr Reynolds in ways designed to bring out the motivation that he had to minimise his own criminality and maximise that of others, including the appellant. It would also have given rise to cross-examination of Det Sgt Bandouvakis. For example, the statement by that police officer in Ex G: "There is no evidence to indicate that the prisoner [Reynolds] is an active participant in this current inquiry" (ie the inquiry into the widespread theft and conversion of Ford motor vehicles in the central west of New South Wales) was arguably false. At the very least, Mr Reynolds provided

the appellant with four, and possibly five, of the source vehicles incontestably used to disguise the origins of the five stolen vehicles. On the face of things, therefore, false, or at least dubious, evidence was supplied to Nield DCJ by Det Sgt Bandouvakis to sustain a non-custodial sentence for Mr Reynolds. If the cross-examiner could cast doubt on the truthfulness both of the prosecution's prime witness and of the principal investigating police officer, the possibility of the acquittal of the appellant of all or some of the counts could not be excluded. At his trial, the appellant did not have to prove his innocence. It was for the prosecution, from its evidence, to prove his guilt. Undermining the credit of Mr Reynolds and Det Sgt Bandouvakis was a most obvious forensic way to lead the jury to a reasonable doubt that the "rebirthing" could, after all, have been Mr Reynolds' enterprise alone.

71 In answering the question presented by an invocation of the proviso, courts of criminal appeal are bound to assume that the jury acts reasonably upon the evidence, conforming to the judge's directions on the law. But if the jury, knowing of Mr Reynolds' informer status and motivation[66], had concluded that Mr Reynolds might indeed have been the source of the engine number substitutions of the vehicles sold to the appellant and that the appellant was unaware of the substitution, they could have acquitted the appellant on all counts, or at least on the counts in respect of the first, second, fourth and fifth vehicles where Mr Reynolds' involvement at some level in the process of engine number substitution was very strongly arguable.

72 This is not a conclusion that a jury would necessarily have reached. Perhaps it does not represent the most probable verdict of a reasonable jury. But it is a definite possibility. And it is one of which the appellant was deprived because he did not have access to information that, forensically, would have strengthened his attack on the credit both of Mr Reynolds and Det Sgt Bandouvakis. The prosecution should gain no such advantage from its conceded default in disclosing this important information to the defence[67].

Deprivation of a foundation for a judicial warning

73 There is a further consideration that reinforces this conclusion. In Pt 4.5 of the *Evidence Act*, dealing with "Warnings", s 165(2) provides expressly for a judicial duty to warn a jury, where the judge is so requested by a party, that certain evidence may be unreliable; to inform the jury of the matters that may

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66 Including his exposure to resentencing if he departed from the evidence upon which his earlier sentence was based: *Criminal Appeal Act* 1912 (NSW), s 5DA.

67 *Hennessey* (1978) 68 Cr App R 419 at 426.

cause such evidence to be unreliable; and to warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.

74 In the appellant's trial, an application was made for a warning along these lines in relation to the evidence of Mr Reynolds. The trial judge declined to give such a warning. However, as recorded by the trial judge, no application was made, in support of the request for such a warning, upon the basis of the examples set out in s 165(1)[68]. Those examples may enliven such warnings. One such example is that contained in par (d) of s 165(1) which reads:

> "(d) evidence given in a criminal proceeding by a witness, being a witness who might reasonably be supposed to have been criminally concerned in the events giving rise to the proceeding".

75 At the appellant's trial, instead of relying on this consideration, the application for a warning was based on the footing that the evidence of Mr Reynolds was unreliable because "he has a bad memory and … has tried to expunge this period of his life from his mind"[69]. Reference was also made to the fact that the events went back to a time six years before the trial. On these propounded bases, the trial judge was unconvinced that any special warning from him was required. By s 165(3), the judge need not comply with the duty to give a warning "if there are good reasons for not doing so". Having regard to the bases argued before the trial judge, there would indeed have been no foundation for disturbing the ruling that his Honour made.

76 If, however, the appellant had known of the bargain that had been struck between the police and Mr Reynolds, evidenced in Ex G, significantly different considerations would have arisen for the exercise of the judicial duty to give a warning as s 165 of the *Evidence Act* contemplates. The Act specifically includes in the examples of instances of "unreliable evidence" the "evidence given in a criminal proceeding by a witness who is a prison informer"[70]. In this respect, s 165 reflects the common law as stated by this Court in *Pollitt v The Queen*[71]. But some of the considerations relevant to the unreliability of prison informants (particularly that they may be of bad character and may be motivated to fabricate evidence by a perception of a likely benefit for themselves[72]) could,

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68 The terms of s 165 of the *Evidence Act* are set out in the joint reasons at [21].

69 Ruling of the trial judge (Rummery DCJ), unreported, District Court of NSW, 25 August 1998 at 1.

70 *Evidence Act*, s 165(1)(e).

71 (1992) 174 CLR 558 at 586.

72 (1992) 174 CLR 558 at 585-586.

in certain cases, apply to a police informer. At least, it could do so, where that informer stands to gain a personal benefit from the provision of such information to the police and to a court or may be viewed as having been an accomplice[73].

77 If the appellant's advisers had enjoyed access to Ex G, or its contents, they would have had a much stronger basis for persuading the trial judge to give the jury a warning[74]. Such a warning would have contributed the weight of judicial authority to assist the appellant's arguments, admonishing the jury to be extremely cautious about the evidence of Mr Reynolds. This additional element in the judicial instructions could have assisted the appellant's case. That is enough[75]. Certainly, it is impossible to say that it would not have been of assistance. As it was, Mr Reynolds appeared before the jury as a person who had owned up to his own wrongdoings, suffered his punishment, had turned over a new leaf and was anxious to forget the errors of his past which were, in any case, on his testimony, wholly unconnected with the appellant's crimes. The letter, Ex G, or its substance might, if it had been provided to the defence, not only have placed a different complexion on Mr Reynolds' evidence for the consideration of the jury. It could also have encouraged the judge, when asked, to give a s 165 direction.

Conclusion and orders

78 It follows that a miscarriage of justice occurred in the appellant's trial. It cannot be said that the appellant's convictions were inevitable. Nor has the DPP proved that the case was otherwise one for the application of the proviso. I therefore agree in the orders proposed in the joint reasons.

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73 cf *Davies v Director of Public Prosecutions* [1954] AC 378 at 399; *R v Booth* [1982] 2 NSWLR 847 at 849.

74 *R v Clough* (1992) 28 NSWLR 396 at 405-406; cf Odgers, *Uniform Evidence Law* 4th ed (2000) at 416.

75 cf *Keane* (1994) 99 Cr App R 1 at 6; *Brown* [1998] 1 Cr App R 66 at 74.

79 HAYNE J. The circumstances giving rise to this appeal are described in the reasons of other members of the Court. I need refer to those circumstances only to the extent that is necessary to explain my reasons for agreeing that the appeal should be allowed.

80 The respondent conceded that a copy of the "letter of comfort" given by police to Mr Leon Reynolds, a witness called by the prosecution at the appellant's trial, should have been, but through inadvertence was not, given to the appellant before the witness was called. (Counsel who appeared to prosecute at trial did not have the document and did not know of it.) The only issue on this appeal was said by the respondent to be whether the Court of Criminal Appeal erred in holding that there was no significant possibility that the jury, acting reasonably, would have acquitted the appellant if the appellant had known about the letter.

81 At the appellant's trial, counsel for the prosecution elicited from Mr Reynolds, in examination-in-chief, that the witness had a criminal record for an offence of assisting to cheat and defraud and that the offence involved his having sold parts from motor vehicles that the owners had reported to their insurers as having been stolen. In cross-examination, trial counsel for the appellant explored the circumstances of this offence, or as it emerged, these offences. Counsel also drew out of the witness that, at relevant times, he had a set of stamps that could have been used to stamp engine and chassis numbers, that police had made inquiries of him about the vehicles which were the subject of the charges against the appellant and that various aspects of his banking and other records relating to those vehicles were open to challenge.

82 At trial, reduced to its essentials, the defence case had been that the appellant had bought four of the five cars in question from Mr Reynolds for prices greater than Mr Reynolds' records revealed, and that the appellant neither knew nor suspected that they were stolen. In the case of the fifth car, the appellant's case was that he had taken a car to Mr Reynolds to have it fixed, Mr Reynolds had given him a car back which he believed to be the car he had delivered for fixing, and that he had sold what he had been given. The veracity of Mr Reynolds was central to the prosecution case.

83 The letter of comfort was material which the appellant could have invited the jury to take into account in considering whether Mr Reynolds was to be accepted as a witness of truth. It follows that, no matter what *other* attacks could have been, or were mounted against Mr Reynolds and his evidence, the jury, taking account of what was revealed by the letter, might have entertained a reasonable doubt about his veracity. If that had been so, given the way the trial was conducted, the appellant would have been entitled to be acquitted.

84 The issue in this Court having been formulated and argued as it was, there is no occasion to consider any wider question about the construction and application of the proviso. The appeal should be allowed, and consequential orders made in the form proposed by Gleeson CJ, Gummow and Callinan JJ.