HIGH COURT OF AUSTRALIA

GAUDRON ACJ,
McHUGH, KIRBY, HAYNE AND CALLINAN JJ

JOHN TERENCE CONWAY APPELLANT

AND

THE QUEEN RESPONDENT

Conway v The Queen
[2002] HCA 2
7 February 2002
C11/2001

ORDER

Appeal dismissed.

On appeal from the Federal Court of Australia

Representation:

S W Tilmouth QC with J Pappas for the appellant (instructed by pappas j. – attorney)

P S Hastings QC with S J Odgers SC and P J de Veau for the respondent (instructed by Director of Public Prosecutions (ACT))

CATCHWORDS

Conway v The Queen

Criminal law – Evidence – *Evidence Act* 1995 (Cth) – Unreliable evidence – Co-offenders – Corroboration – Directions to jury regarding corroboration of evidence given by co-offenders.

Evidence – Corroboration – Warning about acting on unreliable evidence – Directions to jury – Requirements of *Evidence Act* 1995 (Cth) – Misdirection to jury – Whether misdirection requires that appeal be allowed and new trial ordered in the absence of substantial miscarriage of justice.

Appeals – Federal Court of Australia – New trial – Misdirection –Grounds on which new trial may be ordered.

Words and phrases – "evidence" – "on any ground upon which it is appropriate to grant a new trial" – "substantial miscarriage of justice".

Evidence Act 1995 (Cth), ss 164, 165.
Federal Court of Australia Act 1976 (Cth), s 28(1)(f).

1 GAUDRON ACJ, McHUGH, HAYNE AND CALLINAN JJ. The appellant was convicted in the Supreme Court of the Australian Capital Territory of the murder of his wife, Ulrike Conway. Kathy Marie McFie was also convicted of the murder of Mrs Conway. The appellant and Ms McFie had pleaded not guilty and had been tried together. Two others, Barry Steer and Daniel Scott Williams, had also been charged with the murder of Mrs Conway but each had pleaded guilty and had been sentenced before the trial of the appellant and McFie.

2 Mr Steer and Mr Williams admitted that they had entered Mrs Conway's home, late at night, and had injected her with a fatal dose of heroin. They told police that they had done this at the request of the appellant and McFie and that the appellant and McFie had agreed to pay them $15,000 for doing it. Both Steer and Williams gave evidence at the trial of the appellant and McFie.

3 The issues that arise on the appeal to this Court concern directions given to the jury by the trial judge about corroboration of the evidence given by the co-offenders, Steer and Williams. These reasons will seek to demonstrate that the trial judge misdirected the jury about these matters. There having been a misdirection of law the question then becomes whether notwithstanding that the points thus raised might be decided in favour of the appellant, the appeal should nevertheless be dismissed on the basis that no substantial miscarriage of justice has actually occurred[1].

4 This expression of the issue owes much to the familiar language of the criminal appeal statutes based on s 4(1) of the *Criminal Appeal Act* 1907 (UK). The adoption of this formulation is not, however, to be understood as assuming that the relevant statutory provision which governed the appellant's appeal to the Full Court of the Federal Court of Australia[2] contains such language; it does not. Section 28(1)(f) of the *Federal Court of Australia Act* 1976 (Cth), however, declares that in the exercise of its appellate jurisdiction, the Federal Court may grant a new trial "on any ground upon which it is appropriate to grant a new trial".

5 What constitutes a ground appropriate for granting a new trial can only be understood by reference to the history of the law concerning the grant of new trials. Resort to legal history to explain a statutory enactment evinces no distaste

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1 *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 530-531 per Gibbs CJ and Mason J, 613-616 per Deane J.

2 *Federal Court of Australia Act* 1976 (Cth), s 24.

for construing the statutory language. When a statute enters a field that has been governed by the common law, the pre-existing common law almost invariably gives guidance as to the statute's meaning and purpose. That is because the meaning of legislation usually depends on a background of concepts, principles, practices and circumstances that the drafters "took for granted or understood, without conscious advertence, by reason of their common language or culture"[3]. So it is here. No one could know what is an "appropriate" ground for granting a new trial unless that person knew why and upon what grounds courts have granted new trials in the past. Indeed, uninformed by legal history or at all events uninformed by legal instruction, a non-lawyer would find s 28(1)(f) meaningless. In particular, no dictionary, no English grammar and no logic primer could lead the legally uninformed reader of that paragraph to conclude that a new trial could be refused although the trial judge had made serious legal errors. There are no implications inherent in the language of s 28(1)(f) that leads to that conclusion. Only knowledge of the manner in which courts have historically dealt with applications for new trials can reveal when the grant of a new trial is "appropriate"[4].

6 To construe s 28(1)(f) as authorising the dismissal of appeal on the basis that no substantial miscarriage of justice has actually occurred gives effect to the long established rule of the common law that a new trial is not ordered where an error of law, fact, misdirection or other wrong has not resulted in any miscarriage of justice. Historically, the common law may have made an exception to this rule in the case of evidence wrongly admitted in a criminal trial. But, if it did, this Court and the Federal Court have recognised that the exception no longer has a part to play in the administration of criminal justice in cases where a statute gives a general right of appeal against conviction. Those Courts have self-evidently taken the view that this exception, if it exists at common law, should not shackle the power to dismiss an appeal under a statute conferring a general right of appeal in criminal cases. It is an exception that has little to recommend it in principle and it is hardly conducive to the proper administration of the criminal justice system to set aside a conviction where there has been no miscarriage of justice. To explain why this is so, it is necessary to trace briefly

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

4 As Counsellor Pleydell, the Scots lawyer, tells Guy Mannering, on taking him into the library at Pleydell's home: "A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect." (Sir Walter Scott, *Guy Mannering*, (1815) at 270.)

the remedies for setting aside a conviction at common law and the defects of those remedies.

7 Appeal is not a common law proceeding[5]. But that did not mean that the common law was always powerless to set aside a verdict, civil or criminal, that was the result of legal error. It could do so by the writ of error, by a motion in arrest of judgment and by an order made upon a motion for a new trial[6]. In addition, until 1848 the common law judges often met informally to discuss convictions in the King's Bench that may have been affected by legal errors. Where there was no remedy to set aside a conviction that was the result of error, the judges would recommend that the convicted person be pardoned[7]. From 1848, this practice was put on a statutory basis and a judge or chairman or recorder at Quarter Sessions was empowered to refer a question of law to the Court for Crown Cases Reserved which could set aside the conviction and "make such other Order as Justice may require"[8]. All these procedures were far from satisfactory. They compare unfavourably with the rights that the common-form criminal appeal statute now gives to convicted persons. Nevertheless, in many cases – particularly those concerned with misdemeanours – the common law remedies enabled a convicted person to have a conviction set aside and have a new hearing of the charge.

8 The writ of error was the principal method for challenging convictions for treason and felonies. But it was only available for errors on the face of the record – which ordinarily prevented it being used to challenge the directions or legal rulings of the trial judge. Although c 31 of the *Statute of Westminster II* 1285 (13 Edw I stat 1) required a judge to include in the record, any "exceptions" to the judge's rulings, the common law courts confined c 31 to civil proceedings. In *R v Alleyne*[9], Lord Campbell CJ said "[a] bill of exceptions could not lie for the statute of Westminster 2 is confined to civil causes." As a result, the "bill of exceptions" – which enabled the parties to use the writ of error in civil cases to

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5 *Commissioner for Railways (NSW) v Cavanough* (1935) 53 CLR 220 at 225.

6 Stephen, *A History of the Criminal Law of England*, (1883), vol 1 at 308-318.

7 Stephen, *A History of the Criminal Law of England*, (1883), vol 1 at 311; Holdsworth, *A History of English Law*, 7th ed (rev) (1956), vol 1 at 217.

8 11 & 12 Vict c 78, s 2; Stephen, *A History of the Criminal Law of England*, (1883), vol 1 at 311-312.

9 (1854) Dears 505 at 509 [169 ER 823 at 824].

challenge the trial judge's directions and legal rulings – played no part in criminal law procedure. In most cases, challenges were confined to the terms of the indictment and procedural matters appearing in the record. However, as Mr D M Gordon has pointed out, the record could be supplemented by assignment of "error[s] in fact". These "error[s] in fact" arose "from matters which are not only outside the issues before the trial Court, but as to which ordinarily that Court does not inquire at all."[10] They might therefore enable an accused person to challenge a conviction for jury misbehaviour or for bias.

9 But in those cases where legal errors were most frequently made – legal rulings and directions – the writ of error was of no use to a convicted person. Where it applied, the effect of the writ of error was to quash the conviction. But the King's Bench had the power in an appropriate case to grant a *venire de novo* – a new hearing of the case. The trial that followed the award of *venire de novo* was "not to be considered in the nature of a new trial, but the first trial is to be considered a mis-trial, and therefore a nullity[11]." The grant of a *venire de novo* was common in the case of misdemeanours[12]. In 1844, *Gray v The Queen*[13] decided that a *venire de novo* could also be granted in the case of felonies. Even when a *venire de novo* was not granted, the accused might be tried again on the same charge. The original conviction was regarded as a nullity with the result that neither the plea of *autrefois acquit* nor the plea of *autrefois convict* could be pleaded in bar to the indictment at the further trial[14].

10 The use of the writ of error declined once the Court for Crown Cases Reserved – which had operated informally[15] before 1848 – was given a statutory

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10 "Certiorari and the Revival of Error in Fact", (1926) 42 *Law Quarterly Review* 521 at 526.

11 *R v Fowler and Sexton* (1821) 4 B & Ald 273 at 276 [106 ER 937 at 939].

12 *Campbell v The Queen* (1847) 11 QB 814 at 840 [116 ER 680 at 689].

13 11 Cl & F 427 [8 ER 1164].

14 *R v Drury* (1849) 3 Car & K 193 [175 ER 517]; *R v Lee* (1895) 16 NSWLR 6 at 10.

15 Before 1848, the Court for Crown Cases Reserved was not in fact a court. Hence the remark of Park J in *R v Parry, Rea and Wright* (1837) 7 Car & P 836 at 841, "We cannot grant a *venire de novo*, because we are not a Court of Justice – we are merely advising the learned Judge who tried the case." [173 ER 364 at 367].

basis[16]. That Court decided questions of law referred to it by other judges and courts and consisted of all the judges at Westminster, of which five were a quorum. If any of the five dissented, he could require the whole body of judges to hear the question referred[17]. Stephen described[18] its procedure as follows:

> "Any judge or chairman, or recorder of a Court of Quarter Sessions, may state a case for the opinion of the court 'as to any question of law which shall have arisen at' any 'trial', either committing or bailing the prisoner in the meanwhile. The court hears the case argued, delivers judgment, and may either reverse the judgment (if any) or confirm it, or direct the court by which the case was stated to give judgment. This court can determine questions of law arising at the trial, but cannot take notice of questions of fact, and it is absolutely in the discretion of the presiding judge at a trial whether he will or will not reserve a point for its decision."

11 Among the defects of the Crown Cases Reserved procedure was that there was no express power to order a new trial. And the judges refused to interpret the power "to make such other Order as Justice may require"[19] as including a power to order a new trial. They would order a further trial where the proceedings were a mistrial but not a new trial for misdirection or wrongful admission or rejection of evidence. In *R v Mellor*[20], members of the Court of Crown Cases Reserved even differed as to whether the Court had power to grant a *venire de novo.* But in *R v Yeadon and Birch*[21], the Court awarded a *venire de novo* after holding that the trial judge had erred in refusing to accept the first verdict returned by the jury. Mr Chief Baron Pollock, giving the judgment of the Court, described the trial as "a mistrial" which indicated that he saw it as a nullity. The Court was therefore careful to draw a distinction between the award of a *venire de novo* for what was a nullity – thereby equating its powers with a court of error – and the ordering of a new trial.

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16 11 & 12 Vict c 78.

17 *R v Keyn* (1876) LR 2 Ex D 63 is a famous example of all 15 judges hearing a question referred.

18 Stephen, *A History of the Criminal Law of England*, (1883), vol 1 at 312.

19 11 & 12 Vict c 78, s 2.

20 (1858) Dears & Bell 468 [169 ER 1084].

21 (1861) Le & Ca 81 at 85 [169 ER 1312 at 1314].

12 As Mr M L Friedland has argued[22]:

> "Implicit in the above cases was the rule that no new trial could be granted for errors such as misreception of evidence or misdirection by the trial judge. This position was illogical. Either the Court for Crown Cases Reserved had power to order a rehearing or it did not. If it did, then, logically, it should have had the power to order a new trial in any case in which judgment was reversed. The court was incorporating the *venire de novo* procedure used by a court of error. However, the only reason why a court of error could not order a rehearing for, say, misreception of evidence was because the error did not appear on the record. Had the error appeared on the record, as it would have if the bill of exceptions had been used in criminal cases, then a *venire de novo* could have been ordered when the judgment was reversed."

As a result, once a conviction was quashed for misreception of evidence, the accused could not be retried for the offence[23].

13 The remedy of arrest of judgment was also defective. Between the conviction and imposition of sentence, or immediately at assizes, an accused person might move the Court in arrest of judgment[24]. But the motion could only succeed for objections that appeared upon the face of the record whether they appeared in the indictment or otherwise[25]. No defect in the evidence could found a motion in arrest of judgment[26]. Moreover, after sentence, the defendant was confined to the writ of error although it appears that the Court in its discretion might arrest the judgment, notwithstanding that judgment had been given[27]. Once the judgment was arrested, all the proceedings were set aside and judgment

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22 "New Trial after an Appeal from Conviction, Part II", (1968) 84 *Law Quarterly Review* 185 at 201.

23 *R v O'Keefe* (1894) 15 LR (NSW) 1.

24 Chitty, *A Practical Treatise on the Criminal Law*, 2nd ed (1826), vol 1 at 661.

25 Tidd, *The Practice of the Courts of King's Bench and Common Pleas*, 7th ed (1821), vol 2 at 924.

26 Chitty, *A Practical Treatise on the Criminal Law*, 2nd ed (1826), vol 1 at 661; *Sutton v Bishop* (1769) 4 Burr 2283 at 2287 [98 ER 191 at 193].

27 Chitty, *A Practical Treatise on the Criminal Law*, 2nd ed (1826), vol 1 at 663.

of acquittal entered. Nevertheless, the judgment of acquittal was no bar to a subsequent prosecution upon the same matter[28].

14 In addition to the remedies of error and arrest of judgment – remedies that were available in respect of any conviction in any court – the King's Bench had jurisdiction to order a new trial after conviction in *that* Court for a misdemeanour. In 1660, the Court declared "that new trials may be [had] in criminal cases at the prayer of the defendant, where he is convicted"[29]. However, a new trial could not be ordered after a conviction for felony or treason[30], "but after a conviction for a misdemeanour, a new trial may be granted, at the instance of the defendant, where the justice of the case requires it"[31]. If an indictment for a misdemeanour had been presented in the King's Bench, it had jurisdiction to set aside a conviction on the indictment and order a new trial whenever it appeared that to do so would further the ends of justice[32]. It also had jurisdiction to order a new trial in respect of a conviction where the indictment had been removed into the King's Bench by certiorari before the trial of the charge. In cases of complexity pending before Commissioners of Oyer and Terminer at the Assizes or at Quarter Sessions, the King's Bench would remove the proceedings into that Court and have the case tried at Westminster or have it sent for trial at the Assizes or in the City of London[33]. However, the application for removal had to be made before verdict. The King's Bench would not "after verdict remove the case by *certiorari*, with a view to granting a new trial."[34] This was a serious defect in the administration of criminal justice because inferior courts had no jurisdiction to order a new trial except for irregularity[35].

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28 Blackstone, *Commentaries on the Laws of England*, (1769), vol 4 at 386.

29 *R v Read* (1660) 1 Lev 9 [83 ER 271].

30 *R v Bertrand* (1867) LR 1 PC 520.

31 Tidd, *The Practice of the Courts of King's Bench and Common Pleas*, 7th ed (1821), vol 2 at 918.

32 *Archbold's Pleading and Evidence in Criminal Cases*, 21st ed (1893) at 207.

33 Stephen, *A History of the Criminal Law of England*, (1883), vol 1 at 310.

34 Stephen, *A History of the Criminal Law of England*, (1883), vol 1 at 310.

35 Chitty, *A Practical Treatise on the Criminal Law*, 2nd ed (1826), vol 1 at 653-654.

15 The remedy of a motion for a new trial had other defects. No motion for a new trial was allowed unless the defendant was present in court when the motion was made[36]. When the motion was based on the facts or evidence in the case, it had to be supported by an affidavit of the relevant circumstances[37] and "made … within *four* days *exclusive* after the entry of a rule for judgment"[38]. Failure to move for a new trial within that period prevented the defendant from obtaining a new trial. This rule applied in criminal as well as civil cases although in a criminal case occasionally the Court might order a new trial when convinced that "substantial justice has not been done"[39]. Furthermore, as a general rule, a party could not move for a new trial after moving in arrest of judgment[40].

16 Upon granting a motion for a rule nisi for a new trial, the Court would make the rule absolute if it appeared that the conviction had been improperly obtained. A verdict might be set aside on the ground that it was contrary to the evidence, or evidence had been improperly rejected or admitted in the trial, or the jury had been misdirected or had misbehaved, or the accused had been taken by surprise[41]. Speaking generally, once an error or wrong of any of these kinds was identified, the Court would order a new trial of the charge[42] unless it could not reasonably be supposed that the error or wrong had influenced the result[43]. It

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36 *R v Caudwell* (1851) 17 QB 503 [117 ER 1374].

37 Tidd, *The Practice of the Courts of King's Bench and Common Pleas*, 7th ed (1821), vol 2 at 920.

38 Tidd, *The Practice of the Courts of King's Bench and Common Pleas*, 7th ed (1821), vol 2 at 918.

39 Tidd, *The Practice of the Courts of King's Bench and Common Pleas*, 7th ed (1821), vol 2 at 918.

40 Tidd, *The Practice of the Courts of King's Bench and Common Pleas*, 7th ed (1821), vol 2 at 919.

41 *R v Whitehouse and Tench* (1852) Dears 1 at 3 [169 ER 611 at 612]; Blackstone, *Commentaries on the Laws of England*, (1768), vol 3 at 387; Chitty, *A Practical Treatise on the Criminal Law*, 2nd ed (1826), vol 1 at 654; *Archbold's Pleading and Evidence in Criminal Cases*, 21st ed (1893) at 207; and see *R v Fowler and Sexton* (1821) 4 B & Ald 273 [106 ER 937].

42 Chitty, *A Practical Treatise on the Criminal Law*, 2nd ed (1826), vol 1 at 656a.

43 Best, *The Principles of the Law of Evidence*, 9th ed (1902) at 68.

may be that at common law the onus was on the accused to show that the wrong or error affected the result[44]. But however that may be, long before the enactment of the common form statutes, the King's Bench had jurisdiction to order a new trial after a criminal conviction but would not do so if it was unreasonable to suppose that the wrong or error had affected the result. Chitty said[45]:

> "And it is a general rule, that even where grounds are laid, which in general are sufficient, a new trial will not be granted, to encourage a disposition to litigate; or unless it is necessary, in order to obtain substantial justice."

17 Relying on *R v Ball*[46], Chitty went on to say:

> "And although it appears, upon a case reserved, that evidence has been admitted at the trial which ought not to have been received, yet, if the judges are of opinion that there is ample evidence to support the indictment, after rejecting such improper evidence, they will not set aside the conviction."

18 Chitty's opinion was supported by other cases[47]. It was also supported by Tidd[48] who declared that "the courts will not set aside a verdict, on account of the admission of evidence which ought not to have been received, provided there be sufficient without it, to authorise the finding of the jury".

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44 *Balenzuela v De Gail* (1959) 101 CLR 226 at 234-235. Cf the practice of the Judicial Committee in requiring the accused to show not only legal error but that the error had led to a miscarriage of justice: *Dal Singh v The King-Emperor* (1917) LR 44 IA 137 at 146; *Lejzor Teper v The Queen* [1952] AC 480 at 491-492.

45 Chitty, *A Practical Treatise on the Criminal Law*, 2nd ed (1826), vol 1 at 656a (footnotes omitted).

46 (1807) Russ & Ry 132 [168 ER 721].

47 East, *A Treatise of the Pleas of the Crown*, (1803), vol 1 at 355; *R v Oldroyd* (1805) Russ & Ry 88 at 89 [168 ER 698 at 699].

48 Tidd, *The Practice of the Courts of King's Bench and Common Pleas*, 7th ed (1821) vol 2 at 914 citing *Horford v Wilson* (1807) 1 Taunt 12 at 14 [127 ER 733 at 734].

19 In 1887 in *R v Gibson*[49], however, where evidence had been wrongly admitted, the Court for Crown Cases Reserved refused to follow *Ball*, saying that the reporter had added the statement that a verdict would not be set aside if there was sufficient evidence to support it. The Court said that the statement did not represent the judgment of the Court in *Ball*. Lord Coleridge CJ thought that the true account of the case was the report in 1 Campbell[50]. That report showed that the evidence objected to was admissible. His Lordship said[51]:

> "It is clear that a verdict so obtained in a civil case would not formerly have been allowed to stand, because until the passing of the Judicature Acts the rule was that if any bit of evidence not legally admissible, which might have affected the verdict, had gone to the jury, the party against whom it was given was entitled to a new trial, because the Courts said that they would not weigh evidence. Where, therefore, such evidence had gone to the jury a new trial was granted as a matter of right."

20 Mr Baron Pollock said[52] that, if the conviction stood it "would follow that in every case where inadmissible evidence had been received it would become the office of the Court to decide in what way the jury ought to have acted upon the evidence before them which was legally admissible."

21 *Gibson* was followed and applied by the Court for Crown Cases Reserved in *R v Saunders*[53] and by the Full Court of the Supreme Court of Tasmania in *R v Hall*[54]. In *R v M'Leod*[55], the first Windeyer J said that he had always understood the law to be as laid down in *Gibson*[56]. After stating that the Court had a

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49 (1887) 18 QBD 537.

50 (1808) 1 Camp 324 [170 ER 973].

51 (1887) 18 QBD 537 at 540-541.

52 (1887) 18 QBD 537 at 542.

53 [1899] 1 QB 490.

54 (1905) 1 Tas LR 21.

55 (1890) 11 LR (NSW) 218 at 231-232.

56 (1887) 18 QBD 537.

discretion in civil trials to refuse a new trial if evidence had been wrongly admitted, his Honour said[57]:

> "It is because the law has made the jury, and not the Court, the final and sole tribunal in deciding as to facts in criminal cases, that the Court cannot consider whether the evidence is sufficient to convict the prisoner."

22 However, Windeyer J did not always hold this view. In *R v Cowpe and Richardson*[58], counsel for the Crown told the Full Court of the Supreme Court of New South Wales that "[t]he profession are very anxious for an expression of opinion of this Court on the case of *R v Gibson*". The Court held that the evidence objected to in that case was admissible. But Windeyer J said[59] that he did "not think that the mere fact of the jury having heard inadmissible evidence is sufficient to vitiate a trial." Innes J said[60] that he did not think "that the Judge is bound of his own motion to expressly withdraw inadmissible evidence from the jury … unless he is requested by counsel for the prisoner to withdraw it from their consideration."

23 Cases decided in New South Wales before the decision in *Gibson* had also held that on a motion for a statutory prohibition against a summary conviction – a procedure equivalent to an appeal on a point of law – the conviction could be sustained if, apart from the inadmissible evidence, other evidence supported the conviction[61]. In *Ex parte Damsiell*[62], Cohen J followed these cases although counsel had referred him to *Gibson*. His Honour said[63] that "if, after rejecting all improper evidence, and giving due effect to every other legal objection, enough remains which is unobjectionable, the conviction must be sustained."

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57 (1890) 11 LR (NSW) 218 at 234.

58 (1892) 9 WN (NSW) 50 at 51.

59 (1892) 9 WN (NSW) 50 at 51.

60 (1892) 9 WN (NSW) 50 at 51.

61 *Ex parte Ward* (1855) 2 Legge 872; *Ex parte McCallum* (1885) 1 WN (NSW) 136.

62 (1901) 18 WN (NSW) 245.

63 (1901) 18 WN (NSW) 245 at 246.

24 In *R v Midwinter*[64], *Gibson* was distinguished on the ground that the inadmissible evidence had been admitted without objection and the trial judge had told the jury to disregard it.

25 In *R v Grills*[65], Griffith CJ said[66] that *Gibson* was "a case which has been much misunderstood". His Honour went on to say[67]:

> "[T]he case has been cited as an authority for the position that if any inadmissible evidence is 'left' to – in the sense of not expressly withdrawn from – the jury, the conviction is bad. What was really decided was that if the jury are expressly invited to take inadmissible evidence into consideration the conviction is bad … But there is no case which decides that a conviction is necessarily bad on the ground that the jury had not been expressly directed to disregard such evidence."

But Isaacs J, who dissented, said[68] that "[t]hough *Gibson's Case* … in 1887 appears to be the first reported case directly on the point, the doctrine it enunciates has been long recognised in English law."

26 Given this course of authority, it is by no means clear that an accused person was entitled to a new trial as of right if evidence was wrongly admitted at the trial.

27 Moreover, it is difficult to accept Lord Coleridge's statement that, in a civil trial, where inadmissible "evidence had gone to the jury a new trial was granted as a matter of right."[69] That statement is inconsistent with the passage in Tidd to which we have referred. It is also inconsistent with the view expressed by Dixon CJ in this Court in *Balenzuela v De Gail*[70] where his Honour said:

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64 (1905) 5 SR (NSW) 558.

65 (1910) 11 CLR 400.

66 (1910) 11 CLR 400 at 409.

67 (1910) 11 CLR 400 at 410.

68 (1910) 11 CLR 400 at 430.

69 (1887) 18 QBD 537 at 541.

70 (1959) 101 CLR 226 at 234-235.

> "[T]he true view, it may be suggested, is that at common law it was necessary to grant a new trial unless the court felt some reasonable assurance that the error of law at the trial *whether in a misdirection or wrongful admission or rejection of evidence* or otherwise was of such a nature that it could not reasonably be supposed to have influenced the result or because, in any case, as a matter of law the same result must have ensued". (emphasis added)

28 Lord Coleridge's statement is also inconsistent with the longstanding practice in civil cases at common law in New South Wales – which adopted the Judicature procedure only in 1980. In *M'Leod*[71], the first Windeyer J made it clear that in 1890 the practice on the civil side of the Supreme Court of New South Wales was to grant a new trial when evidence was wrongly admitted unless the Court was persuaded that the evidence could not have affected the result. In *Piddington v Bennett and Wood Pty Ltd*[72], Evatt J said that, from the judgment of Windeyer J in *M'Leod*:

> "[I]t is quite clear that, at the time, the accepted practice in New South Wales on the civil side at common law was that the court would as a rule grant a new trial where evidence had been improperly admitted: but that in its discretion the court might refrain from granting a new trial if it was affirmatively satisfied that the actual verdict returned could not have been affected by the inadmissible evidence."

29 Notwithstanding the statement in *Gibson*, therefore, it seems clear enough that at common law a new trial would not be ordered in a civil cause if the error – whatever it was – could not reasonably be supposed to have affected the result of the trial. With the exception of evidence wrongly admitted and perhaps evidence wrongly rejected, a similar view was taken in criminal cases upon a motion for a new trial[73]. Why the wrongful admission or rejection of evidence should be an exception is not easy to see. The reason given by the first Windeyer J for the exception is equally applicable to other legal errors such as a misdirection. Moreover, the exception had the result that, even if the admissible evidence was conclusive of guilt, a new trial had to be ordered. In that event, the

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71 (1890) 11 LR (NSW) 218 at 231-232.

72 (1940) 63 CLR 533 at 563.

73 *Archbold's Pleading and Evidence in Criminal Cases*, 21st ed (1893) at 207.

administration of criminal justice would be frustrated and made hostage to "outworn technicality"[74].

30 It is not surprising then that the Judicial Committee of the Privy Council, this Court and the Federal Court should refuse to apply such an exception in determining whether a new trial should be ordered in an appeal heard under a statute in a form different from the common-form criminal appeal statute. It is not surprising that, in the exercise of their discretion to order a new trial, those Courts should refuse to order a new trial where a legal error had not led to any miscarriage of justice.

31 In criminal appeals and applications for leave to appeal against criminal convictions, the Judicial Committee has always refused to allow the appeal or grant the application unless it is satisfied that the legal error – whatever it was – has brought about a miscarriage of justice[75]. In *Lejzor Teper v The Queen*[76], the Judicial Committee said that "it is a principle of the proceedings of the Board that it is for the appellant in a criminal appeal to satisfy the Board that a real miscarriage of justice has occurred." Their Lordships referred to an earlier decision[77] of the Judicial Committee where it was said that "in a case where this Board had no ground for doubting that the appellant had been properly convicted, that the mere admission of incompetent evidence, not essential to the result, is not a ground for allowing an appeal against conviction."[78]

32 Prior to the passing of the *Federal Court of Australia Act*, this Court had also taken the same view about criminal appeals from convictions in the Australian Capital Territory. Before the passing of that Act, criminal appeals from convictions in the Australian Capital Territory and the Northern Territory were brought to this Court. Section 52 of the *Seat of Government Supreme Court Act* 1933 (Cth) (the short title of which was later amended to the *Australian Capital Territory Supreme Court Act*) gave this Court jurisdiction to hear a

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74 *Driscoll v The Queen* (1977) 137 CLR 517 at 527.

75 *Ibrahim v The King* [1914] AC 599 at 615; *Dal Singh* (1917) LR 44 IA 137 at 146; *Lejzor Teper v The Queen* [1952] AC 480 at 491, 492; *Chan Kau v The Queen* [1955] AC 206 at 214.

76 [1952] AC 480 at 491.

77 *Dal Singh* (1917) LR 44 IA 137 at 146.

78 [1952] AC 480 at 491.

criminal appeal from a judgment of the Supreme Court of the Australian Capital Territory. In *Sparre v The King*[79], this Court held that s 52 together with s 36 of the *Judiciary Act* 1903 (Cth) authorised the Court to order a new trial after quashing a conviction on the ground of misdirection of the jury. In *Stokes v The Queen*[80], the Court held that the common law rules concerning new trials in civil cases applied to a criminal appeal under s 52 of the *Australian Capital Territory Supreme Court Act* 1933 (Cth). After finding error on the part of the trial judge, Dixon CJ, Fullagar and Kitto JJ said[81]:

> "In the end we think the decision of the application must depend upon the general rule that if an error of law or a misdirection or the like occurring at the trial is of such a nature that it could not reasonably be supposed to have influenced the result a new trial need not be ordered. The rule applies, we think, in an appeal under s 52".

33 The Court applied this rule and refused to order a new trial.

34 Thus, immediately before the Federal Court was given jurisdiction in criminal appeals from the Australian Capital Territory, an application for a new trial after conviction in that Territory might be refused on the ground that the error could not reasonably be supposed to have influenced the verdict of the jury. It would be surprising indeed if the Parliament in enacting the *Federal Court of Australia Act* intended the Full Court of the Federal Court to have a more limited power in hearing appeals from the Australian Capital Territory than that exercised by this Court in hearing criminal appeals from that Territory.

35 It is true that, before the enactment of the *Federal Court of Australia Act*, doubt had been expressed whether this Court had power to refuse a new trial in an appeal from the Northern Territory on the ground that no substantial miscarriage of justice had occurred. In *Da Costa v The Queen*[82], Owen J thought that, when evidence was wrongly admitted, the Court could not refuse to order a new trial. But in the same case, Windeyer J took a different view[83]. In *Pemble v*

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79 (1942) 66 CLR 149.

80 (1960) 105 CLR 279 at 284-285.

81 (1960) 105 CLR 279 at 284-285.

82 (1968) 118 CLR 186 at 216-217.

83 (1968) 118 CLR 186 at 197, 201.

The Queen[84], Barwick CJ also seems to have been of the view that, because of the statutory framework, a new trial could not be refused on appeal from the Northern Territory on the ground that no substantial miscarriage of justice had occurred.

36 However, the powers of the Federal Court are expressed in different terms from those that governed appeals to this Court from the Northern Territory. Section 28(1)(f) of the *Federal Court of Australia Act* empowers the Federal Court to allow an appeal "on any ground upon which it is appropriate to grant a new trial." This power is expressed in wide terms and should be given a liberal construction. It is a power that must, of course, be exercised judicially[85]. But there is nothing unjudicial, arbitrary or capricious in refusing to order a new trial when, although error has occurred, no miscarriage of justice has occurred. The common law courts applied such a rule in civil proceedings for more than a century. The King's Bench and the Court for Crown Cases Reserved applied it in criminal cases for a long period until 1887 when it was held in *Gibson*[86] that the rule did not apply where evidence had been wrongly admitted. The Judicial Committee applied it in criminal appeals and applications for leave to appeal against criminal convictions[87]. And this Court applied it in appeals from the Australian Capital Territory before the enactment of the *Federal Court of Australia Act*.

37 Very early in the history of the Federal Court, a Full Court of that Court held that the general rule referred to in *Stokes*[88] applied to s 28(1)(e) of the *Federal Court of Australia Act*. In *Duff v The Queen*[89], Brennan, McGregor and Lockhart JJ said that in a criminal appeal the grounds under this paragraph are not to be taken as identical with the grounds in the common-form criminal appeal

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84 (1971) 124 CLR 107 at 125.

85 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 205; *PMT Partners Pty Ltd (In Liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 313.

86 (1887) 18 QBD 537.

87 *Ibrahim* [1914] AC 599 at 615; *Lejzor Teper v The Queen* [1952] AC 480 at 491, 492; *Chan Kau v The Queen* [1955] AC 206 at 214.

88 (1960) 105 CLR 279 at 284-285.

89 (1979) 28 ALR 663 at 674.

statutes, a view later rejected by this Court in *Chamberlain v The Queen [No 2]*[90]. Nevertheless, their Honours accepted[91] that:

> "[T]he new trial grounds contain a qualification that, if the appellate court feels some reasonable assurance that the blemish at the trial could not reasonably be supposed to have influenced the result, the conviction under appeal may be allowed to stand. *The qualifying rule and the proviso in the common form statute have a similar operation, for they avoid the need to quash a conviction whenever an error in the summing-up or in the admission or rejection of evidence or in procedure is established, whether the error be material or not*". (emphasis added)

38 In *Chamberlain [No 2]*[92], Gibbs CJ and Mason J said "the power of the Federal Court, unfettered in terms as it is, was intended to extend at least as widely as those of the State Courts of Criminal Appeal, and thus to enable the Federal Court to set aside a verdict whenever it is of opinion that there has been a miscarriage of justice." Their Honours did not refer to the proviso in the common-form criminal appeal statute. But their remarks are consistent with the Federal Court having the power to dismiss an appeal on the ground that an identifiable error in the proceedings did not affect the result of the proceedings. In his judgment, Deane J reviewed the history of appeals from the various Territories. After doing so, his Honour expressed the view that the principle applied in *Stokes* applied to the grant of jurisdiction to the Federal Court to hear appeals from those Territories. His Honour said[93] that the grant was "subject to the overriding power to dismiss the appeal in any case where it appeared to the Federal Court that, notwithstanding that a point raised in the appeal might be decided in favour of the appellant, no 'substantial' miscarriage of justice had actually occurred."

39 The Federal Court has continued to apply the principle expounded in *Stokes*[94] up to the present time[95].

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90 (1984) 153 CLR 521.

91 (1979) 28 ALR 663 at 674.

92 (1984) 153 CLR 521 at 529.

93 (1984) 153 CLR 521 at 615.

94 (1960) 105 CLR 279 at 284-285.

95 See, for example, *Jamal v The Queen* (2000) 182 ALR 307 at 319 [66].

40 In the present matter, the case against the appellant was overwhelming. Having regard, particularly, to what was said and done at a meeting that took place in the early hours of the morning on which the appellant and McFie were arrested, between those two persons and the two co-offenders, the appellant's conviction was inevitable. His appeal should, therefore, be dismissed.

The facts

41 It is not necessary to describe fully the elaborate body of evidence that was called at trial. In order to explain the corroboration questions that arose, it is, however, necessary to say a little more about the prosecution's case.

42 In 1997, the year in which the murder occurred, Williams was aged 21. He was unemployed, and a substantial heroin addict. Steer, then aged 29, was not a user of heroin but had a substantial cannabis habit. He too was unemployed. Williams, Steer and McFie each lived in flats very close one to the other.

43 The appellant, a police officer, met McFie in the course of his duties. The appellant's relationship with his wife had then been unhappy for some time. By March 1997, the appellant and his wife had separated, and the appellant, who had some time earlier commenced a sexual relationship with McFie, went to live with her. There were proceedings in the Family Court of Australia between the appellant and his wife concerning the custody of their son and Mrs Conway obtained an interim order for his custody.

44 During April and May 1997, Mrs Conway was very depressed and there was a deal of evidence at the trial of her speaking about taking her own life and of events consistent with her preparing, if not attempting, to do so.

45 According to the evidence given by the co-offenders, at some time in March or April 1997 the appellant and McFie asked Williams to kill Mrs Conway and told him that it had to look like a heroin overdose. Evidence was called at trial from which it would have been open to the jury to conclude that on 25 April 1997 the appellant gave Mrs Conway a cup of coffee containing heroin. This evidence was disputed and it is not possible, or necessary, to form any view about its truth. There was, however, undisputed evidence that on the next day, 26 April 1997, the appellant handed to police, two foils which he said he had found at his wife's house and which, on analysis, revealed traces of heroin. Why he should do this was never satisfactorily explained.

46 Mrs Conway was killed on 3 May 1997. There was evidence that both shortly before and after this time Williams had sums of money larger than normal. In the course of their investigations, the police interviewed the appellant and McFie. It is accepted that, in those interviews, each told lies, including making denials of any sexual relationship between them. About three weeks after Mrs Conway's death the appellant and McFie moved into the house where Mrs Conway had lived.

47 On 27 July 1997, police arrested the two co-offenders. In the early hours of the next morning, at the request of police, they went to the house where the appellant and McFie were living. Steer wore a listening device. It was not disputed at the trial that Steer and Williams had a conversation with the appellant and McFie. The authenticity of the tape recording, to which we listened in the course of oral argument, and the accuracy of the transcription that was made of that tape recording were not challenged. Not surprisingly, when the appellant gave evidence in his defence at his trial, he was cross-examined extensively about what was said and done at this meeting.

48 What emerged from the cross-examination of the appellant and from the tape recording of the meeting can be summarised as follows. At his trial, the appellant claimed that he had been devoted to his wife. The visit by Steer and Williams at four o'clock in the morning of 28 July 1997 had not been sought by the appellant or by McFie and it was, so far as the appellant's evidence and the conversation itself revealed, an unsolicited and unexplained visit in the early hours of the morning. On one view of what was said, McFie expressed concern to Steer and Williams about where the taxi, which they said had brought them, had dropped them but that, if it stood alone, could be put aside as equivocal and, perhaps, to be explained by the surprising nature of the visit so early in the morning.

49 Early in the conversation, Steer and Williams admitted that they had murdered the appellant's wife and the appellant gave evidence that he had realised early in the conversation that this was what they were saying. Yet the appellant said and did nothing at the time that expressed surprise or even curiosity at this remarkable revelation. During the conversation, Steer and Williams asked for money described as "a couple of grand" which was money they asserted the appellant and McFie owed them. Again, there was no denial and no expression of surprise. During the conversation, it was said to the appellant that police were then alleging that he and McFie had employed Steer and Williams to commit the murder and the appellant acknowledged in cross-examination that at the time of this conversation he knew that he was a suspect. Again, he expressed no denial. At the end of the conversation he gave Steer and Williams $50 for a taxi fare and he agreed, during the conversation,

that he would pay Steer and Williams more money later, agreeing that he would telephone Steer and Williams for the purpose of arranging this payment.

50 The appellant's explanation for what was said and done during this conversation was, in effect, that he was an innocent observer of events, the unfolding of which he did not try to influence in any way, and that he had intended to report what was said and done to police. Because police arrested the appellant and McFie within minutes of the conversation concluding, he had no opportunity to do that. The appellant did not suggest in his evidence at the trial (and there was nothing in what was said in the meeting that suggested) that he had acted as he had during the meeting in order to shield McFie. Indeed, the conduct of his case at trial was wholly hostile to her interests and inconsistent with a suggestion that having discovered, after the event, that she had contracted to have his wife killed, he had thereafter sought to protect McFie from the consequences of her actions. At trial he suggested that McFie alone had contracted Steer and Williams to kill his wife but he did not suggest that, whether for love or other reasons, he had tried to protect her from the consequences of what she had done.

The issue on the appeal

51 As the Full Court of the Federal Court recorded in its reasons for dismissing the appellant's appeal against his conviction[96], "[i]t was accepted by all parties at the trial that the jury must be warned about the dangers of acting upon the uncorroborated evidence of Steer and Williams". Each had formally admitted that he was a principal participant in the crime with which the appellant and McFie were charged. The trial judge told the jury that Steer and Williams should be treated as accomplices. He explained to them that the sentences imposed on Steer and Williams had been discounted significantly because of their willingness to co-operate in the prosecution of the appellant and McFie and that the applicable legislation[97] would permit the Director of Public Prosecutions to appeal against the sentence imposed on either of them if he did not co-operate in accordance with the written undertaking he had given to provide assistance in the prosecution of the appellant and McFie.

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96 *Conway v The Queen* (2000) 98 FCR 204 at 250 [188].

97 *Crimes Act* 1900 (ACT), s 449.

52 The trial judge then warned the jury "that the evidence of accomplices is frequently unreliable"[98] and that:

> "[a]ccordingly the rule of law which applies in this case, is that you should consider it dangerous to convict either accused upon the evidence of those accomplices or one of them, unless it is confirmed in some material way by other evidence."

53 While such a warning would have been appropriate had the general law applied, it is a warning that was framed without regard to applicable provisions of the *Evidence Act* 1995 (Cth), particularly ss 164 and 165. Section 164 provides, so far as is now relevant:

> "**(1)** It is not necessary that evidence on which a party relies be corroborated.
>
> …
>
> **(3)** Despite any rule, whether of law or practice, to the contrary, but subject to the other provisions of this Act, if there is a jury, it is not necessary that the judge:
>
> (a) warn the jury that it is dangerous to act on uncorroborated evidence or give a warning to the same or similar effect; or
>
> (b) give a direction relating to the absence of corroboration."

Two aspects of the provision should be noted. First, it abolishes the *necessity* for corroboration and the *necessity* for a warning about acting on uncorroborated evidence; it does not *prohibit* warning a jury that it would be dangerous to convict on uncorroborated evidence. Secondly, s 164(3) is expressly said to be subject to other provisions of the Act and, therefore, account must be taken of those other provisions, including s 165 and its provisions about "unreliable evidence".

54 Unreliable evidence is defined to include[99] "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". The

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98 *Conway* (2000) 98 FCR 204 at 250-251 [192].

99 s 165(1)(d).

evidence of Steer and Williams was, therefore, "unreliable evidence". Section 165 further provides:

> "**(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.
>
> **(3)** The judge need not comply with subsection (2) if there are good reasons for not doing so.
>
> **(4)** It is not necessary that a particular form of words be used in giving the warning or information.
>
> **(5)** This section does not affect any other power of the judge to give a warning to, or to inform, the jury."

55 It may well be, as the Full Court suggested[100], that directing the jury that it would be dangerous to convict the appellant upon the evidence of Steer and Williams unless that evidence was confirmed in some material way by other evidence went beyond what was required by s 165. Even if it did, however, the giving of the warning was not a misdirection of law. Neither s 164 nor s 165 of the *Evidence Act* forbids a judge warning the jury that it would be dangerous to convict on uncorroborated evidence. Such a warning would constitute a misdirection only if the facts of the case could not admit of such a conclusion and, given that it is a warning which favours an accused, the giving of such a warning is unlikely to occasion appellate intervention.

56 Neither the appellant nor the respondent contended, whether at trial or on appeal, that telling the jury that it would be dangerous to convict on the uncorroborated evidence of Steer and Williams was a misdirection. Rather, the appellant submitted the judge misdirected the jury when he went on, as he did, to identify what evidence might constitute corroboration.

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100 (2000) 98 FCR 204 at 254 [205].

57 The trial judge referred to 18 matters which he told the jury were capable of constituting corroboration of the evidence of Steer or Williams or both and which, in the Full Court, the appellant contended could not constitute evidence confirming evidence of Steer or Williams implicating the appellant in the crime with which he was charged.

58 In this Court, particular attention has been given to four of the 18 items of evidence with which the Full Court dealt. In that Court, the respondent conceded that three of these four items of evidence were not capable of constituting corroboration. In the view of the Full Court, each concession was rightly made[101]. A fourth item of evidence was held by the Full Court not to have been capable of constituting corroboration[102]. Each of the four pieces of evidence would, if accepted, have tended to confirm that Steer and Williams had been implicated in the murder of Mrs Conway. Their particular detail does not matter for present purposes. Perhaps one or more of the pieces of evidence could have been understood as going further and suggesting that the co-offenders had done so as contract killers. But none of the four pieces of evidence to which we have referred confirmed any evidence which Steer or Williams had given implicating the appellant. Nor did the respondent contend that these pieces of evidence had that effect. Rather, the respondent contended that because the evidence confirmed some detail of evidence of Steer or Williams it supported the overall case mounted by the prosecution against the appellant. So much may readily be accepted, for in essence it is a contention that the evidence was relevant to the issues arising on the trial of the appellant, but that is not an answer to the appellant's contention that the jury were misdirected.

59 The Full Court concluded that none of the four items of evidence was of more than minimal importance and that two of them might even be described as "nebulous"[103]. These conclusions about the importance of the evidence do not sit easily with the fact that the judge commented to the jury that one of the four items of evidence, if accepted, could constitute "very strong" corroboration[104]. Again, however, the importance of the evidence is not a matter that goes to whether there was a misdirection. At most it is a factor that may be relevant to whether there has been a miscarriage of justice.

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101 (2000) 98 FCR 204 at 258 [225](e) and (g), 261 [225](q).

102 (2000) 98 FCR 204 at 257 [225](b).

103 (2000) 98 FCR 204 at 263 [232].

104 (2000) 98 FCR 204 at 258 [225](e).

60 Some items of evidence identified by the trial judge as being capable of constituting corroboration consisted of acts and declarations on the part of McFie which took place in the absence of the appellant. The Full Court concluded that these acts and declarations had been admissible against the appellant under principles of the kind dealt with in *Tripodi v The Queen*[105] and *Ahern v The Queen*[106] and that, accordingly[107]:

> "There seems no reason in principle why such evidence, if admissible against [the appellant], could not also be capable of constituting corroboration of the accomplice evidence in his case."

The respondent's submissions sought to extend this proposition to a more general contention that *any* evidence tending to confirm the version of events given by the co-offenders could corroborate the case against the appellant if the total account of events revealed by the evidence showed that he was implicated. In particular, it was submitted that any evidence admitted under the co-conspirator principles dealt with in *Tripodi* and in *Ahern* could amount to corroboration, whether or not it was evidence that implicated the appellant.

61 It is at least open to serious doubt whether, on the trial of an accused, evidence which does no more than corroborate the involvement of a co-conspirator, may be used as corroborative evidence against the accused. The relevant inquiry must be whether the evidence in question tends to confirm or support the evidence which implicates the accused, not just whether the evidence is relevant to the issues at trial[108].

62 It is, however, unnecessary to examine this question at length, because it is clear that the jury in this case were misdirected about what evidence could constitute corroboration of the evidence of Steer and Williams against the appellant. So much follows inevitably from the concessions made by the respondent in the Full Court that some evidence said by the trial judge to be capable of constituting corroboration was not. There was, therefore, a misdirection of law. It is not to the point to say, as the respondent submitted, that

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105 (1961) 104 CLR 1.

106 (1988) 165 CLR 87.

107 (2000) 98 FCR 204 at 265 [243].

108 *Doney v The Queen* (1990) 171 CLR 207; *R v Baskerville* [1916] 2 KB 658.

the provisions of ss 164 and 165 of the *Evidence Act* relieved the trial judge of any need to give directions in the form in which he did. The directions were given and they were wrong. Unless there was no substantial miscarriage of justice the appeal to the Full Court should have been allowed.

Miscarriage of justice?

63 The evidence of what was said and done by and in the presence of the appellant when Steer and Williams called on him and McFie in the early hours of 28 July was rightly described by the Full Court as "devastating"[109]. His explanation of his conduct was incredible. Had he suggested at any time that he had acted out of a misguided attempt to protect McFie from the consequences of her unsolicited conduct he might have had some basis for suggesting that the matter should go back for retrial. But that has never been his case and he should not now have an opportunity to go back for trial on an altogether different footing from that upon which he chose to attempt to meet the prosecution case that was put against him. His conviction was inevitable. The appeal to this Court should be dismissed.

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109 (2000) 98 FCR 204 at 261 [225](o).

64 KIRBY J. This appeal, brought by special leave from a judgment of the Full Court of the Federal Court of Australia[110] was said ultimately to concern whether that Court ought to dismiss the appellant's appeal on the basis that no substantial miscarriage of justice had actually occurred[111].

65 In several recent appeals it has been observed[112] that some who have the responsibility of construing statutory language appear to shy away from the legislative text. It is as if they find that aspect of their task "distasteful"[113]. They will go to second reading speeches. To law reform reports. To academic commentary and histories. To sociologists' musings. And above all to the words of long-forgotten judges – usually writing in a different country, decades or even centuries before the applicable statutory text was enacted. This is an approach to the task that turns legal analysis on its head. It should be resisted.

66 Where, as here, the text is found in a statute enacted by an Australian Parliament there is a sound constitutional reason why the text must have primacy. Such a law has legal legitimacy because it has democratic credentials. This is why, for my own part, I approach the powers and duties of the Full Court of the Federal Court (and hence of this Court) in these proceedings, involving an appeal against a criminal conviction, by reference to the statute that confers the applicable powers and duties on the appellate bench of the Federal Court[114]. Not

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110 *Conway v The Queen* (2000) 98 FCR 204.

111 The conventional language of the "proviso" common to criminal appeal provisions in Australia and elsewhere: see reasons of Gaudron ACJ, McHugh, Hayne and Callinan JJ ("the joint reasons") at [3].

112 *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (2001) 75 ALJR 1342 at 1351 [46]; 181 ALR 307 at 319; *Victorian WorkCover Authority v Esso Australia Ltd* (2001) 75 ALJR 1513 at 1526-1527 [63]; 182 ALR 321 at 339; *Allan v Transurban City Link Ltd* (2001) 75 ALJR 1551 at 1561 [54]; 183 ALR 380 at 392-393; *The Commonwealth v Yarmirr* (2001) 75 ALJR 1582 at 1630 [249]; 184 ALR 113 at 180.

113 Hayne, "Letting Justice Be Done Without the Heavens Falling", (2001) 27 *Monash University Law Review* 12 at 16.

114 See *Federal Court of Australia Act* 1976 (Cth), ss 25, 27, 28, 30. Note especially s 28(1) which reads, relevantly,

> "the Court may, in the exercise of its appellate jurisdiction:
>
> (a) affirm, reverse or vary the judgment appealed from;
>
> …

(Footnote continues on next page)

the common law. Not legal history. And certainly not statutory provisions applicable in other parts of Australia that have no application to the Federal Court or to this case.

67 My approach to the governing legislation causes me to adopt a criterion for appellate intervention in the conviction of the appellant somewhat different from that expressed in the joint reasons and in the arguments of the parties in this appeal. In the end it does not produce a different outcome. But it obliges me to go about the task of analysis differently. I will explain why this is so. Then, by reference to the statutory provisions that are actually applicable, I will indicate why I too consider that this appeal must be dismissed.

Criminal appeals from the Australian Capital Territory

68 Appeal is a creature of statute[115]. At common law there were very limited powers to disturb a criminal conviction[116]. Eventually, early in the 20th century, statutory provision was made in England by the *Criminal Appeal Act* 1907 (UK). Pursuant to s 4(1) of that Act, a court of criminal appeal was established to afford relief, relevantly "on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice". In any other case the court was required to dismiss the appeal[117].

69 The English statutory reform was copied in common form in all States of Australia. However, the copies typically went beyond the English statute, permitting the local court of criminal appeal, in the event of allowing an appeal, to order a new trial. Concern about success in criminal appeals that were substantially unmeritorious had vexed earlier Australian judicial discourse on the subject[118]. The power to order a new trial was not granted in England for several decades.

(e) set aside the verdict and judgment in a trial on indictment and order a verdict of not guilty or other appropriate verdict to be entered;

(f) grant a new trial … either with or without a jury, on any ground upon which it is appropriate to grant a new trial".

115 *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306 at 322 [72]; 160 ALR 588 at 609 and authorities there cited.

116 *R v Berger* [1894] 1 QB 823.

117 *Criminal Appeal Act* 1907 (UK), s 4(1), set out by Hayne J in *Eastman v The Queen* (2000) 203 CLR 1 at 104 [313].

118 O'Connor, "Criminal Appeals in Australia Before 1912", (1983) 7 *Criminal Law Journal* 262 at 275 referring to *R v Govan* (1872) 3 VR (L) 221.

70 The common form of the Australian legislation added a proviso in keeping with these local concerns. This is the "proviso" usually so described in criminal appeals[119]. The typical proviso reads[120]:

> "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".

Around these words has accumulated much case law. The statutory formula has been described as presenting a riddle worthy of Plutarch[121]. Inevitably and properly, close attention has been addressed to each and every word of the "proviso" and specifically to the adjective "substantial" and the adverb "actually".

71 In some Australian jurisdictions, the common form enactment is not expressed in terms of a proviso. However the substance is the same. And it is usual for lawyers in those jurisdictions to describe the local provision as "the proviso"[122]. There are reasons of principle for avoiding, so far as possible, disparities in the treatment of criminal appeals in different parts of the country, unless such differences are clearly grounded in statute[123]. In Australia, the constitutional provision of appeals to this Court against "judgments" and "sentences"[124] has afforded an important means of developing a consistent body of authority to guide courts of criminal appeal, and their equivalents, in disposing of appeals where a demonstrated error of law in the conduct of a criminal trial attracts the operation of the "proviso". Fundamentally, the purpose of the "proviso" is to defend the administration of criminal justice from being "plunged into outworn technicality"[125].

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119 See discussion in *Festa v The Queen* (2001) 185 ALR 394.

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

121 *R v Gallagher* [1998] 2 VR 671 at 672 per Brooking JA.

122 *R v Zullo* [1993] 2 Qd R 572 at 579 by reference to the *Criminal Code* (Q), s 668E.

123 *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 529.

124 Constitution, s 73. See *Crampton v The Queen* (2000) 75 ALJR 133 at 155-156 [121]; 176 ALR 369 at 399-400.

125 *Driscoll v The Queen* (1977) 137 CLR 517 at 527 per Barwick CJ; *Grey v The Queen* (2001) 75 ALJR 1708 at 1719 [53]-[55]; 184 ALR 593 at 607-608.

72 However, in the case of the Australian Capital Territory there is an important distinction. Neither the Federal Parliament, when it exercised general legislative responsibility for the Territory, nor the Legislative Assembly since self-government, has enacted a criminal appeal statute, whether in the common form or otherwise. After the establishment of the seat of government in the Australian Capital Territory in 1927, provision was made for appeals to this Court in respect of criminal convictions on indictment[126]. The statute afforded appellate jurisdiction and power expressed in general terms. With the creation of the Federal Court of Australia, provision was made for an intermediate appeal to that Court. However, such provision likewise made no express mention of a criminal appellate jurisdiction. The general appellate provisions of the Federal Court's statute had to do service both for civil and criminal appeals[127]. Those provisions permit orders for a new trial after a jury verdict. They do so "on any ground upon which it is appropriate to grant a new trial"[128].

73 The last-mentioned phrase has been construed to enliven a power to set aside a conviction resting on a guilty verdict of a jury where the appellate court concludes that it would be unsafe or dangerous to allow the verdict to stand[129]. Into the generality of the statutory language governing the Federal Court there was introduced an elaboration of the circumstances in which an appeal should be allowed or dismissed and a new trial granted or withheld. Where an error of law, misdirection or the like had occurred in the trial an appeal might nevertheless be dismissed where the demonstrated error "could not reasonably be supposed to have influenced the result"[130].

74 There are understandable reasons why this Court would be reluctant to treat criminal appeals from the Supreme Court of a Territory in a way significantly different from appeals from other Australian courts. Indeed, that reluctance has been expressed[131]. However, it is a fundamental tenet of the law

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126 *Seat of Government Supreme Court Act* 1933 (Cth), s 52 (later *Australian Capital Territory Supreme Court Act* 1933 (Cth), s 52) (since repealed).

127 *Federal Court of Australia Act*, ss 25, 27, 28, 30.

128 *Federal Court of Australia Act*, s 28(1)(f).

129 cf *Duff v The Queen* (1979) 39 FLR 315 at 328-329 per Brennan, McGregor and Lockhart JJ applying *Balenzuela v De Gail* (1959) 101 CLR 226 at 234-235. *Duff* was overruled in *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 532, 570, 616.

130 *Stokes v The Queen* (1960) 105 CLR 279 at 284-285.

131 *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 529.

that courts must obey the provisions of an applicable statute where the statute is constitutionally valid and governs the case[132]. Just as there is a modern "distaste" for studying the text of applicable legislation[133], so there is another tendency to read legislation as incorporating all of the nuances of pre-existing judge-made authority. In my view, both of these tendencies are erroneous and have to be resisted. Whilst the common law adapts to the Constitution[134] and to any relevant statute law[135], it is an elementary mistake to approach the construction of applicable legislation as if it expresses long-standing and familiar principles. Unless the language and obvious purpose of the legislative text clearly require that approach to be adopted, it should be avoided.

75 If it had been the purpose of the legislature to provide for criminal appeals in the Australian Capital Territory in the exact terms as the common form for criminal appeals enacted elsewhere in Australia, it would have said so. So far it has not. Instead, jurisdiction and powers have been conferred on the Federal Court in language of broad generality.

76 I am willing to accept that the appellate discretion conferred on the Federal Court might be harnessed so as to require that an appeal be allowed only in a case where, relevantly, a demonstrated error of law "could not reasonably be supposed to have influenced the result"[136]. This is so for the elementary reason that an appellate court would not exercise its powers to set aside a valid judgment (criminal or civil) for immaterial, irrelevant or insubstantial reasons. For this proposition it is enough to call upon the implications inherent in the language of the Australian statute. Australian courts do not make serious orders having serious consequences for reasons that are futile or purely hypothetical. It is

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132 It has been noted that "the task on which a court of justice is engaged remains one of construction": *Jones v Wrotham Park Settled Estates* [1980] AC 74 at 105; cf Spigelman, "The poet's rich resource: Issues in statutory interpretation", (2001) 21 *Australian Bar Review* 224 at 233.

133 This tendency is here evident in the "remarkable" fact that the judge and parties at trial paid no regard at all to the provisions dealing with accomplice evidence in the *Evidence Act* 1995 (Cth): *Conway* (2000) 98 FCR 204 at 253 [202]; see also joint reasons at [53]-[55].

134 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-567.

135 *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 25-27 [81]-[83], 46-47 [129]-[130]; *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 59-63 [18]-[29], 86 [97]; cf *Lamb v Cotogno* (1987) 164 CLR 1 at 11-12.

136 *Stokes v The Queen* (1960) 105 CLR 279 at 284-285.

unnecessary to resort to ancient legal history to derive that simple principle. But, with respect, I regard it as mistaken to import into the jurisdiction of the Federal Court the language, and exact concepts, of the common form of the "proviso" that the elected legislators for the Australian Capital Territory have not seen fit to enact to govern criminal appeals. Specifically, I regarded it as incorrect in principle to approach this appeal as if, somewhere between the lines of the *Federal Court of Australia Act* 1976 (Cth), one could discover the familiar words of the "proviso" excluding appellate relief for proved error of law on the grounds that "no substantial miscarriage of justice has actually occurred". This is not a proposition for which *Chamberlain v The Queen [No 2]*[137] stands. That case was not concerned with a misdirection of law by the trial judge in his charge to the jury. It was concerned with whether the Federal Court had power to set aside a verdict where a miscarriage of justice had occurred in a case where it would be unsafe or dangerous to allow the verdict to stand. Any use by Gibbs CJ and Mason J[138] and Deane J[139] of language reminiscent of the "proviso" must be understood in the limited context in which that question fell to be decided by them.

77 For criminal appeals from judgments of the Supreme Court of the Australian Capital Territory, the Federal Court therefore has powers expressed in broad statutory language without a "proviso". On the one hand, this means that there is no explicit instruction to the Federal Court in criminal appeals to the effect that a demonstration of an error of law must result in relief ("shall allow the appeal") and the quashing of a conviction that followed such error. On the other hand, there is no express provision to save a criminal conviction from an error of law in the trial where the Full Court considers that no substantial miscarriage of justice has actually occurred. The applicable considerations have to be found, so far as is proper to do so, in the broad legislative powers granted to the Federal Court[140]. Nowhere else.

78 The present appeal was argued without reference to the foregoing considerations – still less the history of "appeals" in criminal cases in England dating back to the *Statute of Westminster II* 1285[141]. Indeed, it has to be said that it was argued as if the statute law applicable in the Australian Capital Territory contained a common form provision for criminal appeals and thus included the

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137 (1984) 153 CLR 521.

138 (1984) 153 CLR 521 at 530.

139 (1984) 153 CLR 521 at 614-615.

140 *Federal Court of Australia Act*, s 24(1)(b).

141 13 Edw I stat 1.

"proviso". This Court did not, therefore, have the advantage of argument addressed to the "radical[ly]"[142] different legislative provisions actually applicable to the case.

79 Within broad discretions, it is possible to incorporate some of the considerations taken into account under the "proviso", where it exists. However, it would be surprising, to say the least, if the applicable law were *exactly* the same, despite the significantly different statutory prescriptions. Given the novel departure from the common law which the common legislation for criminal appeals (including the "proviso") represented when it was enacted, it would be astonishing to discover that such legislation had not been required after all: that a general grant of appellate discretion to order a new trial after a jury verdict sufficed.

80 The true basis of the Federal Court's powers in a criminal appeal such as the present is thus to be found where one would normally look if not blinkered by legal habit or distaste, namely the governing statute. It is not to be found in statutes enacted for other courts in other jurisdictions, in different terms. To this extent, any dismissal of the appeal in the face of a misdirection at trial is controlled by the general rule that a court may dismiss an appeal if the error could not, on any reasonable hypothesis, have influenced the result[143]. I shall approach the present appeal from that perspective. I will put out of my mind the text of the proviso. No amount of legal history can put it there. Only the law-making activity of an Australian legislature can do so; and so far it has not.

The facts and context of the misdirections

81 The facts of the case are set out in the joint reasons[144]. I accept the general description of the background circumstances, the conduct of the trial and the issue on appeal[145]. I agree with the analysis concerning the oversight at the trial of the *Evidence Act* 1995 (Cth)[146]. I also agree that, once it was rightly conceded in the Full Court that three items of evidence, identified to the jury by the trial judge, were incapable of constituting corroboration (and one more was identified as being in the same class) it followed that a material misdirection of the jury on a point of law had occurred. Without more, in a common form statutory regime,

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142 *Duff v The Queen* (1979) 39 FLR 315 at 327.

143 *Stokes v The Queen* (1960) 105 CLR 279 at 284-285.

144 Joint reasons at [41]-[47].

145 Joint reasons at [48]-[52].

146 Joint reasons at [53]-[55].

this would certainly enliven an appellant's entitlement to a new trial unless the prosecution could show that no substantial miscarriage of justice had actually occurred[147]. However, for the reasons stated, it is a mistake to proceed as if the common form provisions were applicable here either in terms or substance.

82 In judging whether, within its statutory powers, the Federal Court "may, in the exercise of its appellate jurisdiction" and should in the particular case "set aside the verdict and judgment in a trial on indictment" and "grant a new trial"[148], it is necessary in every case to take into account the entirety of the judge's instructions to the jury. Only in that way will the direction complained of be seen in context. When this is done in the present case, it is clear that the jury were warned about the danger of convicting Mr John Conway ("the appellant") on the basis of the evidence of Mr Barry Steer and Mr Daniel Williams ("the accomplices") alone[149]. The jury were told why accomplice evidence was potentially unreliable[150]. They were specifically directed that they should approach the evidence of the accomplices "with great scrutiny and care". They were firmly instructed that they could only convict the appellant in reliance on the accomplices' evidence alone if, after "careful scrutiny and having looked at all the circumstances", they were "fully convinced beyond reasonable doubt that their evidence [was] totally reliable".

83 The jury were encouraged to look for supporting material before acting on the accomplices' evidence. They were told to look for such material "from a source independent of the accomplices … which implicates the accused in the crime by tending to show not only was the crime committed but it was these accused who were a party to it"[151]. The jury were also told that corroboration might lie in circumstantial evidence inconsistent with innocence. They were directed to consider the cases of the appellant and Ms Kathy McFie separately. They were reminded that the appellant's case had included his evidence that he had had nothing to do with any common enterprise between Ms McFie and the accomplices. The trial judge also informed the jury that, in a number of material respects, the evidence relating to Ms McFie confirmed the accomplices' evidence, to that extent enhancing its reliability[152].

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147 cf joint reasons at [63].

148 *Federal Court of Australia Act*, s 28(1)(e) and (f).

149 cf *Longman v The Queen* (1989) 168 CLR 79 at 91, 102.

150 cf *Bromley v The Queen* (1986) 161 CLR 315 at 319.

151 See *Makanjuola* [1995] 2 Cr App R 469 at 472.

152 See *Vetrovec v The Queen* (1982) 136 DLR (3d) 89 at 103.

84 These were strong, clear and accurate directions. The significance of the judge's mistaken specification of the four items of corroborative evidence as illustrations must be considered in the foregoing context. Appellate courts should avoid attributing excessive importance to over-subtle distinctions in judicial directions to juries. That is why such directions must be read as a whole and demonstrated mistakes considered in the context of the entire charge[153].

Appellate consideration of a recorded conversation

85 It is exceptional for oral evidence to be heard in this Court, particularly when exercising its appellate jurisdiction. In part, this is because appellate jurisdiction of its nature is ordinarily exercised on the basis of the printed record. In part, it is because this Court has established[154], and reaffirmed[155], the rule, that new evidence may not be received in an appeal to it, however cogent that evidence might be to the issues or to demonstrating that a miscarriage of justice has occurred. Yet, in this case, this Court heard a segment of oral evidence. It was not "fresh" because it had been adduced at the appellant's trial. Indeed, it was part of the trial record. It consisted of a recording of a conversation, procured by a listening device fitted to one of the accomplices. It captured the voice of the appellant responding, after the alleged offence, to inculpatory suggestions in ways that appear incompatible with his lack of involvement in the murder of his wife.

86 In its forensic setting, the recorded conversation was extremely powerful. The four persons accused of planning, procuring and effecting the homicide participated in it. The recording conveys, as no printed transcript could, the desperation of the accomplices. The listener knows that they had made an arrangement with police to secure, and record, the responses of the appellant and Ms McFie. Awakened from their sleep at 4 am, the latter appear equally desperate to placate their unwanted visitors and to rid themselves of them. The drama is heightened by the fact that the listener also knows that, waiting in the street outside, were police officers, one-time colleagues of the appellant. Within minutes of the return of the accomplices with their recording equipment safely in police possession, together with evidence of money given to them by the appellant, there was another knock at the door. The appellant and Ms McFie were confronted, arrested and charged with murder.

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153 *Zoneff v The Queen* (2000) 200 CLR 234 at 260 [65].

154 *Mickelberg v The Queen* (1989) 167 CLR 259 at 271, 275, 298-299.

155 *Eastman v The Queen* (2000) 203 CLR 1.

87 The Full Court described the evidence, recorded in this way, as "devastating"[156]. So indeed it is. On the face of things, it appears to establish, in the most direct way possible (from the mouth of the appellant himself) that he had agreed to pay the accomplices for effecting the murder of his wife. If a court came to the conclusion that this established that the appellant was guilty of the murder it might seem to justify, in a common form regime, the application of the "proviso", notwithstanding a demonstration by the appellant that material misdirections of the law had occurred in the course of the trial judge's summing up to the jury. Would it matter, ultimately, that some mistake had happened on the way to the jury's verdict of guilty, if it could be shown with certainty, that the appellant was indeed guilty of the offence of which he had been convicted[157]? If that were so, no miscarriage of justice would have resulted from any such misdirection. The appellant would not have lost a chance, reasonably open to him, of acquittal of the offence[158]. His conviction would be classified as "inevitable"[159]. The misdirection would be treated as an immaterial one which could not have affected the result. The appellant's conviction would stand. Does the same reasoning apply in the present case where the statutory regime is different?

Caution in the use of such recorded testimony

88 A number of considerations suggest caution before answering the last question in the affirmative. First, it was not the approach taken by the Full Court from which this appeal comes. That Court did not, in the end, dispose of the appellant's appeal on the basis of the "proviso" or its "equivalent". Although the Full Court mentioned the leading authorities on the point and expressed satisfaction that any misdirections had not led to any miscarriage of justice[160], its primary conclusion appears to have been that the misdirections were of "minimal

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156 *Conway* (2000) 98 FCR 204 at 260-261 [225](o). The substance of the evidence is set out in (2000) 98 FCR 204 at 225-226 [67](o).

157 cf *Festa v The Queen* (2000) 185 ALR 394.

158 *Wilde v The Queen* (1988) 164 CLR 365 at 372; *Glennon v The Queen* (1994) 179 CLR 1 at 13.

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

160 *Conway* (2000) 98 FCR 204 at 263-264 [235], [237] citing *Mraz v The Queen* (1955) 93 CLR 493 at 514; *Wilde v The Queen* (1988) 164 CLR 365; *Glennon v The Queen* (1994) 179 CLR 1.

importance" or "nebulous"[161]. The trial judge's instructions to the jury were found to have been adequate and accurate when viewed as a whole.

89 Secondly, in several recent cases it has been said that this Court is now less inclined than in earlier times to apply the common form "proviso" where an appellant can prove that a misdirection has occurred in the trial judge's instruction on the law or in the application of the law to the evidence[162]. Although this is merely a trend, and each decision must depend on its own facts, it is a trend that accords with my own impression and inclination[163].

90 A high store is placed on the accuracy of judicial instructions to a criminal jury about the law and the evidence relevant to such law. In a sense, this principle recognises that a criminal trial that has departed from such accuracy is not one that has been entirely conducted according to law. The strictness observed in such matters reflects an acceptance that, in one sense, a single misdirection can amount to a form of miscarriage of justice. The strictness also accepts that a jury is normally as enigmatic as the sphinx[164]. While it is assumed, for practical reasons, that a jury obeys the judge's directions on the law and its application to the evidence[165], the precise effect of a particular instruction can never be known. The weight given to particular directions, found to have been legally erroneous, is therefore a matter of appellate speculation.

91 Thirdly, I remind myself of a need to guard against over-reaction to the recorded conversation now propounded as conclusive of the guilt of the appellant. Self-awareness obliges an acknowledgment that the exceptional rendition of a dramatic recording, that inculpates an accused, may have a disproportionate impact on the mind of an appellate judge, normally cocooned from such dramas. The practice may change in the future as sound and video

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161 *Conway* (2000) 98 FCR 204 at 263 [232] citing *Kalajzich* (1989) 39 A Crim R 415 at 447.

162 *Gilbert v The Queen* (2000) 201 CLR 414 at 438 [86] citing *Whittaker* (1993) 68 A Crim R 476 at 484.

163 *Doggett v The Queen* (2001) 75 ALJR 1290 at 1313-1314 [153]; 182 ALR 1 at 33-34.

164 *Ward v James* [1966] 1 QB 273 at 301 per Lord Denning MR.

165 *Zoneff v The Queen* (2000) 200 CLR 234 at 260 [65] citing *Richardson v Marsh* 481 US 200 at 211 (1987).

recordings are made available to appellate courts[166]. But hearing such evidence is most exceptional in this Court. Objective analysis of its content is therefore obligatory.

92 In *Doggett v The Queen*[167], this Court found a material misdirection by the trial judge. There too, there was a secret recording of a conversation with the appellant. It contained statements that were arguably inculpating and confirmatory of sexual misconduct of which the appellant had been convicted. This notwithstanding, a majority of this Court refused to apply the "proviso", which was available in that case[168]. Intercepts and secret recordings must always be considered in their context. They can only ever represent a fragment of the relevant evidence. Unless, in the recording, the accused makes a clear admission of guilt of the offence charged, particular care needs to be taken not to enlarge the significance of the fragment so that it overwhelms all other evidence and issues in the trial.

93 Fourthly, there was a very large body of evidence in the trial of the appellant that tended to inculpate him in the murder of his wife, quite apart from the recorded conversation. The prosecution presented a detailed circumstantial case. Nowhere in the recorded conversation did the appellant expressly admit direct involvement in the murder of his wife. For a part of the recorded conversation he was out of the room. He was procuring a $50 banknote for a taxi fare, that he paid to the visitors in order to get them to leave. In fact, the appellant's recorded statements are rather circumspect, as if he suspected that he might have been the subject of a trap. In an earlier recorded telephone conversation with Ms McFie, he had, not too subtly, warned her about the risk of secret recordings of their conversations. They were indeed being intercepted.

94 In a recent decision of the Victorian Court of Appeal[169], Winneke P, correctly in my view, reminded trial courts of the care that must be taken where

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166 *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306 at 329-330 [88]; 160 ALR 588 at 618; cf Gleeson, "A Changing Judiciary", (2001) 75 *Australian Law Journal* 547 at 553.

167 (2001) 75 ALJR 1290 at 1297 [46]-[54] per Gaudron and Callinan JJ, 1311 [142] of my own reasons; 182 ALR 1 at 10-11, 31.

168 In that case *Criminal Code* (Q), s 668E(1A): see *Doggett* (2001) 75 ALJR 1290 at 1297-1298 [55] per Gaudron and Callinan JJ, 1314 [158] of my own reasons; 182 ALR 1 at 11-12, 35.

169 *Dat Tuan Nguyen* (2001) 118 A Crim R 479 at 488-490 [20].

the prosecution relies on "post-offence conduct". After citing decisions of this Court[170] and of the Supreme Court of Canada[171], Winneke P pointed out that:

> "The probative strength of post-offence conduct … will depend upon many factors including the circumstances in which the conduct occurred and the issue in proof of which the evidence is tendered. If it is open to be used by the jury for the purpose of drawing an inference as to the state of the accused's mind at the relevant time, the conduct will have to be assessed in the light of the probabilities[172]. But, because such evidence is capable of being misused by the jury, the interests of a fair trial to the accused require … a careful direction from the trial judge … Properly directed, the jury should … have been told that conduct such as that relied upon by the Crown could stem from reasons other than realisation by the accused of his guilt of the crime charged, what those other reasons might be, and that, if they accepted that a reason of that kind was the explanation for the conduct, they should not use the evidence as probative of guilt[173]."

95 Although the considerations mentioned by Winneke P were particular to the case before him, his Honour's remarks (with which I agree) are relevant in considering the weight to be given to the conduct, words and silences of the appellant in the recorded conversation that is propounded as conclusive of his guilt of murder and of the fact that there is therefore no proper basis for the favourable exercise by the Federal Court of its appellate jurisdiction. This is because, as *Doggett* demonstrates, the content of such a conversation depends upon many factors. These may include the shared knowledge of the participants; their respective states of alertness and attention to what is being said; their respective personalities of volubility and reticence; their concern (if it be a factor) that what they say might be the subject of recording or report; and any other motivations that they may have in dealing with each other or in protecting someone other than themselves.

The critical passages in the recorded conversation

96 At the appellant's trial, and in this Court, there was no contest about the reliability of the recorded conversation or of the accuracy of its transcript. These were important concessions because the sound recording, as heard by this Court,

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170 *Zoneff v The Queen* (2000) 200 CLR 234 at 256-260 [54]-[63].

171 *R v White* [1998] 2 SCR 72 at 85.

172 cf *Broadhurst v The Queen* [1964] AC 441 at 451.

173 *Edwards v The Queen* (1993) 178 CLR 193 at 210-211; *Osland v The Queen* (1998) 197 CLR 316 at 333.

is often indistinct. In the result, the defects can be ignored in judging the ultimate issue before this Court. What happened, and what was said, is adequately described by the Full Court[174]:

> "The conversation commences with Steer informing Conway that he had been interviewed that night by the police, he was in deep trouble, and needed to get out of town:
>
> Steer: 'I've got to get out of town today. I've got to get and I want to get and go and kidnap my son and leave this state John. I need you to pay me. I've got to John, I'm gonna. John they come around tonight they interviewed me again they know something, okay.
>
> …
>
> I, I really got to go, can you understand what I'm doing John, I really got to go, okay.'
>
> Conway: 'I can understand what you're saying.'
>
> Steer: 'I need ya, I need you to fix me up mate. I don't like coming here I, I can't …'
>
> Williams then asks that the light be turned on after which Williams says, with Conway and McFie present, 'Oh, this what the place looks like'. There is no comment by Conway and McFie about that remark. Steer says that the police said that they know that he was involved in the murder. Williams asked if 'we could get a coupla grand or something of yous …'. Steer said that he had panicked and that 'I've got to go and see you people and get some money'. Conway is recorded as saying 'I can get it within a couple of days'. Steer spoke of going to jail for 10, 15 or 20 years 'for murdering this woman'. Steer and Williams then asked for a 'taxi fare back', intimating that they were safe because the taxi which had brought them had dropped them off some distance from the house. Later in the conversation, after Mrs Conway's murder had been specifically mentioned, and Steer said that the police suspected McFie and Conway of having hired himself and Williams to carry out the murder, the following interchange was recorded:
>
> Conway: 'I'll give you a ring.'
>
> Steer: 'Give me a ring.'

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174 *Conway* (2000) 98 FCR 204 at 225-226 [67](o).

Conway: 'I'll give you a ring later today.'

Steer: 'Yeh.'

Williams: 'So we should be getting our money in the next coupla days.'

Conway: 'Definitely some.'

Williams: 'Some.'

Steer: 'We need at least a coupla grand John you realise that don't you know you can't just up and leave like a coupla hundred.'

Williams: '… (inaudible) … can't live on the dole … (inaudible) …'

and later again:

Williams: 'Actually how much do yous owe us now?'

McFie: 'Mmh.'

Steer: 'I'm at eleven.'

McFie: 'Mmh four … (inaudible) … just under. It was four two.'

Steer: 'So you're saying ten eight.'

McFie: 'Mmh huh.'

Steer: 'Oh well as soon as we can get something like that, that as soon as you, so you'll ring tomorrow after lunch will you at home and give me a definite answer.'

McFie: 'Mmh huh.'

Steer: 'At what time I can pick some money up.'

McFie: 'Well we'll have to, we'll have to do something.'

97 At the time this conversation was recorded, the accomplices had confessed to police that they had carried out the murder of the appellant's wife by entering her home at night and administering to her a fatal injection of heroin allegedly at the behest of the appellant and Ms McFie. By cooperation with the authorities they stood to gain advantages. Ultimately, they gained substantial reductions in their sentences[175]. They were subject to losing those advantages if they did not

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175 They were sentenced on 16 October 1997 by Crispin J. Each received a determinate sentence of 18 years imprisonment with a non-parole period of

(Footnote continues on next page)

adhere to their promise of cooperation[176]. They were substantially in control of the direction of the conversation with the appellant. They would have been more alert at its beginning than the appellant and Ms McFie, each of whom had been awakened in alarming circumstances.

98 Nevertheless, when full allowance is made for possible misinterpretation of the words said, and not said, by the appellant, I agree with the joint reasons that it is impossible to reconcile the recorded conversation with complete innocence on the part of the appellant of any offence. The references by the accomplices to the appellant in terms of familiarity which he did not rebuff suggest, in the context, earlier involvement in a common enterprise. The reference to "murdering this woman" is a clear allusion to the death of the appellant's wife. Instead of reacting with horror, indignation and anger as one might expect an innocent person to do in such circumstances, the appellant entered into a discussion about paying "definitely some" moneys owing and promised that he would ring Mr Steer later in the day. These do not appear to be the words of a completely innocent victim of a murderous attack on his spouse. There is no way to twist them that makes them so. The appellant's explanation that he intended to report to police what had been said and done rings hollow when measured against the recorded reactions.

An interpretation consistent with innocence of murder

99 The only interpretation of the recorded words and silences of the appellant, consistent with his being not guilty of the offence of which he was convicted, involves the hypothesis that the death of the deceased was conceived, planned and executed by Ms McFie, with the aid of the accomplices but with neither the knowledge nor the assistance of the appellant before the event.

100 Such a hypothesis is by no means inconceivable. Fiction is full of lovers who dispose of their rivals, confronting survivors with the horrible necessity to embrace complicity after the event out of shared love and an inability to turn back the clock. However, that was not the case which the appellant primarily presented in his defence after he was charged. Had it been so, and had it been accepted, he might have been charged with a different offence, such as being an accessory after the fact of murder. As the Full Court noted, almost to the end of his trial, the appellant's defence was conducted on the basis that neither he nor

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12 years. But for their cooperation with the authorities, his Honour indicated that he would have imposed in each case a sentence of 27 years imprisonment with a non-parole period of 18 years.

176 *Crimes Act* 1900 (ACT), s 449.

Ms McFie had been in any way involved in the murder of the deceased[177]. Before this Court, in answer to questions (and rather unenthusiastically I thought) counsel for the appellant embraced the hypothesis that the accomplices had acted on their own or possibly in combination with Ms McFie. By inference, this is an argument which, granted a retrial, the appellant would wish to advance before a second jury.

The fundamental purpose of criminal appeals

101 The purpose of the scrutiny by an appellate court in a challenge to a conviction (and in the consequent consideration of whether a miscarriage of justice has occurred) is to afford a safeguard against a real possibility, that our courts would regard as intolerable, that a convicted person, innocent of an offence, should suffer criminal punishment. Where, as here, the punishment is prolonged imprisonment, reflecting the nature of the crime of which the appellant has been convicted, it is essential, in my view, for the appellate court to be vigilant against a risk of a wrongful conviction.

102 The burden of any such wrongful conviction falls upon the appellant personally. That is why, ultimately, mistakes of tactics, erroneous decisions or forensic choices and false testimony cannot stand in the way of an order for retrial in a case where an established misdirection is proved unless it could not reasonably be supposed to have influenced the result. In applying that standard, the focus of appellate attention is not upon how the appellant or his representatives played the forensic game in the trial at which he was convicted. It is upon whether a retrial can be dispensed with, notwithstanding an established legal error, because the appellate court properly exercises its power ("may … set aside the verdict"; "may … grant a new trial") to uphold or dismiss the appeal.

103 Sometimes in a criminal trial a mistaken direction is so significant that the "trial" is regarded as "fundamentally flawed". The "irregularity" in such a case is treated as sufficiently serious to warrant the conclusion that the accused has not had a proper "trial" at all. In such an event, without considering other matters, there will be judged to have been a substantial miscarriage of justice[178]. The present is not a case of that kind.

104 If I considered that there was a real possibility that the appellant had suffered a wrongful conviction of murder, I would not be justified in denying

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177 *Conway* (2000) 98 FCR 204 at 271 [272].

178 *Wilde v The Queen* (1988) 164 CLR 365 at 373; *R v Hildebrandt* (1963) 81 WN (Pt 1) (NSW) 143 at 148; *R v Henderson* [1966] VR 41 at 43; *Couper* (1985) 18 A Crim R 1 at 7-8.

him an order allowing the appeal because, at a second trial, he might present his case in a somewhat different way. The "miscarriage of justice" with which an appellate court is concerned in a criminal appeal is addressed to matters of substance and not just procedure. Courts of criminal appeal, and ultimately this Court, must be guardians against wrongful convictions of persons accused of crimes. Recent notorious cases of convictions, later shown by scientific and other evidence to have been mistaken[179], demand rejection of an appellate principle which is complacent and formalistic. Courts of criminal appeal are not mere referees of a game that can only be played once in accordance with a single game plan. Practical considerations ordinarily necessitate holding parties to the way in which they conducted their trial, normally through the lawyers who represent them[180]. But an appellate court should not allow that principle to divert it from its fundamental responsibility. There will be cases where there is no procedural injustice (because of the way the trial was conducted) and yet a substantive injustice is shown (because a real possibility exists that the prisoner is innocent of the crime in respect of which a conviction has been entered).

105 Nothing in the recorded conversation involving the appellant is inconsistent with the hypothesis that he only became involved in the payment of the accomplices *after* the murder of the deceased, for example out of love for, or a sense of obligation to, Ms McFie. At no time in the recorded conversation does the appellant admit to personal involvement in the murder. He is simply concerned in the payment. No accusation of direct involvement in the acts leading up to the death of the deceased is put to the appellant in the conversation. He is merely told of the police suspicions. In short, the conversation could be compatible with the proposition that Ms McFie conceived, planned and arranged the murder by the accomplices, involving the appellant only after the event to pay, or help to pay, the fee that she had promised them.

106 Consistent with the view that I take of the appellate powers of the Federal Court and of the care that the law exercises in the use of post-offence conduct as proof of complicity in an offence, it is not therefore sufficient for me to say that the appellant should not have a second chance to contest his guilt of murder in a way different from that presented at his trial[181]. Because the appellant has established a material error in the directions given to the jury by the trial judge, a new trial should be ordered unless an affirmative conclusion can be reached that

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179 eg *R v Button* [2001] QCA 133 per Williams JA, White and Holmes JJ concurring.

180 *Rowe v Australian United Steam Navigation Co Ltd* (1909) 9 CLR 1 at 24; *R v Birks* (1990) 19 NSWLR 677 at 683-684.

181 cf joint reasons at [63].

the misdirection "could not reasonably be supposed to have influenced the result"[182]. Is that the conclusion that this Court should reach in this appeal?

Scrutiny against the risk of wrongful conviction

107 To answer that question, I must turn to consider the evidence against the appellant, beyond the recorded conversation, to ascertain whether, in combination, it establishes that he was not merely an accessory after the fact of the crimes of Ms McFie and the accomplices, but was an active participant in the plan that led to his wife's death. As with most contested cases of murder where there is no eyewitness testimony or reliable confession by the accused, the prosecution case depended upon circumstantial evidence tending to link the appellant to the crime. None of the elements, alone, establishes the appellant's guilt. However, in combination they achieve that result.

108 By August 1996, the appellant and Ms McFie had commenced a sexual and emotional relationship which continued. By mid-February 1997, telephone conversations recorded by Ms McFie demonstrated the very close bond between the appellant and Ms McFie. This evidence also supported the motivation of the appellant to be free of the deceased. A second element in that motivation was the clear proof of the extremely unhappy relationship between the appellant and the deceased over a considerable period. On a number of occasions, police had been called to intervene in their matrimonial disputes. In 1996, the appellant had at first left his wife after his relationship with Ms McFie had commenced. Later, he returned to the matrimonial home. In March 1997 he again left his home, taking his infant son in April 1997 to live with Ms McFie, ostensibly as a baby sitter. Then, when an interim order of the Family Court awarded custody of the son to the deceased, the appellant moved into Ms McFie's flat. At this point, the relationship between the appellant and the deceased became extremely fractious. The evidence showed that the appellant was very upset with the ruling of the Family Court. For her part, the deceased had threatened to destroy the appellant's career in the police force and to take the house from him.

109 Portions of the recorded telephone conversations between the appellant and Ms McFie showed that they had acted in tandem in their dealings with the deceased in relation to the custody proceedings concerning the son of the appellant and the deceased. Whilst Ms McFie pretended to having a sympathetic relationship with the deceased, it is clear from the recorded conversations that she used that relationship as a tool to assist the appellant in the custody battle. She reported her conversations with the deceased back to the appellant, who was well aware of the deceit.

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182 *Stokes v The Queen* (1960) 105 CLR 279 at 284-285.

110 There was evidence of the parallel involvement of the appellant and Ms McFie in relation to the possession of heroin. On 26 April 1997, the appellant produced two foils containing traces of heroin which he claimed he had found at the deceased's home. He presented these to the police drug register. Meanwhile, the deceased had made a complaint to three people on 25 April 1997 and to a police officer on 27 April 1997 that the appellant had tried to poison her coffee on 25 April 1997. She kept a diary and incriminating entries in it were admitted at the trial recording her belief that the appellant had attempted to drug her. The appellant's provision of the foils to police was consistent with an endeavour on his part to establish a record that the deceased was a heroin user and thus prone to the risk of overdose.

111 Pathology and toxicology tests indicated that the deceased died on 3 May 1997 of a massive overdose of heroin administered by injection. There were no signs of previous intravenous use of drugs on her part. The signs were inconsistent with an inference that her death was the result of suicide. The circumstances were consistent with the later confession by Mr Williams of the manner in which he had administered a syringe of heroin to the deceased whilst Mr Steer had held his hand over her mouth in case she screamed. The heroin supplied at Mr Williams' flat, and allegedly used by the appellant in the deceased's coffee on 25 April 1997, was contained in foils similar in appearance to those handed to the police by the appellant.

112 Whilst it is theoretically possible that the appellant did not know what Ms McFie was up to, and was completely innocent of her dealings with the accomplices, the realities of their intimate relationship, objectively proved, strongly suggest the opposite. When to these realities are added the post-offence conduct of the appellant which was consistent with his prior association with the accomplices and his full involvement with Ms McFie in their payment, the possibility of his being an innocent pawn in a project exclusively of Ms McFie's devising and execution can safely be put out of account.

113 The appellant's failure, virtually until the end of his trial, to advance the case that he was no more than a post-offence supporter of Ms McFie is also compatible with the foregoing conclusion. Although love and loyalty can sometimes cause blindness to reality, by the time the appellant, an experienced police officer, was facing a trial for murder, he would have been well aware of where his personal interests lay. His delay in conducting a "cut throat" defence[183], so as to distance himself from Ms McFie, suggests an appreciation that this would have been unconvincing because of the circumstantial evidence that bound them together. Such involvement also confirmed the testimony of the accomplices.

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183 *Conway* (2000) 98 FCR 204 at 271 [272].

Conclusion and orders

114 By a different route, I therefore come to the same conclusion as that expressed in the joint reasons. There was a material misdirection of the jury at the appellant's trial. On the face of things, this established an error in the trial. In terms of the appellate powers of the Federal Court expressed in its Act – the only law applicable in this respect – such error entitled the appellant to an order for a retrial unless the proper exercise of the Federal Court's appellate powers in the circumstances justified it refusing to "set aside the verdict" and to "grant a new trial". Relevantly, such relief might be refused where the established error could not reasonably have influenced the result of the appellant's trial. An analysis of the entirety of the evidence shows how a compelling prosecution case was eventually constructed against the appellant. Judged against this case, the demonstrated error in the trial was not material. It could not reasonably be supposed to have influenced the result.

115 The appellant's verbal responses to the intrusion of his co-offenders were not consistent with his complete innocence of involvement in the financial and other dealings that led to the murder of the deceased. If this recorded conversation is given weight, the only hypothesis compatible with the appellant's innocence of murder was a proposition that the murder was planned by Ms McFie who involved the appellant only after the deceased was out of the way. However, that hypothesis is not compatible with the objective evidence linking the appellant throughout to the actions of Ms McFie. These conclusions therefore sustain the decision that the Federal Court reached and the judgment that it entered. The appeal should be dismissed.