HIGH COURT OF AUSTRALIA

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

DAVID HAROLD EASTMAN APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS OF THE AUSTRALIAN CAPITAL TERRITORY & ORS RESPONDENTS

Eastman v Director of Public Prosecutions (ACT)
[2003] HCA 28
28 May 2003
C11/2002

ORDER

1. *Appeal allowed.*

2. *Set aside orders 4 and 5 made by the Full Court of the Federal Court on 3 July 2002 and, in lieu thereof, order that the appeal from the orders of the Supreme Court of the Australian Capital Territory in proceeding No SC 149 of 2002 dated 3 May 2002 be dismissed.*

3. *The first respondent to pay the costs of the appellant in this Court.*

On appeal from the Federal Court of Australia

Representation:

D Grace QC with M E Marich for the appellant (instructed by the appellant)

D A Buchanan SC with S J Gageler SC for the first respondent (instructed by the Director of Public Prosecutions (ACT))

J D Harris SC for the second respondent (instructed by Kevin Holmes)

P A Johnson SC with D J C Mossop for the third respondent (instructed by ACT Government Solicitor)

J D Harris SC for the fourth respondent (instructed by the Registrar, ACT Supreme Court)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Eastman v Director of Public Prosecutions (ACT)

Administrative law – Injunction and declaration sought to prevent magistrate from conducting an inquiry under s 475 *Crimes Act* 1900 (ACT) – Whether Supreme Court judge had power to instigate such an inquiry in the circumstances – Whether a doubt as to an accused person's fitness to plead is a doubt as to the "guilt" of that person – Whether "guilt" means "guilt as established by the conviction" or only the occurrence of the acts or omissions that constitute the offence – Whether a doubt as to the fitness to plead of an accused person is relevant to such an inquiry.

Criminal law – Inquiry after conviction – Inquiry under s 475 *Crimes Act* 1900 (ACT) instituted – Whether Supreme Court judge had power to instigate such an inquiry in the circumstances – Whether a doubt as to an accused person's fitness to plead is a doubt as to the "guilt" of that person – Whether "guilt" means "guilt as established by the conviction" or only the occurrence of the acts or omissions that constitute the offence – Whether a doubt as to the fitness to plead of an accused person is relevant to such an inquiry.

Statutes – Interpretation – Provision for inquiry into a suggested doubt or question as to the guilt of a person convicted of a criminal offence – Construction of words of legislation so that all integers operate congruously and harmoniously – Construction by reference to words included and omitted – Construction by reference to legal history of Australian and English progenitors to the subject provision – Construction to give effect to a beneficial, remedial provision – Adoption of a purposive approach to statutory construction.

Words and phrases – "guilt", "doubt or question".

Crimes Act 1900 (ACT), s 475.
Administrative Decisions (Judicial Review) Act 1989 (ACT).

1 GLEESON CJ. I have had the benefit of reading in draft the judgment of Heydon J. I agree with the orders proposed by his Honour, and with his reasons.

2 McHUGH J. Section 475 of the *Crimes Act* 1900 (ACT)[1] provided that, where a person has been convicted of a crime and "any doubt or question arises as to his or her guilt", a judge of the Supreme Court of the Australian Capital Territory could direct a magistrate to examine all persons likely to give material information on the matter. The question in this appeal is whether s 475 authorised a direction to a magistrate when a question arose as to whether the appellant, David Harold Eastman, was fit to plead to the charge of murder upon which he was convicted.

3 The appeal is brought against an order of the Full Court of the Federal Court of Australia holding that s 475 did not authorise a direction "to summon and examine on oath all persons likely to give material information on the matter of the fitness to plead of David Harold Eastman". A majority of that Court (Whitlam and Gyles JJ, Madgwick J dissenting) held that "a doubt or question restricted to fitness of the accused to plead is not a doubt or question as to the guilt of that person."[2] That conclusion reflected the argument of the first respondent, the Director of Public Prosecutions of the Australian Capital Territory, that the term "guilt" in s 475 referred to an objective state that existed anterior to the conviction of the prisoner. On that hypothesis, a doubt about the prisoner's fitness to plead to the charge was not relevant to whether the prisoner was in fact guilty of the crime for which he or she was convicted.

---

1 Section 475 is now repealed but continues to apply to this case. Relevantly it provided:

> "(1) Whenever, after the conviction of a prisoner, any doubt or question arises as to his or her guilt, or any mitigating circumstance in the case, or any portion of the evidence therein, the Executive, on the petition of the prisoner, or some person on his or her behalf, representing such doubt or question, or a judge of the Supreme Court of his or her own motion, may direct any magistrate to, and such magistrate may, summon and examine on oath all persons likely to give material information on the matter suggested.
>
> ...
>
> (4) Every deposition taken under this section shall be stated in the commencement to have been so taken, and in reference to what case, and in pursuance of whose direction, mentioning the date thereof, and shall be transmitted by the magistrate, before whom the same was taken, as soon as shall be practicable, to the Executive if the inquiry was directed by him or her, or to the judge directing the inquiry, and the matter shall be disposed of, as to the Executive, on the report of such judge, or otherwise, shall appear to be just."

2 *Director of Public Prosecutions (ACT) v Eastman* (2002) 118 FCR 360 at 378 [47].

4 In my opinion, s 475 was not so limited. It authorised a direction to summon witnesses and to take evidence whenever there was evidence or information that might raise a doubt as to whether the prisoner was rightly convicted according to law or fact.

Statement of the case

5 In November 1995 in the Supreme Court of the Australian Capital Territory, a jury convicted David Harold Eastman of murdering Colin Stanley Winchester, an Assistant Police Commissioner. The Full Court of the Federal Court rejected an appeal by Eastman against his conviction[3]. In May 2000, this Court dismissed an appeal by Eastman against the order of the Full Court of the Federal Court[4]. The following month Eastman forwarded a "Petition" to the Registrar of the Supreme Court, addressed to the Chief Justice of that Court, seeking a judicial inquiry under s 475 of the *Crimes Act* 1900. The contents of the petition indicated that one matter on which Eastman wanted a judicial inquiry concerned his fitness to plead to the charge of murder. That was not an issue that he had raised at his trial. Initially, Chief Justice Miles rejected the application. But, on 7 August 2001 after a hearing, the learned Chief Justice acceded to the petition. He said that he proposed "to direct the Chief Magistrate, or a Magistrate nominated by him, to summon and examine on oath all persons likely to give material information on the matter of the fitness to plead of David Harold Eastman".

6 In March 2002, the Director commenced two actions in the Supreme Court. The first sought (1) a declaration that the inquiry Miles CJ had ordered was outside the power conferred by s 475 and (2) an injunction to restrain the second respondent, a magistrate, from conducting it. The second action was brought under the *Administrative Decisions (Judicial Review) Act* 1989 (ACT). Those proceedings sought an order quashing the decision of the Chief Justice to direct the inquiry. In May 2002, Gray J dismissed both proceedings[5]. The Director then appealed to the Full Court of the Federal Court. As I have indicated, a majority of that Court allowed the appeal[6]. In November 2002, this Court granted special leave to appeal against the orders of the Full Court.

---

3 *Eastman v The Queen* (1997) 76 FCR 9.

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

5 *Director of Public Prosecutions (ACT) v Eastman* (2002) 130 A Crim R 588.

6 *Director of Public Prosecutions (ACT) v Eastman* (2002) 118 FCR 360.

The construction of s 475

7 The first question in the appeal is whether the term "guilt" in s 475 referred to a state that existed anterior to the conviction of the prisoner, as the Director contends and as the Full Court of the Federal Court found. For once, neither history nor case law throws much light on the question. The terms of the section and the state of the law at the time do, however, throw some light on the mischief at which the section was aimed and what its purpose was.

8 Section 475 was enacted as part of the law of the Australian Capital Territory by s 6 of the *Seat of Government Acceptance Act* 1909 (Cth). It was taken directly from s 475 of the *Crimes Act* 1900 (NSW) which in turn re-enacted s 383 of the *Criminal Law Amendment Act* 1883 (NSW). In 1883 and 1900, there was no common form criminal appeal statute in New South Wales. Because that was so, the circumstances in which a conviction for felony could be challenged for factual errors were limited[7]. They became even more limited after the Judicial Committee held in 1867 that the Supreme Court of New South Wales had no power to order a new trial of a charge of felony[8]. Against that background, s 475 can be seen as intended to authorise the Executive government to inform itself of possible miscarriages of justice resulting from deficiencies in the evidence adduced at the trial. The section left it to the Executive government to determine whether any actual or suspected miscarriages of justice had occurred. It also left to the discretion of the Executive government what steps should be taken to remedy any actual or suspected miscarriage of justice. The remedies were of course limited and confined to commuting death sentences, granting free and conditional pardons and releasing prisoners on licence.

9 However, the power conferred by s 475 did not extend to investigating every possible miscarriage of justice. It did not, for example, extend to doubts or questions concerning any element of the trial process that might have affected the conviction of the prisoner. That seems to follow inevitably from the direction to the magistrate to "summon and examine on oath all persons likely to give material information on the matter suggested." The section assumed that evidence might exist that threw doubt on or questioned the prisoner's guilt or culpability. If such evidence might exist, the section authorised the Executive government or a Supreme Court judge to direct a magistrate to investigate the existence and strength of the evidence by summoning persons who might have information concerning the matter that gave rise to the question or doubt. Thus, the section would not have authorised a direction concerning the directions of the trial judge. Those directions were not "matters" upon which it was likely that

---

7 See *Conway v The Queen* (2002) 209 CLR 203 at 208-213 [7]-[16].

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

any person could "give material information". That does not mean that, in reporting on whether there was such a doubt or question, the judge who directed the calling of witnesses could not evaluate the effect of the inquiry evidence by reference to the strengths or weaknesses of the trial judge's directions[9]. But that is a different matter from ordering an inquiry into the judge's directions. It does not follow, however, that the Director is correct in contending that in s 475 "guilt" referred merely to the acts and omissions of the prisoner that constituted the offence for which that person was convicted. That is to say, it does not necessarily follow from the assumption that the section made about the existence of evidence that its "guilt" limb was concerned only with doubts and questions relating to the existence of the acts or omissions and state of mind that constituted the offence.

10 Even when the primary facts are admitted, the "guilt" of an accused person depends on the law that has to be applied to those facts. Without applying the law to the facts as found or admitted, "guilt" in a legal sense is a meaningless concept. Whether the accused is guilty of murder or, alternatively, manslaughter, rape or, alternatively, indecent assault, burglary or, alternatively, housebreaking depends on the law that has to be applied to the primary facts. In some cases, the "guilt" of the prisoner may even depend on the assessment of a jury as to whether the conduct of the prisoner was reasonable in the circumstances. If the prisoner pleads self-defence to a charge of murder, for example, whether that person is guilty or not guilty of murder or guilty or not guilty of manslaughter depends on the assessment the jury makes of the reasonable grounds for the prisoner's alleged response. In some cases, "guilt" may be found only after the jury determines the nature of the office or employment of the prisoner or the nature of his or her relationship with other persons. Whether a person is guilty of fraudulent misappropriation, for example, may depend on whether the relationship between the prisoner and another person is that of trustee and beneficiary or debtor and creditor. Whether a person is guilty of embezzlement will depend on a finding that at the relevant time the prisoner was a clerk or servant of the person whose money has been taken. In other cases, "guilt" may depend on the acts, intentions or mental states of persons other than the accused. Rape and indecent assault depend on the victim's absence of consent. Larceny, embezzlement and misappropriation depend on whether the owner of the property consented to the taking by the accused. Larceny by finding depends on whether the "owner" of the property has or has not abandoned possession of it.

---

9 That was the view of Wood J in his *Report of the Inquiry Held Under Section 475 of the Crimes Act, 1900 into the Convictions of Timothy Edward Anderson, Paul Shaun Alister, and Ross Anthony Dunn at Central Criminal Court, Sydney, on 1st August, 1979* (1985) at 63-64, 67.

11 In all these cases, it is fanciful to speak of "guilt" as being an entity that is independent of the jury's verdict. It is the conviction recording the jury's verdict that establishes the "guilt" of the prisoner. Like Bishop Berkeley who "maintained that material objects only exist through being perceived"[10], the lawyer maintains that "guilt" exists in a criminal law context only when it is perceived as the concomitant of a conviction. To assert otherwise is to deny the presumption of innocence, a presumption that operates until the entry of a conviction rebuts it.

12 Three other matters indicate that "guilt" in s 475 was concerned with a finding of "guilt" by a judge, magistrate or jury and not merely the acts or omissions that constituted the offence for which the prisoner was convicted.

13 First, the context of "guilt" was a judicial setting. Section 475 was concerned with guilt only "after the conviction" in a court of law. The power conferred by the section was triggered only when any doubt or question arose as to the prisoner's guilt "after the conviction". This context suggests that the doubt or question concerned the guilt of the prisoner as established by the conviction.

14 Second, if a judge had directed the taking of evidence, by necessary implication the judge had a duty to make a report on the evidence taken by the magistrate and to transmit it to the Executive government. By necessary implication, the judge's report would have to discuss the effect of the evidence and whether it showed that there was any doubt or question concerning the prisoner's "guilt". In determining whether there was any such doubt or question, the judge could not avoid examining the legal effect of both the evidence at the trial and the evidence revealed by the s 475 examination. This consideration also indicates that the "guilt" of which the section spoke was guilt established by conviction according to law.

15 Third, the other two limbs of s 475 are concerned with deficiencies in the evidence adduced at the trial. They are not concerned – or at all events not necessarily concerned – with the anterior acts or omissions that constitute the offence. As well as authorising a direction when any doubt or question arises as to (a) the prisoner's guilt, s 475 authorises a direction where any doubt or question arises as to (b) any mitigating circumstances of the case and (c) any portion of the evidence.

16 Mitigating circumstances of the case may cover – indeed ordinarily would cover – matters other than the acts or omissions that constitute the offence. In most cases, that limb would be concerned with evidence that could not be or was not given at the trial. In a murder case, for example, the mitigating

---

10 Russell, *History of Western Philosophy*, (1946) at 673.

circumstances limb might cover matters that were legally irrelevant to the guilt or innocence of that accused. Take a case where a woman was convicted of murder but claimed that, although she was a victim of the "battered wives syndrome", the law did not permit her to raise the defence of provocation. The "mitigating circumstance" limb of s 475 was wide enough to authorise a direction to take evidence concerning the claim. Similarly, that limb would have authorised a direction to take evidence concerning the diminished responsibility of the accused in the days before the law permitted a jury to use the diminished responsibility of the accused to find manslaughter rather than murder. And there is no reason why such a direction could not have been given after the law recognised diminished responsibility as an ameliorating factor, if it appeared that the accused might have suffered from that condition, whether or not that "defence" was raised at the trial. It would be surprising if the section permitted an inquiry of that kind but not an inquiry as to whether the accused was fit to plead to the charge. The surprise is increased by the realisation that s 475 obviously authorised an inquiry as to whether the accused was sane when he or she committed the crime. Perhaps more importantly, this limb was concerned with evidence that was not or could not have been adduced at the trial.

17 The "any portion of the evidence" limb was also not confined to the acts and omissions of the accused. Its focus was evidence given at the trial. We know as a matter of history that that limb was placed in the section's predecessor to permit an inquiry into the background and character of persons other than the convicted prisoner. In the Second Reading Speech on the Bill containing the clause that became s 383, the Minister said[11]:

> "Clause 383 contains an important provision. In cases of capital offence, especially where the victim is a female, representations are frequently made to the Government – after the person charged with the offence has been found guilty – which reflect on the character, the honor, or the chastity of the prosecutrix, or some of the witnesses on her behalf. As the law stands at present the Government have not the power to institute inquiries on oath to ascertain whether the imputations or reflections *are or are not well-founded* ...
>
> [Clause 383] appears to me to afford much more solid ground on which the Executive may proceed when they have to deal with capital cases *where doubts are thrown on the character of persons connected with them*." (emphasis added)

---

11 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 22 February 1883 at 618. See *Varley v Attorney-General in and for the State of New South Wales* (1987) 8 NSWLR 30 at 45.

18 This passage suggests that the "portion of the evidence" limb had two aims: (1) clearing the reputation or reputations of the deceased and witnesses at the trial, and (2) investigating whether the conviction of the accused had been obtained by the evidence of unsavoury or unreliable witnesses. It shows conclusively that this limb of s 475 was concerned with what happened at the trial. Together with the "mitigating circumstances" limb, it suggests that s 475 as a whole was concerned with what happened at the trial and with new evidence that suggests the prisoner should not have been convicted or that his or her culpability is less than might appear from the conviction.

19 It is true, as the Director pointed out, that the term "guilt" is often used to mean "state of guilt". But used in that sense, "guilt" usually refers to culpable or morally reprehensible conduct that is deserving of punishment, penalty or social condemnation. It is not necessarily synonymous with the legal quality of the acts, omissions and state of mind that together constitute a particular criminal offence. In support of his argument that s 475 was not concerned with a finding of "guilt", the Director pointed out that lawyers and others refer to "consciousness of guilt" and "admission of guilt", concepts that exist independently of any finding of guilt by a judge, magistrate or jury. But these examples of "guilt" are not really helpful. They refer to the state of mind of the accused. Such states of mind constitute evidence that a jury can use to infer that the accused is guilty of the offence with which he or she is charged. Sometimes those states of mind refer to the *actus reus* of the offence. Sometimes they refer to the *mens rea* of the offence. Sometimes, particularly in the case of simple criminal offences, they refer to both the *actus reus* and the *mens rea* of the offence. But the conduct recognised or admitted by those states of mind is not always or necessarily synonymous with the legal quality of the acts and omissions that constitute the elements of any particular criminal offence. A person may believe that he or she is "guilty" of a breach of the law when in fact no law has been breached. In the context of s 475, it was the legal quality of the acts and omissions of the prisoner that identified the "guilt" of the prisoner, not the prisoner's or other persons' beliefs as to his or her guilt.

20 That "guilt" in s 475 was concerned with the legal quality of the prisoner's acts and omissions is not necessarily destructive of the Director's arguments. It is not necessarily inconsistent with his argument, strenuously maintained at all levels of these proceedings, that "guilt" in s 475 was concerned only with the prisoner having committed the acts or made the omissions that constitute the offence. But once the legal quality of those acts or omissions is recognised as a decisive consideration in determining the "guilt" of the prisoner, it is difficult to accept that "guilt" in s 475 was referring to anything but a curial determination of "guilt".

21 In my opinion, the reference to "guilt" in s 475 was not concerned only with the acts or omissions that constituted the offence for which the prisoner was convicted. It authorised a direction to summon witnesses and to take evidence

whenever there was evidence or information that might raise a doubt as to whether the prisoner was rightly convicted according to law or fact. That is to say, the "guilt" of which the section spoke was "guilt" established by conviction.

22 This construction of s 475 also gives effect to the purpose of the section. That purpose was to provide machinery for supplementing the evidence at the trial so that the Executive government could determine whether a miscarriage of justice had or might have occurred or the culpability of the prisoner was less than it seemed. The purposive approach is the modern approach to statutory construction[12]. Wherever possible, a statute should be given a construction that promotes its purpose. To construe s 475 as the Director contends is not directly contrary to its purpose. But it has the effect of denying it an operation that its purpose indicates that it should have.

23 Accordingly, in my opinion, in s 475 "guilt" meant "guilt" established by a conviction.

Section 475 authorises an inquiry into the fitness of the prisoner to plead to the charge upon which he or she was convicted

24 The second question in the appeal is whether s 475 authorises an inquiry into the fitness of a prisoner to plead to the charge upon which he or she was convicted. It needs no argument to show that, if a prisoner is unfit to plead to the charge, he or she will not be able to defend himself or herself adequately. Such a person is not only incapable of understanding the nature of the charge or the process by which it is proved but will be incapable of instructing legal representatives or of following the evidence. As a result, a doubt or question concerning the guilt of a prisoner must inevitably arise if that prisoner was unfit to plead to the charge upon which he or she was convicted.

25 The Director contended, however, that the legislature in enacting s 475 could not have intended issues concerning fitness to plead to be the subject of inquiry under that section and its predecessors. The Director pointed out that the Executive government has no power to quash a conviction or order a new trial, the only remedies that justly deal with a case of unfitness to plead. The only remedies realistically available would be either to release the prisoner or to grant a free pardon, courses of action that are hardly appropriate where the prisoner had been unfit to plead to the indictment. No doubt the considerations to which the Director refers pose considerable difficulties for the Executive government if it is ultimately determined that the prisoner was unfit to plead to the charge. But these practical considerations do not bear on the construction of the section. In

---

12 *Bropho v Western Australia* (1990) 171 CLR 1 at 20; *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 421-424.

any event, they ignore the possibility that the Executive may persuade the legislature to introduce legislation quashing the conviction and permitting a new trial when the prisoner was fit to plead.

Order

26 The appeal should be allowed.

Postscript

27 On 28 March 2003 after I had circulated my reasons in this appeal to other members of the Court, the appellant informed the Registry that he had withdrawn his instructions to the Senior Counsel who had represented him on the hearing of the appeal. He also forwarded to the Court a seven page document that he described as "Appellant's Supplementary Submissions".

28 I have had no regard to these "submissions". They should not have been forwarded to the Court. The Rules of the Court gave no authority for them to be forwarded. Nor did the Court give leave to the appellant to file them. If leave had been sought, I would have refused it. If the Court gave leave, it would have to give leave to the other parties in the appeal to file replies – with consequent delay in the business of the Court.

29 Parties to matters before the Court need to understand that, once a hearing in the Court has concluded, only in very exceptional circumstances, if at all, will the Court later give leave to a party to supplement submissions. Parties have a legal right to present their arguments at the hearing. If a new point arises at the hearing, the Court will usually give leave to the parties to file further written submissions within a short period of the hearing – ordinarily seven to fourteen days. But a party has no legal right to continue to put submissions to the Court after the hearing. In so far as the rules of natural justice require that a party be given an opportunity to put his or her case, that opportunity is given at the hearing.

30 This is not the first time that this Court has had to emphasise that the hearing is the time and place to present arguments. In *Carr v Finance Corporation of Australia Ltd [No 1]*[13] Mason J said:

> "The material was submitted without leave having been given by the Court. The impression, unfortunately abroad, that parties may file supplementary written material after the conclusion of oral argument, without leave having been given beforehand, is quite misconceived. We

---

13 (1981) 147 CLR 246 at 258.

> have to say once again, firmly and clearly, that the hearing is the time and place to present argument, whether it be wholly oral or oral argument supplemented by written submissions."

31 Once the hearing has concluded, the workload of the Court makes it impossible for the Court to give leave to file further submissions – with all the attendant delay in the Court's business by a fresh round of submissions. Efficiency requires that the despatch of the Court's business not be delayed by further submissions reflecting the afterthoughts of a party or – as perhaps is the case in this appeal – some dissatisfaction with the arguments of the party's counsel.

32 GUMMOW J. I agree with the reasons for judgment of McHugh J and of Heydon J.

33 The appeal should be allowed and consequential orders made as proposed by Heydon J.

34 KIRBY J. I agree in the orders proposed by Heydon J and with his reasons.

35 HAYNE J. I agree with Heydon J.

36 CALLINAN J. I have read the judgment of Heydon J. I agree with his Honour's reasons and conclusions.

HEYDON J.

Background: the earlier proceedings

37 On 3 November 1995, after a trial lasting five and a half months in the Supreme Court of the Australian Capital Territory ("the Territory"), a jury convicted the appellant of murdering Colin Winchester, an Assistant Commissioner of the Australian Federal Police. The appellant was represented for parts of the trial and unrepresented for other parts of it. The majority of the Full Federal Court from whose orders this appeal is brought said that during the trial the appellant exhibited "erratic and unusual behaviour"[14]. However, the issue of his fitness to plead was not raised during the trial – not by the appellant, nor by his legal representatives, nor by counsel for the Crown, nor by the trial judge. An appeal by the appellant against his conviction to the Full Court of the Federal Court of Australia was dismissed[15]. The appellant was represented during that appeal by senior and junior counsel experienced in the practice of criminal law. They argued numerous grounds of appeal. However, they took no point about the appellant's fitness to plead, and, according to the majority of the Full Court from whose orders this appeal is brought, expressly declined to do so[16].

38 The appellant then applied for special leave to appeal to this Court from the dismissal of his appeal by the Full Federal Court. He did not re-agitate the grounds which had been rejected in the Full Court. Rather he sought to tender further evidence to this Court on the question of his fitness to plead. He also argued that the Full Court, by reason of the material that was before it, ought, of its own motion, to have inquired into the issue of his fitness to plead.

39 On 25 May 2000, this Court decided two points. First, it held that, consistently with prior authority construing s 73 of the Constitution, the Court had no power to receive the further evidence. Secondly, it rejected the contention that the Full Court erred in failing to consider fitness to plead[17]. The former outcome was supported by Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; Kirby and Callinan JJ dissented on that point. The latter outcome

---

14 *Director of Public Prosecutions (ACT) v Eastman* (2002) 118 FCR 360 at 362 [3].

15 *Eastman v The Queen* (1997) 76 FCR 9.

16 *Director of Public Prosecutions (ACT) v Eastman* (2002) 118 FCR 360 at 363 [4].

17 *Eastman v The Queen* (2000) 203 CLR 1. In earlier proceedings not relevant to the present appeal, this Court rejected a challenge to the legality of the trial based on the contention that the trial judge had not been validly appointed: *Re Governor, Goulburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322.

was supported by Gleeson CJ, McHugh, Gummow and Kirby JJ; Gaudron, Hayne and Callinan JJ dissented on that point.

The Petition

40 On 9 June 2000 the appellant sent a "Petition" to the Registrar of the Supreme Court of the Australian Capital Territory for dispatch to the Chief Justice. In that document he applied for a judicial inquiry under s 475 of the *Crimes Act* 1900 (ACT) ("the Crimes Act"). That document stated:

> "A 4-3 majority of the High Court (Gaudron, Kirby, Hayne and Callinan) considered that the negative outcome of my appeal was 'CLEARLY UNSATISFACTORY' (see pages 26, 100, 115 and 147), and specific reference was made to a Judicial Inquiry as one of the means of repairing this defect (see page 100)."

41 The references to those pages are apparently intended to be references to the following passages.

42 Gaudron J, who was in the majority on the first point and in the minority on the second, said[18]:

> "Because the material before the Federal Court raised the possibility that the applicant might not have been fit to plead at the time of his trial, that court, of its own initiative, should have raised the issue of the applicant's fitness to plead and thereafter proceeded to take evidence and to determine whether, at the time of his trial, there was a question as to his fitness to plead.
>
> Special leave should be granted so far as concerns the question whether there was material before the Federal Court raising an issue as to the applicant's fitness to plead and the appeal treated as instituted instanter. The appeal should be allowed, the order of the Federal Court dismissing the applicant's appeal should be set aside and the matter remitted to that court for further hearing and determination as to whether there was a question as to the applicant's fitness to plead at the time of his trial."

43 Kirby J, who was in the minority on the first point but in the majority on the second, said[19]:

---

18 *Eastman v The Queen* (2000) 203 CLR 1 at 31 [99]-[100].

19 *Eastman v The Queen* (2000) 203 CLR 1 at 96 [287].

> "This outcome is clearly unsatisfactory. In this case, there are other remedies that may permit the repair of the possible injustice to the applicant which the result entails. However, such remedies lie outside the appellate system of the Australian Judicature. Essentially, they belong to the Executive Government. By reason of the constitutional holding that is upheld in this case, the Australian judiciary is disclosed as incapable, even in a matter still before it in its highest court, to repair what may be a fundamental error or a proved injustice. This is an outcome which I would reject and from which I dissent. But upon the basis of this Court's adherence to its narrow view of its appellate jurisdiction, it is an outcome that must follow. The applicant must therefore fail."

In a footnote to the second sentence, he said: "Such as an application under the *Crimes Act* 1900 (ACT), s 475."

44 Hayne J, who was in the majority on the first point but in dissent on the second, said[20]:

> "The material to which I have referred as being before the Full Court was such as to require the Full Court, of its own motion, to raise with the parties to the appeal to that Court whether there was a question about the fitness of the present applicant to plead and stand his trial. On the material to which I have referred, I do not consider it possible to say that a finding that the applicant was fit was inevitable.
>
> No doubt the fact that neither the prosecution nor the defence suggested, either at trial or on appeal, that there was a question about the applicant's fitness to plead and stand his trial is a very important consideration suggesting that the applicant was fit. But three other matters must be considered. First, there was expert medical opinion that in 1992 the applicant suffered from a serious emotional or paranoid disorder that might be characterised by delusions. Secondly, there was the record of the way in which the trial had been affected by the applicant's conduct. Thirdly, there was the Full Court's own conclusion that some of that conduct had no reasonable or rational basis.
>
> The Full Court not having raised the issue, the prosecution, as respondent to the appeal, had no opportunity of meeting the material which raises the question. In these circumstances the proper order for this Court to make is to grant special leave to appeal, treat the appeal as instituted and heard instanter and allowed. The order of the Full Court of the Federal Court should be set aside and the matter remitted to that Court for further consideration in conformity with the reasons of this Court."

---

20 *Eastman v The Queen* (2000) 203 CLR 1 at 108 [324]-[326].

45 Finally, Callinan J, who was in the minority on both points, said[21]:

> "I am of the opinion that in the circumstances the members of the Full Court should have turned their minds to the possibility of the existence of a question of the applicant's fitness to plead at the trial.
>
> The last question is how the applicant's application for special leave to appeal to this Court should be disposed of? The issues as to whether the relevant question of fitness to plead arose, and if it did, what should follow were fully argued, with each party in agreement on the course which should be followed if the applicant were to succeed here. The respondent accepted that if the appeal were upheld the matter should be remitted to the Full Court for further hearing in that Court. Accordingly, I would order that special leave be granted, that the appeal be allowed, the order of the Full Court of the Federal Court dismissing the appeal be set aside, and that the matter be remitted to the Full Court of the Federal Court for further hearing and determination whether there was a question as to the appellant's fitness to plead at the time of the trial."

46 Section 475 of the Crimes Act as it then stood provided:

> "(1) Whenever, after the conviction of a prisoner, any doubt or question arises as to his or her guilt, or any mitigating circumstance in the case, or any portion of the evidence therein, the Executive, on the petition of the prisoner, or some person on his or her behalf, representing such doubt or question, or a judge of the Supreme Court of his or her own motion, may direct any magistrate to, and such magistrate may, summon and examine on oath all persons likely to give material information on the matter suggested.
>
> (2) The attendance of every person so summoned may be enforced, and his or her examination compelled, and any false statement wilfully made by him or her shall be punishable in like manner as if he or she had been summoned by, or been duly sworn and examined before, the same magistrate, in a case lawfully pending before him or her.
>
> (3) Where on such inquiry the character of any person who was a witness on the trial is affected thereby, the magistrate shall allow such person to be present, and to examine any witness produced before such magistrate.
>
> (4) Every deposition taken under this section shall be stated in the commencement to have been so taken, and in reference to what case,

---

21 *Eastman v The Queen* (2000) 203 CLR 1 at 134 [407]-[408].

> and in pursuance of whose direction, mentioning the date thereof, and shall be transmitted by the magistrate, before whom the same was taken, as soon as shall be practicable, to the Executive if the inquiry was directed by him or her, or to the judge directing the inquiry, and the matter shall be disposed of, as to the Executive, on the report of such judge, or otherwise, shall appear to be just."

Section 475 was repealed with effect from 27 September 2001. However, by reason of s 84 of the *Legislation Act* 2001 (ACT), s 475 continues to apply to inquiries directed before its repeal.

47 On 26 July 2000 the Registrar sent the appellant a letter informing him that the "Chief Justice has made an administrative decision not to direct an inquiry under s 475".

48 On 31 May 2001 the appellant made a further application for a s 475 inquiry. The further application referred to four matters: a psychiatric report of Dr Jolly; evidence supposedly emanating from Detective Forster; evidence to the supposed effect that the victim was murdered by "organised crime"; and forensic evidence of Dr Wallace.

49 On 28 June 2001 the Chief Justice announced that he had not yet been able to decide whether to direct a s 475 inquiry in relation to Dr Jolly's report, that he proposed to conduct a hearing on whether to direct a s 475 inquiry in relation to it, but that he had decided not to direct an inquiry on the other three matters.

50 On 7 August 2001, after a hearing on 12 July 2001, the Chief Justice indicated that he proposed "to direct the Chief Magistrate, or a Magistrate nominated by him, to summon and examine on oath all persons likely to give material information on the matter of the fitness to plead of David Harold Eastman". On the same day the direction was made, and the Chief Magistrate thereafter directed the second respondent in this Court to act as the magistrate pursuant to s 475.

The present proceedings

51 On 20 March 2002 the Director of Public Prosecutions (ACT) ("the Director"), who is the first respondent in this Court, commenced two proceedings in the Supreme Court of the Australian Capital Territory in relation to the inquiry directed by the Chief Justice[22]. The first proceedings sought a declaration that

---

22 According to the majority of the Full Federal Court, the appellant has commenced proceedings for review of the decision of the Chief Justice declining to direct an inquiry on the issues raised by the appellant other than fitness to plead: *Director of*

(Footnote continues on next page)

the inquiry was not authorised by s 475, and an injunction restraining the second respondent from conducting it. The second proceedings sought relief under the *Administrative Decisions (Judicial Review) Act* 1989 (ACT) ("the ADJR Act") quashing the decision of the Chief Justice (the fourth respondent to those proceedings and in this Court) directing the inquiry. The second proceedings had been commenced out of time, and the Director applied for an extension of time accordingly.

52 On 3 May 2002 Gray J dismissed both proceedings, and also refused to extend time for commencing the second proceedings. He did so on the substantive ground that the Chief Justice had acted within the power conferred by s 475. He said[23]:

> "[T]he words used to convey the circumstances for the provision to operate were each descriptive of aspects of the trial and ... 'guilt' encompasses the verdict that results from that process, just as mitigating circumstances and portion of the evidence are part of that process.
>
> ... [I]t is the trial process which is under scrutiny in each of the circumstances which might give rise to the operation of s 475. In most cases I agree that this will measure the evidence given at the trial with other material, but I do not think that this was intended to be exclusive or to make unreviewable matters which might affect the ultimate verdict."

53 The Director then appealed to the Full Court of the Federal Court of Australia. By majority (Whitlam and Gyles JJ; Madgwick J dissenting), the Full Court allowed the appeal. The majority did so on the basis that "an inquiry and report which is limited to the fitness to plead of an accused person who has been convicted is not authorised by s 475". They said[24]: "Put another way, a doubt or question restricted to fitness of the accused to plead is not a doubt or question as to the guilt of that person." They extended the time for commencement of the second proceedings, and set aside the Chief Justice's decision.

54 On 15 November 2002 this Court granted to the appellant special leave to appeal against the judgment and orders of the Full Court.

Public Prosecutions (ACT) v Eastman (2002) 118 FCR 360 at 369 [22]. This Court is not concerned with these questions.

23 *Director of Public Prosecutions (ACT) v Eastman* (2002) 130 A Crim R 588 at 597-598 [44]-[46].

24 *Director of Public Prosecutions (ACT) v Eastman* (2002) 118 FCR 360 at 378 [47].

Irrelevant issues

55 The primary issue in the appeal was the construction of s 475. Among the issues which the parties argued in writing, and came prepared to argue orally, were whether the Director had power to institute the Supreme Court proceedings; whether, if he did, he had power to appeal against Gray J's orders; whether he was a "person aggrieved" for the purposes of the ADJR Act; and whether the time for commencing the second proceedings should have been extended.

56 In view of the conclusions reached below as to the construction of s 475, it is not necessary to consider the other issues.

The structure of the appeal

57 It was common ground in the Full Federal Court and in this Court that[25]:

> "the Chief Justice was, and was entitled to be, satisfied that there is a doubt or question as to whether [the appellant] should have been convicted at his trial, as there is a question or doubt as to his fitness to plead during the trial … [T]hat being so, it was an appropriate case to direct an inquiry pursuant to s 475 if the section permitted it."

58 On the construction of s 475, the arguments advanced by the appellant in support of the reasoning of the trial judge and Madgwick J, and against the reasoning of Whitlam and Gyles JJ, were supported by the Attorney-General of the Australian Capital Territory (the third respondent before this Court). Those arguments were opposed by the Director (the first respondent). The second and fourth respondents (respectively the magistrate conducting the inquiry and the Chief Justice, who left office shortly before this appeal was argued) submitted to any order save as to costs, and took no part in the argument.

59 In essence the appellant and the Attorney-General contended that "guilt" in s 475 meant "guilt as established by the conviction", and hence that a doubt or question as to guilt could include matters affecting the process by which guilt was established, in particular a defendant's fitness to plead. The Director contended that "guilt" referred only to the occurrence in fact of the acts or omissions proscribed by the criminal law which had been charged against the accused and of which he had been convicted.

---

25 *Director of Public Prosecutions (ACT) v Eastman* (2002) 118 FCR 360 at 377 [45] per Whitlam and Gyles JJ.

60 The Director accepted what the appellant urged, namely that s 475 was a remedial provision and hence should be given a beneficial construction[26]. As Hope JA remarked[27]:

> "This well-known principle does not of course mean that courts can construe a statute so as to achieve a result which they think the legislature should have enacted; it means that they should construe the statute to give the fullest effect to the legislation's intention to remedy the mischief aimed at which the language of the statute will allow."

The Director argued that the principal vice in the contentions advanced against his position was that they pursued the first rather than the second of the two approaches described by Hope JA. The Director submitted that to construe s 475 as the appellant urged would be to arrive at a conclusion which, while it might be desirable in certain respects, would go beyond what the words could mean even on their most beneficial construction.

61 The Director's argument that the word "guilt" in s 475(1) referred to the occurrence of the acts or omissions proscribed by the criminal law, entirely independently of whether there was later a criminal conviction, distinguished questions of guilt from deficiencies in the process by which guilt was determined. Issues of fitness to plead, and other issues affecting the integrity of the process leading to a conviction, such as the bribery of jurors, the exercise of duress against jurors, deficiencies in the constitution of the court, and jury decision of the case by casting dice or tossing coins or other impermissible means, did not go to the question of whether the acts or omissions proscribed by law had actually taken place. Hence doubts or questions about issues of that kind fell outside s 475, and s 475 conferred no powers to direct an inquiry into them. On this construction, the expression "after the conviction of a prisoner" had temporal significance only; it had no other relevance in construing the section except to support the argument that "guilt" was used to mean nothing more than guilt in fact.

---

26 *Varley v Attorney-General in and for the State of New South Wales* (1987) 8 NSWLR 30 at 38 per Kirby P, 46 per Hope JA.

27 *Varley v Attorney-General in and for the State of New South Wales* (1987) 8 NSWLR 30 at 46.

62 The Director pointed out that the question of fitness to plead is determined by a different tribunal from that which determines guilt[28]. He also pointed out that a finding of unfitness to plead does not result in acquittal[29].

63 The arguments advanced by the Director and by the opposing parties in this Court closely parallel those which they had respectively advanced below. Gray J and Madgwick J rejected the Director's arguments, and Whitlam and Gyles JJ accepted them. It is convenient initially to set out the history of s 475, and then to go immediately to the arguments of the Director, without setting out the reasoning of the judges who sat in the Full Court. The arguments will sufficiently disclose the issues.

The legislative history of s 475

64 The legislative history of s 475 is as follows.

65 In 1871 the First Report of Commissioners inquiring into the statute law of New South Wales was presented to the Legislative Assembly. That report dealt with the consolidation of the criminal law. The President of the Commissioners was Sir Alfred Stephen CJ, who had been a Supreme Court judge since 1839. The Report stated[30]:

> "It not unfrequently happens after a prisoner's conviction, generally on his representation, but sometimes at the instance of strangers, that doubts or questions are raised as to some part of the evidence, or some matter not in evidence, tending to impeach the verdict. Such doubts must

---

28 In the Territory, fitness to plead is determined by the Mental Health Tribunal: *Mental Health (Treatment and Care) Act* 1994 (ACT) ("the Mental Health Act"), s 68(3).

29 In the Territory, a finding of unfitness to plead results in a deferral of the trial if the unfitness is found by the Mental Health Tribunal to be temporary (ie of less than twelve months in duration). If the unfitness is likely to last longer, the Supreme Court conducts a special hearing to determine whether the accused is not guilty of the offence charged or whether the accused committed the acts which constituted the offence. Where the jury advises that the accused did commit those acts, the Court orders the accused to be detained until the Mental Health Tribunal otherwise orders or else orders the accused to submit to the jurisdiction of the Tribunal to enable the making of a mental health order: Crimes Act, Pt 11A, Divs 1 and 2 as in force before 2001, and Pt 13, Divs 13.1 and 13.2 since then.

30 *First Report of Commissioners on the Consolidation of the Criminal Law* (1871) at 11-12.

> in the course of years have presented themselves without suggestion elsewhere, to the mind of every Judge. There is, however, as we all know, not only no Appeal in such cases, but no mode provided by law for investigating the facts represented, or satisfactorily solving any doubts so raised. The absence of such a provision has often been regretted; but there is great difficulty in applying an adequate remedy. We have endeavoured to meet this, to some extent, by an enactment enabling the Governor, or the presiding Judge in any case, to cause witnesses to be examined on oath before some Justice; and thus to obtain materials, under legal sanction, for determining how far the doubt or representation is well founded."

The appellant stressed the words "tending to impeach the verdict".

66 To the First Report was annexed a draft Bill. Clause 392 provided:

> "Whenever after a prisoner's conviction or sentence any question shall arise as to his guilt or any mitigating circumstance in the case or any portion of the evidence therein it shall be lawful for any Justice by the direction of the Governor or of the Judge before whom such prisoner was tried to summon and examine on oath all persons who may be thought likely to give material information on the matter suggested and to transmit every deposition taken thereupon to the Governor or Judge for his information. And the attendance of every person so summoned may be enforced and his examination compelled and any statement made by him wilfully false shall be punishable in like manner as if he had been summoned by or been duly sworn and examined before the same Justice in a case lawfully pending before him. Provided that every deposition so taken shall be stated in the commencement to be taken under this section and in reference to what case and in pursuance of whose direction mentioning the date thereof."

67 Thereafter, the *Criminal Law Amendment Act* 1883 (NSW) ("the 1883 Act") was enacted. Sections 383 and 384 provided:

> "383. Whenever after the conviction of a prisoner any doubt or question arises as to his guilt or any mitigating circumstance in the case or any portion of the evidence therein it shall be lawful for any Justice by direction of the Governor on the petition of the prisoner or some person on his behalf representing such doubt or question – or by direction of a Judge of the Supreme Court of his own motion – to summon and examine on oath all persons likely to give material information on the matter suggested Provided that where on such inquiry the character of any person who was a witness on the trial is affected thereby the Justice shall allow such person to be present and to examine any witness produced before such Justice And such Justice shall transmit every deposition taken by him under this section as soon as shall be practicable to the Governor if

> the inquiry was directed by him or to the Judge directing the inquiry and the matter shall thereafter be disposed of as to the Governor on the report of such Judge or otherwise shall appear to be just.
>
> 384. The attendance of every person so summoned may be enforced and his examination compelled and any statement made by him wilfully false shall be punishable in like manner as if he had been summoned by or been duly sworn and examined before the same Justice in a case lawfully pending before him Provided that every deposition taken under the last section shall be stated in the commencement to have been so taken and in reference to what case and in pursuance of whose direction mentioning the date thereof."

68 In the Second Reading Speech the responsible Minister described the mischief addressed by ss 383 and 384 as follows[31]:

> "Clause 383 contains an important provision. In cases of capital offence, especially where the victim is a female, representations are frequently made to the Government – after the person charged with the offence has been found guilty – which reflect on the character, the honor, or the chastity of the prosecutrix, or some of the witnesses on her behalf. As the law stands at present the Government have not the power to institute inquiries on oath to ascertain whether the imputations or reflections are or are not well-founded ...
>
> [Clause 383] appears to me to afford much more solid ground on which the Executive may proceed when they have to deal with capital cases where doubts are thrown on the character of persons connected with them."

69 Sir Alfred Stephen and Mr Alexander Oliver (who was Parliamentary Draftsman and had been Secretary to the Commissioners when they presented their First Report) wrote a *Criminal Law Manual* on the legislation. Of s 383 it said[32]:

> "This section legalises and regulates inquiries after a prisoner's conviction – hitherto unauthorizedly conducted, (as in England by the Home Secretary,) and necessarily without oath – by way of review of a verdict

---

31 New South Wales, Legislative Assembly, *Parliamentary Debates* (Hansard), 22 February 1883 at 618. See *Varley v Attorney-General in and for the State of New South Wales* (1987) 8 NSWLR 30 at 45 per Hope JA.

32 *Criminal Law Manual Comprising the Criminal Law Amendment Act of 1883 with an Introduction, Commentary and Index* (1883) at 151.

> represented as being a mistaken one, or in order to ascertain if grounds exist for exercising the power of mitigation. But, since any reference such as is here provided involves often, if not ordinarily, imputations upon the character, or impeachment otherwise of the veracity, of the prosecutor or some other witness, – especially in cases of Rape, where the woman would otherwise be at the mercy of her accuser, – the Proviso here has been introduced. The enactment contemplates, it will be seen, a Report to the Governor by the Judge (if any) directing the inquiry before final decision; and probably a Report on the whole case will be obtained from the Judge who tried the prisoner. The entire enactment is new."

The Director stressed the word "mistaken".

70 In the same year, 1883, Sir Alfred Stephen's cousin, Sir James Fitzjames Stephen, published his celebrated work *A History of the Criminal Law of England*. The Director relied on certain passages in it. The author pointed out[33] that in English criminal procedure there was "no appeal properly so called", but that there were apparent or real exceptions to that state of affairs. The first exception he referred to was the writ of error, enabling the expansion of the record and the correction of certain errors of fact so revealed[34]. He referred to a second exception in criminal cases in which a jury had returned an imperfect special verdict: by a proceeding called a venire de novo it was possible for the proceedings to be treated as a nullity and for a new jury to be summoned to re-hear the matter. According to Stephen, special verdicts had by his day gone almost entirely out of use[35]. A third exception he referred to was the reservation by the trial judge of points of law for the consideration of the Court for Crown Cases Reserved. After noting that writs of error were rare, and that the Court for Crown Cases Reserved probably did not determine twenty cases a year, he said[36]:

> "It is a much more important circumstance that no provision whatever is made for questioning the decision of a jury on matters of fact. However unsatisfactory such a verdict may be, whatever facts may be discovered after the trial, which if known at the trial would have altered the result, no means are at present provided by law by which a verdict can be reversed. All that can be done in such a case is to apply to the Queen

---

33 *A History of the Criminal Law of England* (1883), vol 1 at 308-312.

34 See Gordon, "Certiorari and the Revival of Error in Fact", (1926) 42 *Law Quarterly Review* 521.

35 *A History of the Criminal Law of England* (1883), vol 1 at 311.

36 *A History of the Criminal Law of England* (1883), vol 1 at 312-313.

> through the Secretary of State for the Home Department for a pardon for the person supposed to have been wrongly convicted.
>
> This is one of the greatest defects in our whole system of criminal procedure. To pardon a man on the ground of his innocence is in itself, to say the least, an exceedingly clumsy mode of procedure; but not to insist upon this, it cannot be denied that the system places every one concerned, and especially the Home Secretary and the judge who tried the case (who in practice is always consulted), in a position at once painful and radically wrong, because they are called upon to exercise what really are the highest judicial functions without any of the conditions essential to the due discharge of such functions. They cannot take evidence, they cannot hear arguments, they act in the dark, and cannot explain the reasons of the decision at which they arrive. The evil is notorious, but it is difficult to find a satisfactory remedy. The matter has been the subject of frequent discussion, and it was carefully considered by the Criminal Code Commission of 1878-9. I have nothing to add to the following observations which occur in their *Report* as to the reforms which seem to be required in regard to the whole matter of appeals in criminal cases."

The author then set out a lengthy quotation from the Report of the Criminal Code Commission which discussed a recommendation for wider rights of appeal. Towards the end of that passage, there was discussion of the difficulties involved in a proposal to permit an appellate court to grant a new trial "where circumstances throwing doubt on the propriety of a conviction are discovered after the conviction has taken place"[37]. The passage then continued[38]:

> "Cases in which, under some peculiar state of facts, a miscarriage of justice takes place, may sometimes though rarely occur; but when they occur it is under circumstances for which fixed rules of procedure cannot provide.
>
> Experience has shown that the Secretary of State is a better judge of the existence of such circumstances than a court of justice can be. He has every facility for inquiring into the special circumstances; he can and does, if necessary, avail himself of the assistance of the judge who tried the case, and of the law officers. The position which he occupies is a guarantee of his own fitness to form an opinion. He is fettered by no rule, and his decision does not form a precedent for subsequent cases. We do not see how a better means could be provided for inquiry into the circumstances of the exceptional cases in question. The powers of the

---

37 *A History of the Criminal Law of England* (1883), vol 1 at 315.

38 *A History of the Criminal Law of England* (1883), vol 1 at 316-317.

Secretary of State, however, as to disposing of the cases which come before him are not as satisfactory as his power of inquiring into their circumstances. He can advise Her Majesty to remit or commute a sentence; but, to say nothing of the inconsistency of pardoning a man for an offence on the ground that he did not commit it, such a course may be unsatisfactory. The result of the inquiries of the Secretary of State may be to show, not that the convict is clearly innocent, but that the propriety of the conviction is doubtful; that matters were left out of account which ought to have been considered; or that too little importance was attached to a view of the case the bearing of which was not sufficiently apprehended at the trial; in short, the inquiry may show that the case is one on which the opinion of a second jury ought [to] be taken. If this is the view of the Secretary of State, he ought, we think, to have the right of directing a new trial on his own undivided responsibility. Such a power we accordingly propose to give him by section 545."

71 Section 475 of the *Crimes Act* 1900 (NSW) ("the 1900 Act") provided:

"(1) Whenever, after the conviction of a prisoner, any doubt or question arises as to his guilt, or any mitigating circumstance in the case, or any portion of the evidence therein, the Governor on the petition of the prisoner, or some person on his behalf, representing such doubt or question, or a Judge of the Supreme Court of his own motion, may direct any Justice to, and such Justice may, summon and examine on oath all persons likely to give material information on the matter suggested.

(2) The attendance of every person so summoned may be enforced, and his examination compelled, and any false statement wilfully made by him shall be punishable, in like manner as if he had been summoned by, or been duly sworn and examined before, the same Justice, in a case lawfully pending before him.

(3) Where on such inquiry the character of any person who was a witness on the trial is affected thereby, the Justice shall allow such person to be present, and to examine any witness produced before such Justice.

(4) Every deposition taken under this section shall be stated in the commencement to have been so taken, and in reference to what case, and in pursuance of whose direction, mentioning the date thereof, and shall be transmitted by the Justice, before whom the same was taken, as soon as shall be practicable, to the Governor if the inquiry was directed by him, or to the Judge directing the inquiry, and the matter shall thereafter be disposed of, as to the Governor, on the report of such Judge, or otherwise, shall appear to be just."

72 In 1909 s 475 was adopted for the Territory by s 6 of the *Seat of Government Acceptance Act* 1909 (Cth) ("the Acceptance Act").

73 To some degree the limited exceptions to the non-availability of a right of appeal continued in New South Wales after 1883, and indeed after the grant of more general rights of appeal. Writs of error were preserved by s 427 of the 1883 Act and by s 471 of the 1900 Act[39]. In the Territory, s 471 of the Crimes Act was repealed by the *Crimes (Amendment) Act* 1983 (ACT)[40]. The power to reserve questions of law was preserved by s 422 of the 1883 Act and s 470 of the 1900 Act. In the Territory, s 470 of the Crimes Act was repealed by the *Justice and Community Safety Legislation Amendment Act* 2001 (ACT)[41].

74 For some time after the 1883 Act, there continued to be no general right of appeal in criminal cases. This was so when s 475 of the 1900 Act was enacted. It remained so in 1909, when s 475 was extended to the Territory. When the Acceptance Act was enacted, s 8 provided: "Until the Parliament otherwise provides, the High Court and the Justices thereof shall have, within the Territory, the jurisdiction which immediately before the proclaimed day belonged to the Supreme Court of the State and the Justices thereof." That jurisdiction did not include a general appellate jurisdiction. It was not until 1912 that general rights of appeal were introduced in New South Wales by the *Criminal Appeal Act* 1912 (NSW) following the *Criminal Appeal Act* 1907 (UK). In 1927 s 8 was repealed, and by s 30B of the *Judiciary Act* 1903 (Cth) this Court was given the same original jurisdiction in the Territory as the Supreme Court had had before 1 January 1911. Section 30B(4) provided:

> "A decision of the High Court in the exercise of the jurisdiction vested by this section shall be final and conclusive except so far as, under the Constitution or the laws of the Commonwealth, an appeal may be brought to a Full Court of the High Court."

Section 34A(1) provided:

> "The High Court shall have such jurisdiction to hear and determine appeals from all judgments whatsoever of any Court of the Territory for the Seat of Government as is vested in it by Ordinance made by the Governor-General."

Sections 30B and 34A were repealed by s 4 of the *Seat of Government Supreme Court Act* 1933 (Cth). Section 52 of that statute introduced general rights of appeal, or rights to seek leave to appeal, against convictions on indictment by the

---

39 *Fleming v The Queen* (1998) 197 CLR 250 at 257-258 [16]-[17].

40 Section 31(2), Sched 3.

41 Schedule 1, Item 1.6.

Supreme Court of the Australian Capital Territory to the Full Court of this Court. Later, rights of appeal to the Full Court of the Federal Court of Australia were granted, and even more recently to the Court of Appeal of the Australian Capital Territory.

75 Section 475 of the Crimes Act was repealed with effect from 27 September 2001, and the review of convictions and sentences otherwise than by appeal is now regulated by a different regime[42].

The Director's arguments from linguistic usage

76 The Director submitted that the distinction between "guilt" (the fact or state of wrongdoing) and the process by which guilt was established, which he contended underlay s 475, corresponded with ordinary linguistic usage as revealed in dictionaries, and legal linguistic usage as revealed in legal dictionaries, treatises, statutes, cases and the language of practitioners.

77 Thus the primary meaning in *The Macquarie Dictionary*[43] is "the fact or state of having committed an offence or crime". *Black's Law Dictionary* defines "guilt" as "[t]he fact or state of having committed a wrong, esp a crime"[44]. Reference was made to passages in which Blackstone spoke of persons being guilty independently of conviction[45].

78 Reference was also made to parts of the Crimes Act as it stood at the relevant time[46]. Other statutes in the Territory, too, were said to employ a universal usage of "guilt" to mean "the state of being guilty", and to reveal that

---

42 Crimes Act, Pt 20, originally introduced as Pt 17 by the *Crimes Legislation Amendment Act* 2001 (ACT).

43 3rd ed (1997) at 949.

44 7th ed (1999) at 714.

45 *Commentaries on the Laws of England*, 18th ed (1829), Introduction at 45-46 and bk 4, c 14.

46 Section 448(6) provided: "An admission of guilt made by a person under this section in respect of an offence shall not be admissible in evidence in any proceedings or further proceedings taken against that person in respect of that offence." Section 556U provided that where the court revoked a community service order and proposed to make another order "then, pending the making of that order, the court has the same powers in relation to that person as it would have if, at the time of revocation of the community service order, it had made a finding of guilt against him or her of an offence."

when a judicial determination of guilt was referred to, the expression "finding of guilt" was used[47].

79 Attention was also drawn to provisions for alternative verdicts in the 1883 Act in which the precursors to s 475 were introduced as ss 383 and 384. These provisions were said clearly to show that the legislature knew the difference between the concept of guilt and the incidents of a trial in which a finding of guilt is made.

80 The Director submitted that in "describing the adjudgment and punishment of criminal guilt as an essentially and exclusively judicial function, this Court has distinguished between guilt as the fact or state of having committed crime and the curial determination of the existence of that fact or state." Reliance was placed on *Chu Kheng Lim v Minister for Immigration*[48] where Brennan, Deane and Dawson JJ said: "In exclusively entrusting to the courts designated by Ch III the function of the adjudgment and punishment of criminal guilt under a law of the Commonwealth, the Constitution's concern is with substance and not mere form." The Director also referred to *Re Tracey; Ex parte Ryan*[49] where Deane J said: "The power to adjudge guilt of ... breach of the law ... fall[s] within the concept of judicial power." He also said: "The guilt of the citizen of a criminal offence ... can be conclusively determined only by a Ch III court".

81 The Director further submitted that, in cases setting aside convictions after a plea of guilty, "guilt" was used to mean "state of guilt" rather than "finding of guilt"[50].

82 The Director contended that lawyers commonly speak of an "admission of guilt" and of lies as revealing a "consciousness of guilt", well before any curial finding of guilt has been made.

83 It may be accepted that "guilt" can be used to mean "the fact of contravention, independently of any curial finding", and that this usage can be noted in ordinary speech, in statutes, and in the language of judges and

---

47 *Magistrates Court Act* 1930 (ACT), s 92(1); *Supreme Court Act* 1933 (ACT), s 68C(1); *Firearms Act* 1996 (ACT), s 116(2); *Prohibited Weapons Act* 1996 (ACT), s 16(2) and *Coroners Act* 1997 (ACT), s 58(5).

48 (1992) 176 CLR 1 at 27.

49 (1989) 166 CLR 518 at 580.

50 Various instances are set out by Spigelman CJ in *R v Hura* (2001) 121 A Crim R 472 at 478 [32]-[33].

practitioners. However, the crucial question is whether that usage was employed in this particular statute. The answer to that depends on the construction of the particular words used in their particular context, assisted by whatever light the history of the legislation casts on the question. It does not follow from the fact that in some contexts "guilt" is used to mean what the Director contended that it had that meaning in s 475.

Words omitted from s 475

84 The next argument advanced by the Director was:

> "[T]he language of the section distinguishes between 'the conviction of a prisoner' on the one hand and 'any doubt or question ... as to his or her guilt, or any mitigating circumstances in the case, or any portion of the evidence therein' on the other. Had it been intended to bear the construction for which the appellant contends, the section could easily have been drafted to refer to 'any doubt or question as to the conviction'."

The Director also submitted that to read s 475 in the manner urged by the appellant involved inserting words into the statute impermissibly.

85 No doubt the section could have been more clearly drafted. The even and sharp division of carefully reasoned judicial opinion in the courts below supports that view. However, the Director's approach places immense emphasis on the word "guilt", and no emphasis on the words "any portion of the evidence therein". The Chief Justice's decision to make a direction turned on his conclusion that a question arose as to the appellant's "guilt" in the sense of the finding of guilt made about the appellant; it did not turn on the existence of "mitigating circumstance[s] in the case" or "any portion of the evidence" in the case. But, if it be open to do so, s 475 must be construed so that all of its integers operate congruently and harmoniously[51]. The question, for example, whether a particular witness was bribed, or otherwise biased, is strictly separate from the question of whether the convicted person actually carried out the acts or omissions constituting the crime proscribed. Yet the statutory language would appear to permit the direction of an inquiry into whether a particular portion of the evidence was perjured by reason of bribery or other bias. That, in turn, suggests that s 475 has an ambit extending beyond the issue of whether a convicted person in fact committed the crime, so as to permit inquiries into at least some aspects of the process by which the conviction was arrived at.

86 It will be necessary to return to this aspect of s 475.

---

51 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[71].

The possessive pronouns

87 The Director next argued that "the linking of the 'doubt or question' to 'guilt' by the possessive pronouns 'his or her', provides some indication that it is the fact or state of guilt of the convicted prisoner (rather than [some defect in] the processes of criminal justice which led to his or her conviction) which is the relevant 'guilt'."

88 This argument is weak. If "his or her" had been omitted, s 475(1) would have had the same meaning: the relevant "guilt" is obviously that of the "prisoner" who has been the subject of "the conviction". Hence "his or her" does not, as argued, provide "some indication" that it is only the fact of guilt, and not the integrity of the trial, which can be the subject of a s 475(1) inquiry.

The subject of the trial and the incidents of the trial

89 The Director then submitted that s 475 dealt with matters going to the subject of the trial, not to its incidents. "Guilt in fact", "mitigating circumstances" and "portions of the evidence" were matters which were the subjects of the trial. They were distinct from the incidents of the trial, such as "arraignment, taking a verdict, returning a verdict, entering a conviction, passing sentence." The purpose of a criminal trial was to conduct an inquiry to determine whether something had happened in the past which was prohibited by law.

90 Any distinction between the "subject" and the "incidents" of a trial is not one which is, in terms, known to the law and it is not one which was, in terms, picked up by s 475(1). Defects in some of the "incidents" of a trial are capable of affecting its "subject matter", namely the issues of guilt in fact, the existence of mitigating circumstances, or the acceptability of portions of the evidence.

The adequacy of the mechanism employed

91 The Director argued further:

> "[T]he inquiry for which the section provides is one to be conducted by a magistrate who has power 'to summon and examine on oath all persons likely to give material information on the matter suggested'. Such a mechanism is well adapted to the examination of the factual substratum upon which an existing conviction is based. It is less well adapted to examining the process (much of it in a superior court) which led to the conviction."

The majority of the Full Federal Court made a further point in agreeing with the general submission advanced by the Director[52]:

> "The procedure laid down by s 475 is rather like the role of a magistrate at a committal hearing, and is singularly inappropriate for the kind of review of the regularity of proceedings at a trial which a court of criminal appeal might now undertake."

The Director did not advance that point to this Court.

92 It does not follow that because all or part of a process leading to conviction took place in the Supreme Court, the examination of witnesses before a magistrate was not well adapted to inquire into that process. Even on the Director's construction, a magistrate might have had to form adverse views as to the handling of the trial by a Supreme Court judge. On either construction, the legislature has acted on an assumption that magistrates in the Territory were capable of an effective inquiry into whatever doubt or question triggered the inquiry.

93 There is no relevant analogy with committal proceedings. The types of inquiry undertaken in New South Wales under s 475 in practice bore no analogy to committal proceedings. They were at least as exhaustive as those which a court of criminal appeal might have undertaken. Indeed they were commonly much more exhaustive, since the work of a court of criminal appeal in relation to a particular appeal is done in hours or days, while the work of those conducting s 475 inquiries took much longer and was much more general. Madgwick J said that it was only the "bifurcation of function between the examining magistrate and the reporting judge … that casts doubt on the modern appropriateness of the mechanism." He correctly concluded that "the mechanism owes its existence merely to the antiquity of its original conception and says nothing … as to the scope of the doubts or questions that may be examined"[53].

The inadequacy of remedies

94 The Director referred to s 475(4) and pointed out that "at the end of the inquiry the 'matter' which was the subject of the inquiry is left to 'be disposed of, as to the Executive ... shall seem just'." He argued:

---

52 *Director of Public Prosecutions (ACT) v Eastman* (2002) 118 FCR 360 at 379 [51].

53 *Director of Public Prosecutions (ACT) v Eastman* (2002) 118 FCR 360 at 393 [114].

> "Whether by prerogative or by statute, the remedies available to the Executive are appropriate only to a conclusion of a doubt about guilt or about the presence of mitigating circumstances, namely pardon and remission of sentence. There is no remedy available to the Executive appropriate to a conclusion as to irregularity in a criminal trial unrelated to guilt. Such a remedy could only be the quashing of a conviction and the ordering of a new trial. No conditional pardon could achieve these results."

In effect, this argument was an argument from futility. If the accused had been unfit to plead but had become fit to plead and the s 475 procedure could not lead to a new trial, it was futile. And if the accused had remained unfit to plead and the s 475 procedure could not lead to some other appropriate treatment, it was equally futile. The futility of s 475, either way, in cases of a doubt or question about fitness to plead, was a sign that on its true construction s 475 did not deal with doubts or questions about fitness to plead.

95 To the "remedies" available to the Executive after a successful s 475 inquiry might be added the possibility of special legislation overturning the conviction and providing for the future disposition of the matter[54]. But that and other ad hoc solutions[55] may be put to one side so as to permit an evaluation of the Director's argument taken at its highest.

96 In Australia the right to pardon, to which the Director's submission referred, usually resides in the Governor-General or a Governor. However, there is no equivalent in the Australian Capital Territory to the office of Governor of a State or Administrator of the Northern Territory. As enacted, the *Australian Capital Territory (Self-Government) Act* 1988 (Cth) ("the Self-Government Act") provided, in s 72, for the tendering of advice to the Governor-General with respect to the exercise of the Royal Prerogative of mercy in relation to the Territory. Section 72 has since been repealed[56]. The Governor-General has only a few functions within the Territory[57]. This represents a curious and unique arrangement for the composition of a legislature within the Australian Commonwealth.

---

54 cf s 433A of the *Criminal Code* (NT), discussed in *Re Conviction of Chamberlain* (1988) 93 FLR 239 at 241-242.

55 Madgwick J suggested several in *Director of Public Prosecutions (ACT) v Eastman* (2002) 118 FCR 360 at 392 [109].

56 *Arts, Environment and Territories Legislation Amendment Act* 1993 (Cth), s 5.

57 See Self-Government Act, ss 16, 35 and 74.

97 At the time when the s 475 inquiry was directed s 557 of the Crimes Act provided:

> "(1) The Executive may, by instrument, grant to a person a pardon in respect of an offence of which that person has been convicted.
>
> (2) A pardon granted to a person under subsection (1) in respect of an offence discharges the person from any further consequences of the conviction for that offence."

Section 558 provided:

> "The Executive may, by instrument, remit, in whole or in part, a sentence of imprisonment imposed on, a fine or other monetary penalty ordered to be paid by, or a forfeiture of property ordered to be forfeited by, a person on conviction for an offence against a law of the Territory."

(The corresponding provisions are now ss 433 and 434 of the Crimes Act.) The "Executive" is the Australian Capital Territory Executive constituted by the Chief Minister of the Australian Capital Territory and such other Ministers as are appointed by the Chief Minister[58]. Among the responsibilities of the Executive are those conferred by s 37(a) and (d) of the Self-Government Act:

> "(a) governing the Territory with respect to matters specified in Schedule 4;
>
> …
>
> (d) exercising prerogatives of the Crown so far as they relate to the Executive's responsibility mentioned in paragraph (a), (b) or (c)."

Among the matters listed in Sched 4 are "Law and Order", "Magistrates Court and Coroners Court" and "Courts (other than the Magistrates Court and Coroners Court)".

98 At common law the pardon "is in no sense equivalent to an acquittal. It contains no notion that the man to whom the pardon is extended never did in fact commit the crime, but merely from the date of the pardon gives him a new credit and capacity."[59] In England it has been held that at common law, "the effect of a

---

58 Self-Government Act, ss 36 and 39.

59 *R v Cosgrove* [1948] Tas SR 99 at 106, approved by the English Court of Appeal (Watkins and May LJJ and Butler-Sloss J) in *R v Foster* [1985] QB 115 at 128; cf *Ex parte Garland* 71 US 333 at 380 (1866). Parliament can give a pardon a wider effect, eg *Crimes Act* 1914 (Cth), s 85ZR(1), which provides that where a person

(Footnote continues on next page)

free pardon is such as, in the words of the pardon itself, to remove from the subject of the pardon, 'all pains penalties and punishments whatsoever that from the said conviction may ensue,' but not to eliminate the conviction itself"[60]. This type of outcome is not the outcome which a person convicted of a crime and claiming to be innocent of it would desire. The common law conception of a conviction is that, by it, the convicted person receives justice; the common law conception of a pardon is that, by it, the convicted person receives mercy, notwithstanding the demands of justice. Once it is apparent that the conviction is unjust, the convicted person should receive something different from a pardon, which grants mercy but assumes the validity of the conviction. Only a court can quash a conviction. "At the heart of the pardoning power there is a paradox. To pardon implies to forgive: if the convicted person is innocent there is nothing to forgive."[61] The Report of the Criminal Code Commission of 1878-9[62] noted "the inconsistency of pardoning a man for an offence on the ground that he did not commit it". Sir James Fitzjames Stephen deplored the "unsatisfactory" technique of pardoning convicted persons where the Home Secretary experienced a doubt, or relied on experts who experienced a doubt, about guilt, as distinct from ordering a new trial[63].

99 It may well not have been satisfactory that, if s 475 inquiries extended to issues relating to fitness to plead, the remedies available to the Executive were limited in the manner urged by the Director. If the inquiry revealed that the convicted person was not fit to plead at the time of the trial that led to the conviction, it may well have been more desirable for the conviction to be quashed and for a new trial to be ordered (if the accused person has become fit to plead) or for the other courses contemplated by the Crimes Act, Pt 13 Div 13.2 (as it now stands) to have been adopted[64]. But the Director's argument does not

---

has been granted a free and absolute pardon for what is called a "Territory offence" because the person was "wrongly convicted" of the offence, the person shall be taken never to have been convicted of the offence. This has no application in the Australian Capital Territory, however: see definition of "Territory" in s 85ZL.

60 *R v Foster* [1985] QB 115 at 130. This was referred to without disapproval by Wilson J in *Kelleher v Parole Board (NSW)* (1984) 156 CLR 364 at 371.

61 Pattenden, *English Criminal Appeals 1844-1994* (1996) at 383.

62 Quoted by Sir James Fitzjames Stephen in *A History of the Criminal Law of England* (1883), vol 1 at 317.

63 See Sir James Fitzjames Stephen in *A History of the Criminal Law of England* (1883), vol 1 at 317 and 438-456.

64 In New South Wales this view prevailed in 1993 with the introduction of Pt 13A of the 1900 Act. It prevailed in the Territory from 27 September 2001 onwards, when

(Footnote continues on next page)

take account of the fact that the existing "remedies" were not in any case well matched to all of the instances which, on that argument, were the sole cases to which s 475 could apply. Thus, if a convicted person successfully petitioned for a s 475 inquiry, and if that inquiry concluded that, because of doubts about guilt, the conviction was wrong, or even concluded that the convicted person clearly did not commit the crime, a pardon was not a satisfactory remedy so far as its effects at common law are concerned.

100 In short, this deficiency in the operation of pardons at common law does not support the Director's argument, because the deficiency would have existed whatever the true construction of s 475. The Director's argument would depend on showing the existence of a remedy which worked satisfactorily if a s 475 inquiry were limited to questions of actual guilt or innocence, and on showing that there was no remedy which worked satisfactorily if s 475 extended to defects in the conviction independently of the convicted person's innocence in fact. But the common law effect of the "remedy" of pardon would have worked no more satisfactorily for the case of a convicted person who the magistrate conducting the inquiry said was innocent than it would have worked for the case of a convicted person who the magistrate conducting the inquiry said was not fit to plead.

101 It would assist the appellant's construction if it were clear that at all material times free pardons have been given on grounds other than a perception of the convicted person's innocence, and correspondingly it would assist the Director's construction if it were clear that they never had been given in such cases. The Director said that his researches had not revealed any case in which a pardon had been granted "to address a claimed or proven irregularity in the proceeding". The appellant did not point to any clear case of that kind. However, the Attorney-General pointed out that in two Privy Council appeals from New South Wales, decided in the 1860s shortly before the 1871 Report which led to the introduction of the precursor to s 475 in 1883, their Lordships had indicated that purely procedural irregularities, not entitling a person convicted of a felony to a new trial and not of themselves pointing against guilt, could nonetheless trigger a successful application for a pardon[65].

---

there came into force the repeal of s 475 of the Crimes Act by the *Crimes Legislation Amendment Act* 2001 and the replacement of s 475 with Pt 20, originally Pt 17.

65 *R v Bertrand* (1867) LR 1 PC 520 at 535-536 (evidence of witnesses at first trial not given orally at the second, but read over to them from the judge's notes); *R v Murphy* (1869) LR 2 PC 535 (jury access to newspaper reports before verdict).

102 It would appear that, since the close of the 19th century, it has been the English practice to refuse a free pardon unless the Home Secretary felt certain of the applicant's innocence[66]. However, according to a Home Office memorandum of 1874, a free pardon could be granted "on legal grounds, or where there is ascertained innocence or a doubt of guilt"[67]. In context, the expression "legal grounds" must refer to factors vitiating the conviction rather than to innocence or a doubt about guilt. If that memorandum represented English conceptions in the years when the equivalent of s 475 was recommended for adoption by the legislature of New South Wales, it probably represented New South Wales conceptions also. The language of the Home Office memorandum of 1874 corresponds with the assumptions underlying the approach of the Privy Council in the 1860s. That suggests that lawyers in the 1870s and 1880s would have considered that if the legislative forerunner to s 475, proposed in 1871, and the actual legislative forerunner introduced in 1883, permitted inquiries into matters other than guilt, an inquiry which was successful from the convicted person's point of view would lead to a remedy which was not unknown and was perceived to be useful, namely a pardon on grounds other than "ascertained innocence or a doubt of guilt"[68].

103 The function of s 475 was to give the Executive a means of conducting an effective inquiry into particular factual questions. The Executive or the Supreme Court judge was to act under s 475 when a relevant doubt or question arose. The result of the inquiry might have revealed that there is more than a doubt or question. The doubt might have swelled into certainty that something had gone wrong. The question might have been answered in positive terms favourable to the petitioner. Alternatively, the result of the inquiry might not only have answered the question adversely to the petitioner, thereby removing any doubt, but also have shown that the conviction was unquestionably well-based, and that public confidence in its soundness could legitimately intensify beyond the point which had been reached when the inquiry was directed. Section 475 thus furnished "the Executive with a means of putting an end to any public

---

66 Pattenden, *English Criminal Appeals 1844-1994* (1996) at 379-380.

67 See Pattenden, *English Criminal Appeals 1844-1994* (1996) at 379 n 238, discussing Home Office memorandum 33391 (1874). The relevant passage is set out in *R v Secretary of State for the Home Department; Ex parte Bentley* [1994] QB 349 at 357.

68 In *R v Grand and Jones* (1903) 3 SR (NSW) 216 at 223, Stephen ACJ operated on the same assumption as the Privy Council in contemplating that a pardon might be granted where inadmissible evidence had been received.

agitation"[69]. If a doubt or question about fitness to plead could have triggered a s 475 inquiry, the inquiry could have clarified whether erratic and unusual behaviour by an accused person was a sign of unfitness to plead or was instead merely feigned, as part of an attempt to disrupt and frustrate the trial. "If a doubt or question arises because of an attack, and particularly an attack which is made public, upon a Crown witness, that witness may perhaps be seen to be the beneficiary of the inquiry as well as the convicted person."[70] The outcome of the inquiry might have stimulated the Executive into action with specific regard to the particular prisoner, for example the grant of a pardon, or the presentation to the legislature of a Bill favourable to the prisoner's interests. Or the outcome of the inquiry might have stimulated the Executive into an action of more general significance, such as the presentation of a Bill to the legislature with a view to the law being reformed on a more general basis. For example, a s 475 inquiry turning on doubts or questions about mistaken identification evidence might cause the Executive to seek to effectuate legislative reform of the law and practice on that subject.

104 In view of the range of functions which s 475 inquiries were capable of performing, the fact that a pardon was not well fitted for use in favour of a convicted person found unfit to plead is not decisively against a construction of s 475 that would permit the section to be used to direct an inquiry into unfitness to plead.

The significance of the legislative history

105 The Director advanced a further submission about the enactment of ss 383 and 384 of the 1883 Act and the enactment of s 475 of the 1900 Act:

> "[The materials] uniformly make clear that the provision was enacted to deal with cases of fresh evidence giving rise to a question as to whether a person actually committed the offence of which the person was convicted: that is, where the subject-matter of doubt or questioning was the factual sub-stratum of the offence of which the person was convicted. The immediate context was a concern that persons might be hanged for rape when material came to light after trial suggesting the alleged victim was not the woman of chaste character she appeared to be at trial. The general context, however, was a concern by Sir Alfred Stephen (shared with his cousin Sir James Fitzjames Stephen) of the need to regularise the post-

---

69 *Director of Public Prosecutions (ACT) v Eastman* (2002) 118 FCR 360 at 385 [77] per Madgwick J.

70 *Varley v Attorney-General in and for the State of New South Wales* (1987) 8 NSWLR 30 at 46 per Hope JA.

conviction inquiries then conducted in the Colonial or Home Secretary's Office."

106 He continued:

"[I]t is (to say the least) highly unlikely that, in 1883, by using the words concerned in s 383 *Criminal Law Amendment Act*, the New South Wales legislature intended suddenly to provide a remedy for a defective process by which a charge of felony might have been tried. It is even less likely that the legislature would have intended such a remedy to take the form of an executive inquiry. Moreover, if that had been the intention, it defies belief that such intention would have been omitted from the New South Wales Law Reform Commission's 1871 report, from the 1883 second reading speech and from the contemporaneous learned commentary by Sir Alfred Stephen and parliamentary counsel, Alexander Oliver.

With the enactment of the *Criminal Appeal Act* in 1912 in New South Wales, there became available ample and established avenue for exploration of the matters going to propriety of conviction consisting in procedure at trial. It is significant that at the time of enacting the *Criminal Appeal Act*, no step was taken to amend or repeal s 475 *Crimes Act*. This is consistent with the view of the NSW legislature at that time being that the purpose of the post-conviction inquiry provided for by s 475 was confined to doubts and questions about the factual sub-stratum of the conviction rather than any aspect of the process by which the conviction was obtained.

Likewise in the Australian Capital Territory. As part of the law in force in the Territory at the time of its inception, s 475 of the *Crimes Act 1900* (NSW) was picked up and applied as surrogate Commonwealth law. Given that original jurisdiction in criminal matters in the Territory was then conferred on this Court, and given the separation of judicial power from executive power effected by Chapter III of the Constitution, it would be surprising if s 475 were then seen as authorising an executive inquiry into the process that led to conviction. No attempt was made to repeal or modify s 475 when provision was made in 1933 for the establishment of the Supreme Court of the Australian Capital Territory and for appeal to this Court against conviction on indictment in the Supreme Court of the Australian Capital Territory."

107 The Attorney-General, on the other hand, argued that the absence of rights to appeal and the limited availability of other techniques for correcting errors at trials pointed to the likelihood that the 1883 Act was intended to provide a broad and flexible power to remedy errors in convictions.

108 The difficulty with the arguments based on the available background materials is that they do not assist on the present question of construction because

the minds of the respective authors were not specifically directed to the present problem, and the use of particular nuances of phrase in attempting to explain the legislation thus lacks significance in assessing the general language of the actual legislation.

109 In any event, different views are held, and have been expressed by courts, concerning the relevance of the understanding of the meaning and purpose of legislation at the time of its enactment for its operation years later. On occasion, particularly with respect to legislation having a procedural purpose[71] (but not only with respect to that type of legislation[72]) the view has been taken that it is the modern meaning of the operative words that is finally determinative. It is unnecessary in this appeal to resolve these questions. Whatever approach is adopted the result is the same.

Other authorities

110 The Director conceded that on occasion the courts have described the purposes of s 475 as permitting the investigation of a doubt or question concerning a "conviction"[73] or concerning the possibility of an accused person having been "improperly convicted"[74]. However, the Director argued that in all these cases the context was whether there was a doubt or question as to whether or not the offence had been committed, and that in none was there a suggestion of a conviction which was flawed by an error in the trial process. That argument has force. But its force is damaging to a contrary argument advanced by the Director, which was that three of those cases used language supportive of his contentions[75]. The precise choice of words by a court in relation to s 475 would

---

71 cf *R v Gee* (2003) 77 ALJR 812 at 830-831 [114]; 196 ALR 282 at 308.

72 *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 at 35, 45-46.

73 *Varley v Attorney-General in and for the State of New South Wales* (1987) 8 NSWLR 30 at 37 per Kirby P, 46 per Hope JA; *Sen v The Queen* (1991) 30 FCR 173 at 176 per Morling, Neaves and Foster JJ.

74 eg *White v The King* (1906) 4 CLR 152 at 165 per O'Connor J; *R v Rendell* (1987) 32 A Crim R 243 at 245 per Hunt J.

75 *White v The King* (1906) 4 CLR 152 at 165 (it was submitted that since O'Connor J said the section enabled the accused to have "the opportunity of having his character cleared by a public proceeding", and since this could be done by demonstration of innocence but not by revelation of some procedural flaw, the section did not deal with the latter); *R v Rendell* (1987) 32 A Crim R 243 at 245 per Hunt J ("a direction can only be given where a doubt arises as to the prisoner's guilt"); *Varley v Attorney-General in and for the State of New South Wales* (1987) 8 NSWLR 30 at 48 per Hope JA ("a doubt must arise as to … guilt").

lack any significance in relation to the present problem unless that court were directing its specific attention to the present problem, and this no court has yet had to do.

Justice Wood's report

111 The Director conceded that in a report of Justice Wood of the Supreme Court of New South Wales, his Honour said that in s 475[76]:

> "guilt has the meaning given to it in the trial process, that is, guilt established beyond reasonable doubt. So far as any question or doubt may concern a conflict of evidence or the reliability of a witness, or may depend on fresh evidence concerning aspects of the case proven by the Crown, it seems to me that I must weigh those matters and express my own opinion in the report. So far as the question or doubt may concern a possible miscarriage of justice or involves the possibility that the convictions were improperly obtained, due to some error in the trial process, it seems to me that I must explore whether or not there was a mishap, and report my conclusion both as to its occurrence and as to its significance in relation to the guilt found by the convictions.
>
> Questions arose in the Inquiry whether it was proper for consideration to be given to whether or not further evidence now available might have brought about a different jury verdict, and whether or not the jury verdict might have been different if, absent any mishap shown to have occurred, the trial might have been conducted differently. In order to discharge my function I believe it necessary to consider and report in some detail on the new evidence and on the facts concerning any suggested error or mishap in the trial process and on its practical implications, so that the Executive may have the material needed to dispose of the matter as shall appear to it to be just."

The appellant relied on that passage. Later Justice Wood said[77]:

> "For example, if I were to conclude at the end of the Inquiry that at the trial there was a miscarriage of justice in some respect, yet the jury would certainly have returned the same verdict if the matter complained of had

---

76 *Report of the Inquiry Held Under Section 475 of the Crimes Act, 1900 Into the Convictions of Timothy Edward Anderson, Paul Shaun Alister, and Ross Anthony Dunn at Central Criminal Court, Sydney, on 1st August, 1979* (1985) at 63-64.

77 *Report of the Inquiry Held Under Section 475 of the Crimes Act, 1900 Into the Convictions of Timothy Edward Anderson, Paul Shaun Alister, and Ross Anthony Dunn at Central Criminal Court, Sydney, on 1st August, 1979* (1985) at 67.

> not arisen ..., I do not believe that I could discharge my function by a simple conclusion that there was no doubt or question. Unlike the Court of Criminal Appeal, I do not believe that I could myself have resort to a process akin to an application of the proviso to Section 6(1) of the Criminal Appeal Act 1912. In such a case I consider that I would have to report in relation to the questions or doubts concerning the matter or matters involving a miscarriage of justice, and for the benefit of the Executive express my opinion as to their significance for the finding of guilt."

The appellant stressed the words "mishap in the trial process".

112 The Director submitted that this language did not support the appellant, and that Justice Wood only used this language in the cited passage because, in the circumstances before him, a trial irregularity had the potential to render a conclusion that the offences had actually been committed less likely. There is some force in that argument. However, after considering several possibilities, Justice Wood concluded that there was no "failure of trial process, such as to require the conclusion that there was a miscarriage of justice on that count, leaving a question or doubt as to the convictions"[78]. What is more, Justice Wood did not have under consideration the conviction of a prisoner in respect of whose fitness to plead there was a doubt or question. The words of Justice Wood in his report are thus not determinative of the present issue. They do, however, merit serious consideration.

The significance of an accused person's fitness to plead

113 The Director accepted that his construction turned on the idea that s 475 concentrated "on the fundamental issue of guilt or innocence", and not on "arguments about … procedures or defaults of a technical kind". As a matter of principle this construction is unattractive. It draws too sharp a distinction between that which is determined in a criminal trial and particular elements of the procedure employed to determine it. It is wrong to characterise the latter as "technical".

114 An essential function of the criminal trial is to minimise the risk that innocent persons will be convicted. It does this by ensuring that the prosecution case, taken as a whole, consists of potentially reliable evidence presented in an unprejudiced manner. The legal system is prepared to tolerate some lack of concordance between those who are convicted and those who are in truth guilty,

---

78 *Report of the Inquiry Held Under Section 475 of the Crimes Act, 1900 Into the Convictions of Timothy Edward Anderson, Paul Shaun Alister, and Ross Anthony Dunn at Central Criminal Court, Sydney, on 1st August, 1979* (1985) at 446.

in the sense that it is prepared to accept the practical possibility that some persons who are not innocent are acquitted. But it does not accept that any persons who are innocent should be convicted. Because it does not accept the latter outcome, it employs numerous means to prevent accused persons who are innocent from being convicted. Those means centre on the institutions and techniques used to ensure a fair trial – an independent judiciary and, where applicable, an independent jury; an ethical code binding the prosecution which is in part reflected in rules of law; the burden and standard of proof; the applicable rules of evidence; and the rule preventing an accused person from being tried unless that person is fit to plead. That last rule is among the key rules of criminal procedure which seek to ensure that a successful prosecution case rests on reliable evidence. If the accused is not fit to plead and stand trial, there can be no trial[79].

115 If an appeal is allowed on the ground that an accused person was unfit to plead, it is not possible to apply the "proviso" that permits criminal appeals to be dismissed if the appellate court considers that, despite the ground of appeal having been made good, no substantial miscarriage of justice has actually occurred[80]. That is because the case is one "where an irregularity has occurred which is such a departure from the essential requirements of the law that it goes to the root of the proceedings"[81]. There has been "a fundamental failure in the trial process"[82]. If the accused is not fit to plead, the key adversary in a partly adversarial proceeding falls below a minimum level of competence. In this case, if the appellant had been unfit to plead, it would mean that he was incapable of understanding what he had been charged with, or incapable of pleading to the charge, or incapable of exercising rights of jury challenge, or incapable of understanding that the trial was an inquiry into whether or not he did what he was charged with, or incapable of following the course of the proceedings, or incapable of understanding the substantive effect of the evidence given against him, or incapable of deciding what defence to rely on, or incapable of instructing legal representatives, or perhaps incapable of doing any combination of these things[83]. If the appellant had been unfit to plead, there could have been no

---

79 *Eastman v The Queen* (2000) 203 CLR 1 at 22 [62]-[63] per Gaudron J, 98 [294] per Hayne J.

80 *Kesavarajah v The Queen* (1994) 181 CLR 230 at 248 per Mason CJ, Toohey and Gaudron JJ.

81 *Wilde v The Queen* (1988) 164 CLR 365 at 373 per Brennan, Dawson and Toohey JJ.

82 *Eastman v The Queen* (2000) 203 CLR 1 at 22 [62] per Gaudron J.

83 *Eastman v The Queen* (2000) 203 CLR 1 at 14 [23] per Gleeson CJ, analysing the application of s 68(3) of the Mental Health Act to the appellant's trial.

adequate testing of the Crown case in cross-examination; no adequate process of objection to inadmissible Crown evidence; no adequate process of preventing erroneous rulings by the trial judge; no proper attention given to the defence answer to the Crown case or to any proper case which the defence might have been well advised to advance, whether that answer or case be testimonial, documentary or otherwise; and no proper development of defence submissions.

116 It is undesirable to give particular instances, by reference to events at the trial of the appellant, of how the alleged unfitness to plead of the appellant might have had an impact on particular aspects of his trial. But when the matter is viewed generally, it is obvious that fitness to plead can have an impact on whether the prosecution has proved guilt and on whether or not the accused was guilty in fact.

117 There will be parts of the evidence on which fitness to plead directly bears: the evidence which the accused personally gives, the evidence of prosecution witnesses giving a different version from that given by the accused in relation to matters within the personal knowledge of the accused, and the evidence of defence witnesses potentially confirmatory of the accused's testimony. If the accused is represented, the form and content of each of these kinds of evidence can be radically affected by the accused's instructions and by the capacity of the accused to give effective instructions. If the accused is unrepresented, the form and content of each kind of evidence can be radically affected by the capacity to articulate testimony given by the accused, and by the accused's ability to cross-examine prosecution witnesses, and to examine and re-examine evidence given by defence witnesses.

118 There may well be other forensic decisions relating to the actual evidence given which could be affected by the accused's fitness to plead. Those decisions might relate to what objectionable questions should be objected to, what objectionable questions should not be objected to, what evidence should be called even in fields outside the accused's personal knowledge, and what tactical courses taken by the Crown should be consented to or opposed. And the significance of particular evidence as expounded in address, whether that address is presented by the accused or by a representative of the accused, can be affected by the accused's fitness to plead.

An alternative route to success for the appellant

119 One possible path to success for the appellant is to construe "guilt" as meaning "guilt as established by the conviction". Any doubt or question as to the validity of the process by which the conviction was obtained would, on this construction, have been sufficient to give power for a s 475 direction to be made. It was this path which the appellant and the Attorney-General contended was correct. It was also the path that Madgwick J took in his dissenting judgment in

the Full Court. He considered that in s 475 "guilt" meant "guilt duly determined". The expression referred to[84]:

> "a conception such as guilt duly adjudged or guilt as known to the criminal law, that is (among other things) proved beyond reasonable doubt; upon admissible evidence; upon a formal charge (arraignment) to which the accused person was fit to plead; and, failing acceptance of a guilty plea, after a trial throughout which the accused was fit to be tried."

120 It followed from this analysis that Madgwick J agreed with the trial judge's decision upholding the Chief Justice's direction on the following grounds[85]:

> "If a person is not fit to plead, he or she cannot be tried for an alleged crime, indeed cannot be arraigned for it. If a person cannot be tried for a crime, he or she cannot be adjudged guilty of it. If an accused person cannot be adjudged guilty of a crime, he or she cannot legally be treated as if he or she were guilty – no punishment can be imposed; no foundation for a future plea of autrefois convict comes into existence. Indeed, he or she is still entitled to the presumption of innocence. Thus, if there is a doubt or question that [the appellant] was not fit to plead, there is necessarily a doubt or question that he is guilty, or at least that he has unlawfully been treated as guilty. That is to say, in law, that a doubt or question has arisen as to his guilt."

An alternative head of power

121 In order to decide the present controversy, it is not necessary to decide whether "guilt" means "guilt duly determined" or whether a doubt or question about any aspect of the trial would have been sufficient to justify a s 475 direction. It would be enough for the appellant's purposes if the Chief Justice's direction were upheld on the basis that a doubt or question had arisen in relation to any portion of the evidence at the trial. On that approach, even if the word "guilt" is to be construed as meaning "guilt in fact", a question or doubt can arise not only in relation to the ultimate question of guilt in fact, but also in relation to a particular portion, or particular portions, of the evidence. The foregoing approach avoids the need to consider whether the first limb of s 475 bore a wide construction.

122 Taking that path, an inquiry could have been directed in one of three circumstances. An inquiry could have been directed if there had been a doubt or

---

84 *Director of Public Prosecutions (ACT) v Eastman* (2002) 118 FCR 360 at 386 [79].

85 *Director of Public Prosecutions (ACT) v Eastman* (2002) 118 FCR 360 at 386 [80].

question about guilt in fact. An inquiry could have been directed if there had been a doubt or question about any mitigating circumstance (usually a matter going to sentence, but possibly including matters which were "mitigating" in the sense of provocation or diminished responsibility, leading to the conclusion that while the convicted person was guilty of a crime, it might be a different and lesser crime). Or an inquiry could have been directed if there had been a doubt or question about a particular portion of the evidence. That particular portion of the evidence might not have been decisive of guilt. But the Supreme Court judge might lawfully have initiated an inquiry into a particular portion of the evidence even though it was not decisive of guilt. After the inquiry the Executive would be obliged to consider what "shall appear to be just" in relation to a conviction which, though otherwise satisfactory, was the outcome of a trial at which a portion of evidence given was perjured, or manifestly mistaken, or inadequately given, or not properly tested on cross-examination, or otherwise unsatisfactory.

123 In *Varley v Attorney-General in and for the State of New South Wales*[86] Hope JA said he found the words "or any portion of the evidence therein" a "mystery" because it "is hard to understand what an inquiry would be about if a doubt or question as to some evidence could not give rise to a doubt or question as to guilt or sentence". He suggested that the function of the reference to "any portion of the evidence" was to enable the section to be used to redress unjustified attacks on a particular Crown witness. If it has that function, the reference would necessarily extend to unjustified attacks on particular defence witnesses. In either case the attack might not of itself raise a doubt or question about guilt in fact, but it might merit investigation. And it does not seem possible to limit the generality of the words "*any* portion of the evidence" to portions of the evidence of those two types. Before this Court counsel for the Director conceded:

> "It is conceivable that a doubt or question could arise about a portion of the evidence without it being a doubt or question about a person's guilt. One can conjure up questions that might so arise."

That concession was sound.

124 The Director also conceded that the Chief Justice was entitled to conclude, and did conclude, that there was a doubt or question about the appellant's fitness to plead. It follows that, in a trial of the kind that led to the conviction of the appellant, a doubt or question must, in turn, arise about portions of the evidence. No part of the Director's argument about the narrow meaning of "guilt" would have invalidated an inference that it did, and that inference is inescapable. The Chief Justice did not in fact reason in that way. However, his decision was an

---

86 (1987) 8 NSWLR 30 at 46.

administrative decision[87]. If the maker of an administrative decision purports to act under one head of power which does not exist, but there is another head of power available and all conditions antecedent to its valid exercise have been satisfied, the decision is valid despite purported reliance on the unavailable head of power[88].

125 It follows that the Chief Justice's decision to direct a s 475 inquiry was valid. The appeal to the Full Court against the order of the primary judge should therefore have been dismissed.

126 However, in view of the fact that the appellant and the Attorney-General did not take the point just discussed, with the result that the Director directed no argument to it, and in view of the extent of the argument on the construction of the words "any doubt or question arises as to his or her guilt", it is desirable to consider whether the Chief Justice's direction was valid when considered in the light of that head of power.

Doubts or questions about aspects of the conviction bearing on the proof of guilt in fact

127 It is not necessary, and hence it is undesirable, to decide whether the most extreme approach advocated by the appellant and the Attorney-General is correct, namely that s 475 permitted a direction if there were a doubt about any aspect of the conviction. It is only necessary to decide the narrower question whether s 475 permitted a direction if there were a doubt or question about fitness to plead. The issue is: "Is a doubt or question about the fitness to plead of a convicted person capable of being a doubt or question as to guilt?"

128 There is another construction of s 475 which, if sound, is sufficient to decide the appeal in the appellant's favour. That construction would hold that s 475(1) gave power at least to direct an inquiry where there was a doubt or question about any element of the process which might have affected whether the

---

87 *Varley v Attorney-General in and for the State of New South Wales* (1987) 8 NSWLR 30 at 49-50 per Hope JA.

88 *Moore v The Attorney-General for the Irish Free State* [1935] AC 484; *R v Bevan; Ex parte Elias and Gordon* (1942) 66 CLR 452 at 487; *Lockwood v The Commonwealth* (1954) 90 CLR 177 at 184; *Brown v West* (1990) 169 CLR 195 at 203; *Mercantile Mutual Life Insurance Co Ltd v Australian Securities Commission* (1993) 40 FCR 409 at 412, 424-425, 435-437; *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 618-619; *Pyrenees Shire Council v Day* (1998) 192 CLR 330 at 353-354 [49], 383 [151]; *Harris v Great Barrier Reef Marine Park Authority* (1999) 162 ALR 651 at 654-657 [8]-[22].

existence of guilt in fact was properly determined. On this construction s 475(1) applied where a doubt or question arose about whether an element in the process was not carried out or was not correctly carried out in circumstances raising a doubt or question about guilt in fact.

129 To put the matter another way, a s 475(1) inquiry could have been ordered where there was a question or doubt about an element in procedure at the trial which the law insists on as a means of ensuring that convictions are soundly based in substance. If the function of a particular element in criminal procedure is to ensure that a conviction is soundly based, in the sense that the accused in fact carried out the conduct charged, a doubt or question as to whether that element operated properly is capable of being a doubt or question as to guilt in fact. It raises a different doubt or question from that which is raised when fresh evidence of an exculpatory kind emerges, or when a key piece of prosecution evidence becomes, in hindsight, suspect. Rather the question arises: "How can we be sure that the accused was guilty on the basis of the jury finding of guilt if there is a doubt or question as to whether that element, seen as important to efficient jury fact finding, operated properly in this case?" On this approach, where a doubt or question arises about fitness to plead, a doubt or question can arise about "guilt", because there can be no confidence that the evidence underlying the conviction established such guilt.

130 The Director rejected this approach because of the sharp distinction, on which his argument depended, between the existence of guilt in fact and the process of establishing guilt. He went so far as to submit that, if an accused person was convicted after standing mute, and later it was discovered that that person was in a psychiatric state precluding any comprehension of what was happening during the trial, no doubt or question was raised as to that person's guilt. He said that the only doubt or question raised was whether the trial was a nullity: no doubt or question was raised as to whether the accused in fact committed the conduct charged.

131 The Director's construction should not be accepted. The correct construction of s 475 is that it gave power at least to direct an inquiry where there was a doubt or question about the fitness to plead of the convicted person to the extent to which that might have affected the proper determination of the existence of guilt in fact. That is so for several reasons.

132 First, the whole of the Crimes Act may be said to vindicate the rule of law. The legislation states standards of conduct to be met by citizens on pain of criminal sanctions. It provides for the conduct of trials in order to determine criminal guilt, and the function of determining guilt is an essential and exclusive

attribute of judicial power[89]. The legislation provides for appeals where trials which determined criminal guilt have been misconducted. One goal of a criminal trial is to ensure that no person is convicted who is innocent of the crime charged. Certain elements in criminal procedure are closely related to that goal. Amongst the most basic of these is that no accused person shall stand trial if unfit to plead.

133 Secondly, as between the prosecutor and the accused, just as an acquittal is conclusive evidence that the accused was not guilty, a conviction is conclusive evidence of guilt. That is so because the system for determining criminal guilt is highly unlikely to convict the innocent because it is adapted in numerous ways to prevent that outcome. The law reacts so sharply against the possibility of persons who are not guilty being convicted that it treats any breakdown in the procedural machinery of the trial as carrying a prima facie risk of convicting the innocent. Because of that prima facie risk, if there is any breakdown, an appeal will be allowed, subject to the operation of the proviso.

134 Thirdly, a "doubt" is one thing. A "question" suggests a less intense mental state. Particular information can stimulate a question without any particular answer being pointed to. A breakdown in some aspect of the trial capable of bearing on the accuracy of the jury's conclusion that the accused was guilty in fact can stimulate a question about whether the accused was guilty in fact. Criminal appeals, under the modern procedures adopted from the *Criminal Appeal Act* 1907 (UK), commonly succeed for reasons other than an actual demonstration of marked weakness in the Crown case or the highlighting of any strong ground for believing that the accused did not commit the crime. Rather, criminal appeals commonly succeed because some defect has arisen in the procedure of the trial. The integrity of the criminal trial and the extent to which there is professional and public confidence in its outcome depend heavily on correct procedures being followed. Failure to follow them is a common cause, not only of appeals succeeding, but also of doubts arising as to the correctness of convictions, because an error in procedure, even if it may not point decisively against guilt, may raise a "doubt" or "question" as to guilt. On the other hand, once it is demonstrated that correct procedures have been followed, "doubts" or "questions" which might otherwise arise do not arise, or if they have arisen they are removed or answered.

135 Fourthly, the first limb of s 475(1), relating to "guilt", has to be read with the other limbs, "any mitigating circumstance" and "any portion of the evidence". The words "any portion of the evidence" are significant. Unfitness to plead will

---

89 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 258-259, 269; *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 109 [40].

often raise a doubt or question about particular portions of the evidence, for example the testimony which the accused has given and the testimony which Crown witnesses have given about matters within the accused's personal knowledge. If the words "any portion of the evidence" permitted an inquiry as to some aspects of the way the process of finding guilt proceeded, as distinct from the isolated question of guilt in fact, they suggest that the word "guilt" permits an inquiry into aspects of the way the process of finding guilt proceeded, at least so far as it had an impact on the conclusion that there was guilt in fact.

136 Fifthly, this construction has support in the language of Justice Wood in the report already mentioned[90]. In assessing it, certain qualifications must be remembered: it is not clear what precise arguments were advanced to the judge; that inquiry did not relate to a doubt or question about fitness to plead; and the inquiry was based not only on doubts or questions concerning guilt but also those concerning mitigating circumstances and portions of the evidence. However, it is clear from the parts of his language quoted below to which emphasis has been added that he saw himself as entitled to explore the possibility that convictions were "*improperly* obtained, due to *some error in the trial process*" and to explore "its significance in relation to the *guilt found by the convictions*". It follows that Justice Wood assumed that a direction given on that basis was a direction within power. That is, while a mere error did not suffice, the inquiry was not limited to guilt in fact. It included the extent to which a flaw in the process leading to conviction cast light on guilt in fact. The view of Justice Wood has been persuasive[91]. It is true, as the Director submitted, that Justice Wood's language did not support the appellant's argument that a doubt or question about any aspect of the conviction would have supported a s 475 direction. However, his Honour's language does support the narrower argument under consideration, that a doubt or question about any aspect of the conviction tending to negate guilt in fact would have supported a s 475 direction.

137 Sixthly, if the Director's construction were correct, s 475 would have produced a curious outcome. If in particular circumstances there is a chance of

---

90 *Report of the Inquiry Held Under Section 475 of the Crimes Act, 1900 Into the Convictions of Timothy Edward Anderson, Paul Shaun Alister, and Ross Anthony Dunn at Central Criminal Court, Sydney, on 1st August, 1979* (1985) at 63-64.

91 It was expressly adopted by Mr Justice Loveday in the *Report of the Inquiry Held Under Section 475 of the Crimes Act 1900 Into the Conviction of Alexander Lindsay (formerly Alexander McLeod-Lindsay) at Central Criminal Court, Sydney on 5 March 1965* (1991) at 5-7 and 185 and by the Hon John Slattery QC in the *Report of the Inquiry Held Under Section 475 of the Crimes Act 1900 Into the Conviction of Andrew Peter Kalajzich at the Central Criminal Court, Sydney on 27 May 1988* (1995) at 20-21.

acquittal which is fairly open, it follows that there is a question about whether guilt can be established beyond reasonable doubt. If there is a question about the existence of a reasonable doubt, there is a doubt or question about guilt. On any construction of s 475 which has been proposed, there is no reason why an inquiry could not be directed where there is a doubt or question about guilt arising from a perception that the accused had lost a chance of acquittal which was fairly open. If an accused person has lost a chance of acquittal which was fairly open, an appeal, if pursued, will be allowed, subject to the operation of the proviso. Where an appeal of that kind succeeds, the appellate court does not necessarily conclude that the accused was innocent. Commonly, the order made is an order for a new trial, not an acquittal. If there were no appeal, but material suggesting the loss of a chance of acquittal which was fairly open came to light, it is likely to have been material raising a "doubt" or "question" about guilt. The inquiry might resolve the doubt or answer the question adversely to the accused, but that does not negate the possibility of a doubt or question arising to a sufficient degree to justify a direction that there be an inquiry. Yet a convicted person complaining about the loss of a chance of acquittal which was fairly open is in many instances complaining of an error which is of a lower order than the error complained of by a person claiming that the conviction is defective because that person was not fit to plead. If a trial takes place where the accused is not fit to plead, there has been "a fundamental failure in the trial process"[92]. The trial is not merely blemished or flawed by the risk that the accused may not have been guilty, it is so seriously defective that if the matter arises before an appellate court, no question arises of applying the proviso: the only course open is to set aside the verdict no matter how strong the Crown case and no matter how likely a conviction is if a trial is later held according to law[93]. It would be strange if, on the true construction of s 475(1), an inquiry could be triggered by doubts or questions about guilt arising from material which suggested that convicted persons lost a chance of acquittal which was fairly open, but a near-certainty that accused persons were unfit to plead would fail to trigger an inquiry. A construction that avoids such a strange result is to be preferred to one which generates it.

138 Seventhly, the Director's argument draws a fundamentally false distinction, in the context of s 475, between a doubt or question about the process of determining whether guilt exists and a doubt or question about the existence of "guilt in fact". Let it be accepted, for the purpose of argument, that guilt in fact by reason of conduct at a particular point in time is conceptually distinct from the process of investigating that conduct, attempting to prove that it took place, and arriving at a jury conviction of guilt. Section 475 does not turn on that particular

---

92 *Eastman v The Queen* (2000) 203 CLR 1 at 22 [62] per Gaudron J.

93 *Eastman v The Queen* (2000) 203 CLR 1 at 22 [63] per Gaudron J.

distinction. Section 475 is triggered by a "doubt or question … as to … guilt". A doubt or question as to guilt in fact can be stimulated by a doubt or question as to some aspects of the process by which the conclusion of guilt recorded in the conviction was arrived at. An observer may legitimately reason as follows:

> "The police force, the prosecuting authorities, the judges, the juries and the legal profession are supposed to administer the legal system for establishing criminal guilt in such a way that the fundamental principles of the system are complied with. One of these fundamental principles is that no person who is unfit to plead shall be tried and convicted. The Director concedes that there is a doubt or question about whether this appellant was fit to plead. In part that concession is based on what judges have said about one possible set of conclusions from his behaviour at the criminal trial. If he was tried and convicted in circumstances giving rise to a doubt or question about his fitness to plead, the doubt or question about the operation of the process must stimulate a doubt or question about whether he in fact did what the conviction which resulted from that process avers he did – that is, a doubt or question as to his guilt."

The short answer to the Director's contention that proceedings of which a convicted person lacked any comprehension because of a psychiatric state raised no doubt or question as to guilt, only as to whether the trial was a nullity, is that the more radical certain types of defect in a trial resulting in a conviction are, the more they raise a doubt or question as to the fundamental propositions inherent in the conviction.

139 It is conceded by the Director that the Chief Justice was, and was entitled to be, satisfied that there was a doubt or question about the appellant's fitness to plead. At least in the circumstances of this case, a doubt or question about fitness to plead would raise a doubt or question about "guilt in fact", in the sense accepted above, because the question as to fitness to plead raised the further question whether the adversarial process of ascertaining the facts selected by the law operated properly where one of the adversaries was unfit to participate. That in turn raises a question of whether the recorded conviction corresponds with the petitioner's guilt in fact. There may be cases where, even if there is a doubt or question about a convicted person's fitness to plead, there is no doubt or question as to guilt in fact. An example could arise where a crime, committed in the presence of many unimpeachable witnesses with good opportunities of observation, was admitted in several admissible videotaped confessions by the accused made to different people on different occasions. The fact that, after the crime and the confessions, the accused suffered bad head injuries in a car accident and became unfit to plead would not raise a doubt or question as to guilt in fact even if the trial should not have taken place because of the accused's unfitness to plead. But the present case is remote from those circumstances.

140 This reasoning affirms the conclusion already stated that the Chief Justice had power under s 475(1) to make the direction he did[94].

Orders

141 The appellant in substance seeks orders that the appeal be allowed with costs, that the orders of the Full Federal Court be set aside and that the appeal to that Court by the Director be dismissed. The appellant seeks no order as to costs in the courts below. The third respondent seeks no order as to costs. The Director submitted that if the appeal were allowed, no order for costs should be made against the Director because of the special nature of the proceedings and the identity of the parties and because no order for costs had previously been made in the proceedings. That submission explains why there should be no order as to costs as between the Attorney-General and the Director. It is also true that costs are not normally ordered against the Crown in criminal cases. However, the appeal is not a criminal appeal, but an appeal originating in civil litigation about the validity of an administrative order. It raised an important issue as to the scope of the power to direct inquiries under the Crimes Act. It is appropriate to order that the Director pay the appellant's costs in this Court.

142 The following orders should be made.

1. Appeal allowed.

2. Set aside orders 4 and 5 made by the Full Court of the Federal Court on 3 July 2002 and, in lieu thereof, order that the appeal from the orders of the Supreme Court of the Australian Capital Territory in proceeding No SC 149 of 2002 dated 3 May 2002 be dismissed.

3. The first respondent to pay the costs of the appellant in this Court.

Appellant's Supplementary Submissions

143 On 28 March 2003 the appellant informed the Registry that he had withdrawn his instructions from the counsel who represented him at the hearing

---

94 Underlying the reasoning is a purposive approach to construction: *Bropho v Western Australia* (1990) 171 CLR 1 at 20; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 112-113; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69], 384 [78]. This line of authority was highly influenced by McHugh JA's (dissenting) reasons in *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 421-424, which were specifically approved in *Bropho v Western Australia* (1990) 171 CLR 1 at 20.

of the appeal. He supplied a seven page document entitled "Appellant's Supplementary Submissions". No leave was sought or given for the supply of this document, and it does not state any reason why it should now be received. Accordingly, it is rejected[95].

---

95 See *Carr v Finance Corporation of Australia Ltd [No 1]* (1981) 147 CLR 246 at 258 per Mason J.