HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, KIRBY, HAYNE AND CALLINAN JJ

KALA SUBRAMANIAM APPELLANT

AND

THE QUEEN RESPONDENT

Subramaniam v The Queen [2004] HCA 51
10 November 2004
S588/2003

ORDER

1. Appeal allowed.

2. Set aside the order of the New South Wales Court of Criminal Appeal made on 25 November 2002 dismissing the appellant's appeal and, in its place, order that:

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

(b) the conviction of the appellant be quashed; and

(c) there be a new trial of the appellant on the first count of the indictment.

On appeal from the Supreme Court of New South Wales

Representation:

M R Einfeld QC with D R J Toomey for the appellant (instructed by McClellands)

R D Cogswell SC with G E Smith and J A Quilter for the respondent (instructed by the Solicitor for Public Prosecutions for New South Wales)

CATCHWORDS

Subramaniam v The Queen

Criminal law – Unfitness to be tried – Attorney-General directed that a "special hearing" under the *Mental Health (Criminal Procedure) Act* 1990 (NSW) ("the Act") be conducted in respect of charges against the appellant – Whether and in what circumstances a "special hearing" should be stayed – Whether "special hearing" conducted in compliance with conditions and procedures required by the Act – Adequacy of trial judge's directions to the jury.

Practice and procedure – Trials conducted as "special hearings" under the Act – Jury directions.

Words and phrases – "unfit to be tried", "special hearing", "substantial miscarriage of justice".

Mental Health (Criminal Procedure) Act 1990 (NSW), ss 19, 21(4).

1 GLEESON CJ, McHUGH, KIRBY, HAYNE AND CALLINAN JJ. The principal questions in this appeal are whether a stay of the appellant's trial under the *Mental Health (Criminal Procedure) Act* 1990 (NSW) ("the Act") should have been granted, and whether, when the trial did proceed, it was conducted in compliance with the Act.

Facts

2 *The initiating events*: On a morning in August 1995 the driver of a vehicle registered in the name of Ms Leigh Johnson, who was then a practising solicitor, failed to stop at a red light in a Sydney suburb. The failure was captured on camera. The features, and therefore the identity of the driver could not be distinguished in the photograph. Ms Johnson was issued with an infringement notice. She elected, as she was entitled to do, to contest the charge contained in the notice before the Local Court of New South Wales. In November 1995 Ms Johnson requested that Court to grant her an adjournment on the grounds of her physical inability to attend. On 10 January 1996 the case was set down for hearing on 29 May 1996. On 30 January 1996, Ms Johnson requested copies of the images captured on camera. They were supplied. On 29 February 1996 the appellant, who at the time was an employee of Ms Johnson, made a statutory declaration that she was the infringing driver of the vehicle. The declaration was witnessed by another solicitor employed by Ms Johnson.

3 On 5 March 1996 Ms Johnson sent the appellant's statutory declaration to the prosecutor with a request that the case be discontinued. She also asked that the infringement notice be forwarded to the appellant. The prosecutor rejected the requests. On 2 July 1996 Ms Johnson was convicted in absentia. On 5 August 1996 she appealed to the District Court of New South Wales. There the appellant gave evidence that was, with one non-material exception, generally consistent with her declaration. The appeal was upheld and Ms Johnson's conviction was quashed.

4 On 5 December 1996 the appellant and Ms Johnson were charged with two counts of perverting the course of justice under s 312 of the *Crimes Act* 1900 (NSW). The first charge against the appellant was as follows:

> "on 29 February 1996 at Sydney in the State of New South Wales did make a statutory declaration knowing it to be false with intent to pervert the course of justice."

This was the second charge:

> "on 5 August 1996 at Sydney in the State of New South Wales did give false evidence to the District Court with intent to pervert the course of justice."

A recorded conversation: On 6 December 1996 members of the Homicide Unit of the New South Wales Police Force – why that Unit was involved was not explored – arranged for a former employee of Ms Johnson and therefore an acquaintance of the appellant, Ms Coughlan, to meet the appellant. Ms Coughlan was fitted with a recording device to record surreptitiously any conversation that she might have with the appellant. Ms Coughlan then contrived a meeting with the appellant and discussed the infringement and Ms Johnson's and the appellant's involvement in it. These exchanges formed part of that discussion:

> "[Coughlan]: Yeah. Well do you remember I was in the, I was in the, do you remember, you know when we were in the room and she asked which one of us, you know, was going to take it. And I couldn't because of all my ...
>
> [Appellant]: Oh, I'd take it.
>
> [Coughlan]: And you said you could, because of your perfect driving record.
>
> [Appellant]: Not that I could, but that ...
>
> [Coughlan]: You didn't want to ...
>
> [Appellant]: Yeah, I could ...
>
> [Coughlan]: … because of your ...
>
> [Appellant]: … not that I wanted to.
>
> [Coughlan]: Yeah, yeah.
>
> [Appellant]: But the thing is that they were out of time: they can't strip, they couldn't take any points of my licence anyway. So I've still got a clean record.
>
> [Coughlan]: Really?
>
> ...

[Appellant]: Yeah, so she didn't lose any points, neither did I.

[Coughlan]: Yeah.

[Appellant]: And no one got fined either.

[Coughlan]: Yeah.

[Appellant]: Yeah.

...

[Appellant]: ... well we didn't stall it. What happened was, they didn't inform us the first day. Right? By the time they had to re-list it, we had not documentation saying it was listed on that day. So no one turned up.

...

[Coughlan]: So what did they ask you in court?

[Appellant]: Well, I just, I just sat in the witness box and had a nice conversation with the judge.

[Coughlan]: So you weren't cross examined?

[Appellant]: No, because, Leigh, Leigh thought she'd have to. Because she was, like, all ready to go.

[Coughlan]: Yeah.

[Appellant]: And he was just sitting there asking me questions, and I was just, like, sitting back enjoying myself.

...

[Appellant]: (Laughs) But the photos, the photos, the photos ...

[Coughlan]: ... and showed her driving instead of you.

[Appellant]: The photos showed nothing. We ordered the photos.

[Coughlan]: Right.

[Appellant]: Mm. And they showed nothing. You couldn't tell who was driving.

[Coughlan]: So, you weren't worried about …

...

[Coughlan]: ... apart from her being blonde and with you being like dark haired.

[Appellant]: I know, I know, I know.

[Coughlan]: Yeah, because when it came out in the paper I thought, 'Oh my God, she could have at least ...'

[Appellant]: Yeah.

[Coughlan]: … got someone blonde to say they were driving. You know what I mean?"

6 After a lengthy preliminary hearing the appellant was committed to stand trial. Ms Johnson was discharged on both counts. The reason for the dismissal of the charges against Ms Johnson was that without the taped evidence which was not admissible against her, there was insufficient evidence to put her on trial.

The appellant's first trial

7 A trial ("the first trial") at which the appellant gave evidence, commenced in the New South Wales District Court on 23 August 1999 before Shillington DCJ, sitting with a jury. On 3 September the jury was discharged because it was unable to reach a verdict. The appellant's mental health deteriorated thereafter.

The first application for a permanent stay

8 It was against this background that the appellant applied for a permanent stay of the criminal proceedings ("the first application"). On 11 April 2000 the first application was heard and rejected by Gibson DCJ. The Court of Criminal Appeal of New South Wales also rejected an interlocutory appeal against the refusal of the stay of those proceedings.

The determination of the appellant's fitness for trial

9 *Determination of unfitness*: On 27 March 2001 the District Court (Stewart ADCJ) directed that there be a hearing with respect to the appellant's fitness to

stand trial. On 25 September 2001 the Mental Health Review Tribunal, acting pursuant to s 16[1] of the Act formed this view:

> "that, because of [the appellant's] moderate intellectual disability, [the appellant] would not meet the criteria as described by Smith J in *R v Presser*[2], for fitness to be tried for an offence, and that on the balance of

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1 Section 16 provided:

> "(1) If a person has been referred to the Mental Health Review Tribunal under section 14 after a finding that the person is unfit to be tried for an offence, the Tribunal must, as soon as practicable after the person is so referred, determine whether, on the balance of probabilities, the person will, during the period of 12 months after the finding of unfitness, become fit to be tried for the offence.
>
> (2) If the Tribunal determines that a person will, during the period of 12 months after the finding of unfitness, become fit to be tried for an offence, the Tribunal must also determine whether or not:
>
> (a) the person is suffering from mental illness, or
>
> (b) the person is suffering from a mental condition for which treatment is available in a hospital and, if the person is not in a hospital, whether or not the person objects to being detained in a hospital.
>
> (3) After determining in respect of a person the matters referred to in this section, the Tribunal must notify the Court which referred the person to it of its determination.
>
> (4) If the Tribunal determines that a person will not, during the period of 12 months after the finding of unfitness, become fit to be tried for an offence, the Tribunal must notify the Attorney General of the determination and furnish the Director of Public Prosecutions with a copy of the notification."

2 [1958] VR 45 at 48. In his reasons Smith J suggested that before a trial could proceed without unfairness or injustice an accused should meet certain "minimum standards". Such minimum standards include the ability to understand the offence with which the accused has been charged, the nature of the proceedings, and the effect of any evidence given against the accused. Additionally, his Honour said that

(Footnote continues on next page)

probabilities, this situation will continue, and [the appellant] will not become fit during the period of twelve months after the finding of unfitness."

10 *Direction for special hearing*: On 28 November 2001 the Attorney-General for New South Wales, in accordance with s 19 of the Act, directed that a special hearing be conducted of the charges against the appellant. Section 19 provides:

"**19 Court to hold special hearing on direction of Attorney General**

(1) If the Attorney General directs that a special hearing be conducted in respect of an offence with which a person is charged, the appropriate Court must, as soon as practicable after the Attorney General so directs, conduct a special hearing for the purpose of ensuring, despite the unfitness of the person to be tried in accordance with the normal procedures, that the person is acquitted unless it can be proved to the requisite criminal standard of proof that, on the limited evidence available, the person committed the offence charged or any other offence available as an alternative to the offence charged.

(2) The question whether a person has committed an offence charged or any other offence available as an alternative to an offence charged is, except as provided by section 21A, to be determined at a special hearing by a jury constituted for that purpose.

(3) The *Jury Act 1977* applies to and in respect of the constitution of a jury and a jury constituted as referred to in subsection (2) in the same way as it applies to and in respect of the constitution of a jury and a jury for the trial of any criminal proceedings.

(4) A member of a jury otherwise constituted for the purpose of any proceedings relating to the same accused person and the same offence is disqualified from being a member of a jury constituted as referred to in this section."

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an accused should possess sufficient capacity to be able to decide whether he or she will rely upon a defence, and, if so, be in a position to communicate, either to the court or counsel, the facts necessary for the defence.

11 *Conduct of the special hearing*: On 24 April 2002 the special hearing commenced before Luland DCJ and a jury of twelve when a further application for a permanent stay ("the second application") was made and refused. An application to exclude the recorded evidence of Ms Coughlan's conversation with the appellant was similarly rejected.

12 As to a permanent stay the appellant claimed that following the mistrial she had begun to manifest suicidal tendencies. This claim was supported by medical evidence tendered at the hearing, including 11 reports from the appellant's psychiatrist, Dr Menzies. The primary judge generally accepted this doctor's opinion, that the appellant was suffering from an "adjustment disorder" which had become worse since the first application, but was not satisfied that the evidence justified the grant of a permanent stay. His Honour made no reference to the principles governing applications for stays in his judgment, probably because these were not in contest between the parties. The matter then proceeded to trial by special hearing.

13 The procedures for special hearings are prescribed by s 21 of the Act which provides:

> "**21 Nature and conduct of special hearing**
>
> (1) Except as provided by this Act, a special hearing is to be conducted as nearly as possible as if it were a trial of criminal proceedings.
>
> (2) At a special hearing, the accused person must, unless the Court otherwise allows, be represented by counsel or a solicitor and the fact that the person has been found unfit to be tried for an offence is to be presumed not to be an impediment to the person's representation.
>
> (3) At a special hearing:
>
> (a) the accused person is to be taken to have pleaded not guilty in respect of the offence charged, and
>
> (b) the counsel or solicitor, if any, who represents the accused person may exercise the rights of the person to challenge jurors or the jury, and
>
> (c) without limiting the generality of subsection (1), the accused person may raise any defence that could be properly raised if

the special hearing were an ordinary trial of criminal proceedings, and

(d) without limiting the generality of subsection (1), the accused person is entitled to give evidence.

(4) At the commencement of a special hearing, the Court must explain to the jury the fact that the accused person is unfit to be tried in accordance with the normal procedures, the meaning of unfitness to be tried, the purpose of the special hearing, the verdicts which are available and the legal and practical consequences of those verdicts."

14 *Initial directions to the jury*: At the outset his Honour offered these explanations to the jury about the task upon which they were about to embark:

"Ladies and gentlemen, I have a few things to explain to you before we get under way. What you are about to engage in is what is called a special hearing. I will explain to you how that comes about and the purposes of it and what your role will be in the trial.

The reason it has been necessary to have a special hearing is because the accused has been found unfit to be tried. The reason she has been found unfit to be tried is because of her mental condition. No need for me to go into that, but that is the reason why she has been found unfit to be tried.

... Now a special hearing is held as near as possible to that of a normal trial with its limitations because of the situation of the accused. The counsel will have the opportunity to cross-examine any of the witnesses that the Crown calls, and it will certainly be – the trial will be normal in that sense.

The ultimate situation will be this. That you will be asked at the conclusion of the special hearing to determine upon the limited evidence that will be available to you and come to a verdict on the verdicts that will be available to you. The verdicts that will be available to you will be either not guilty, and if that be the case, the accused, like any other accused in any other trial, will be discharged. If however you find that the accused committed the charge on the limited evidence that will be placed before you, then it is open to you to make that special finding, that upon the limited evidence available, that she committed the offence, charge, the one that you are dealing with, remember there are two charges. And if you so make that finding, then the legal and practical consequences of that

> will be that I then will have to determine what is to happen to the accused as a result of your finding, what penalty would be imposed, and where in fact she would be referred to in respect of that penalty. So that is the nature of this hearing that you are about to engage in, and that is what you will be called upon to do."

The primary judge at a later stage of the hearing said this:

> "Just as a bit of background before I tell you what the doctor diagnosed in respect of [the appellant], there has been a previous trial in respect of this matter. You don't really need to concern yourselves with the fact that there was a trial. You're to determine this matter on what's put before you here in this Court. But there was no resolution of the trial on that occasion. That was back in August of 1999. Following that trial there was a proceeding again in this Court before a judge to determine whether she was fit to be tried, based on the evidence in particular by her treating psychiatrist, Dr Menzies. Dr Menzies' diagnosis of the accused was that she was suffering from an adjustment disorder, with anxiety and depressive features which were severe. The illness began in February/March 1999 when she was notified she had to stand trial. It's said by the doctor, that as a result of the first trial, and the subsequent proceedings, that the depressive illness, anxiety order [sic] had intensified and is to the point where it has made her unfit to be tried. In addition to the hearing before the judge she was then referred to the Mental Health Review Tribunal who heard somewhat similar evidence, and they in turn directed that she was unfit to be tried. It was then forwarded off to the Attorney General who ordered these proceedings ..."

15 *Supplementary directions*: In his summing up, the trial judge initially omitted to direct the jury as to the appellant's failure to give evidence. After he had concluded his directions the following exchange occurred in the presence of the jury:

> "[Trial Judge]: ... do you want to raise anything?
>
> ...
>
> [Defence Counsel]: Just one matter your Honour in relation to the law in regards to the accused not giving evidence.
>
> [Trial Judge]: I am sorry, the what?

[Defence Counsel]: In regards to the accused not giving evidence.

[Trial Judge]: Certainly I meant to do that, I am sorry about that."

The direction that the trial judge then gave was as follows:

> "The accused did not give any evidence before you. She was entitled to give evidence before you but you might think in all of the circumstances of this case it is perhaps understandable why she did not. But the fact that she did not give evidence is not something that you can assume therefrom that she is making any admissions at all in respect of the matter, and certainly you cannot take her silence, in any way, to fill the gaps of the evidence that was tendered by the prosecution. You certainly cannot do that in respect of the matter."

16 On 1 May 2002 the jury returned a verdict of not guilty of the second charge, of giving false evidence, and a verdict on the other of guilty of the making of the false statutory declaration.

17 On 25 November 2002 the New South Wales Court of Criminal Appeal (Beazley JA and Sully J, Simpson J dissenting on the issue of the stay which was also the subject of the appeal) dismissed an appeal brought by the appellant against her conviction. It is from this judgment that the appellant appeals to this Court.

Decision of the Court of Criminal Appeal

18 Beazley JA, (Sully J agreeing) said this with respect to the stay[3]:

> "It is often the case that, because of a person's mental condition, the person is not able to give evidence or otherwise meaningfully participate in the trial. As I have said, his Honour considered that the interests of justice were best served by the trial proceeding as soon as possible ... It is often the case with a person being tried under [the Act] that he/she cannot, in any practical or meaningful way, participate in the trial. Accordingly, I do not see any appellable error in his Honour having refused the application."

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3 [2002] NSWCCA 372 at [42].

19 In her dissenting judgment Simpson J[4] expressed the view that the "medical evidence was so overwhelming as to dictate that the proceedings be stayed – if not permanently, at least temporarily."

The appeal to this Court

20 The appellant appealed to this Court on a number of grounds: that the Court of Criminal Appeal should have set aside the finding of the trial judge, Luland DCJ, that there should not be a stay in the proceedings; that the trial judge failed to direct the jury adequately about why the appellant did not give evidence, or how they should approach the absence of that evidence; and about how they should deal with the taped evidence and the evidence of Ms Coughlan.

21 The next ground of appeal was as follows:

> "The trial/special hearing miscarried by reason of the Crown's failure to place evidence before the jury of the nature and extent of the appellant's mental illness and unfitness to give evidence in the light of:
>
> (a) The Crown's refusal to consent to the trial/special hearing proceeding before a Judge alone as permitted by the relevant legislation, so requiring it to be a trial by Jury;
>
> (b) The Crown's requirement and the trial Judge's order that the appellant be present throughout the trial/special hearing;
>
> (c) The fact that the appellant had previously given sworn evidence on these issues of which the jury had not rejected."

22 During the hearing of the appeal the appellant was granted leave to add another ground as follows:

> "The special hearing miscarried by reason of the trial judge's failure to comply with the requirements imposed by s 21(4) of [the Act]."

23 It was upon this ground that the parties particularly focussed during the hearing of the appeal.

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4 [2002] NSWCCA 372 at [84].

The stay

24 *The principles governing stays*: The principles relating to the grant of a stay are not disputed[5]. The appellant does not in this Court, nor has she previously, complained of unreasonable delay in the prosecution of her case. She relies solely on the fact of her deteriorating mental health, that it relevantly adversely affected her in two particular respects. First, it is submitted that her mental health prevented her from being able to give reliable testimony. Secondly, further prosecution of the proceedings could have resulted in a serious worsening of her current mental health. We observe at this point that no fresh evidence was sought to be tendered in the Court of Criminal Appeal to establish that the trial had in fact significantly worsened the appellant's condition.

25 In *Jago v District Court (NSW)*[6] Brennan J cautioned against too ready a disposition to grant stays:

> "The reasons for granting stay orders, which are as good as certificates of immunity, would be difficult of explanation for they would be largely discretionary. If permanent stay orders were to become commonplace, it would not be long before courts would forfeit public confidence. The granting of orders for permanent stays would inspire cynicism, if not suspicion, in the public mind."

26 It may now also be accepted however that the categories of factual situations which may call for a consideration of the possibility of abuse of process in criminal proceedings are not closed[7]. As Mason CJ, Deane and Dawson JJ said in *Walton v Gardiner*[8], the inherent power of a superior court to stay proceedings on the ground of "abuse of process extends to all those

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5 *Aboud v Attorney-General for New South Wales* (1987) 10 NSWLR 671 at 684 per Kirby P, 692 per McHugh JA.

6 (1989) 168 CLR 23 at 50.

7 *Walton v Gardiner* (1993) 177 CLR 378 at 393 per Mason CJ, Dean and Dawson JJ; see also *Jago v District Court (NSW)* (1989) 168 CLR 23 at 31 per Mason CJ, 74 per Deane J, 77 per Gaudron J; *Barton v The Queen* (1980) 147 CLR 75 at 95-96 per Gibbs ACJ and Mason J.

8 (1993) 177 CLR 378 at 393.

categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness."

27 Fairness or unfairness has been said to defy "analytical definition" and to "involve an undesirably, but unavoidably, large content of essentially intuitive judgment"[9]. Deane J in *Jago*[10] posed some examples of unfairness: default or impropriety on the part of the prosecution in pre-trial procedures, or the concealment of evidence from an accused person that may have assisted his or her defence. Others may include conviction on evidence truly not probative; compulsion upon an accused to incriminate himself or herself; the exaction of involuntary confessions or admissions[11]; failure to hold committal proceedings[12]; the absence of legal representation of an indigent person facing serious criminal proceedings[13]; and, unreasonable delay.

28 *Stays in the context of the Act*: One important purpose of the Act is an ameliorative one, to give a person unfit to be tried in an orthodox way, an opportunity of being acquitted in a special hearing so that any possibility of legal proceedings against the accused of any kind may be brought to an end[14]. It is also no doubt another purpose of the Act that a special hearing actually take place, and that victims be afforded an opportunity to see that a form of justice, as necessarily imperfect as it may be in the circumstances, has been done. This purpose is secured not only by the holding of the special hearing, but also, in an appropriate case, by the pronouncement of a "limiting term" of imprisonment that would have to be served if the person had been tried in the normal way[15]. It is self-evident that a special hearing in which an accused is disabled from

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9 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 57 per Deane J.

10 (1989) 168 CLR 23 at 57.

11 *R v Swaffield* (1998) 192 CLR 159.

12 *Barton v The Queen* (1980) 147 CLR 75 at 100-101 per Gibbs ACJ and Mason J; cf Stephen J at 104.

13 *Dietrich v The Queen* (1992) 177 CLR 292.

14 See ss 26 and 28.

15 See ss 23(1)(b) and 24.

instructing his or her lawyers or in other ways from full participation in the proceedings, will have its deficiencies. But no system of justice is perfect. Neither the deficiencies of a special hearing under the Act, nor the other matter which was referred to in submissions, that the Act reposes expansive and wide discretions in the State Attorney-General[16], provides reason to construe and apply the Act otherwise than according to its tenor.

29 *No error has been shown*: The main difficulty for the appellant is that the Act assumes as the basis for its application to her, the very matter upon which she would seek to rely to escape its application, her current mental infirmity and all that it involves.

30 The appellant relied not only upon her current mental condition, but also upon the potential for its exacerbation by reason of the special hearing. This, it was said, would be so oppressive to her as to justify a permanent stay.

31 A relevant test that has been applied and which we would adopt, is whether, in light of the appellant's deteriorating condition, it "would be out of accord with common humanity" to have allowed the matter, which was, it must be emphasized, a special hearing, to proceed[17].

32 It is true that the medical evidence given by Dr Menzies and accepted by the primary judge established that the appellant had "an adjustment disorder with anxiety and depressive features" which developed to the point that after the first trial she was talking about suicide. It would no doubt have been better had the trial judge discussed the principles relating to stays and might therefore now be able to be seen to have applied them to particular parts of the medical evidence which he was disposed to accept. But nonetheless it does appear that the primary judge did have regard to the whole of the medical evidence in reaching the decision that he did.

33 The possibility of the continuing deterioration of the appellant's mental health and any potential that the trial might have for its aggravation did not therefore, in the circumstances of this case, provide sufficient reason for the grant of a permanent stay. The primary judge has not been shown to have failed to

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16 See ss 19 and 20.

17 *Hakim* (1989) 41 A Crim R 372 at 377; *R v WRC* (2003) 59 NSWLR 273 at 281 [51]-[52].

weigh and give effect to relevant factors of the kind to which Mason CJ, Deane and Dawson JJ referred to in *Walton*[18]:

> "a weighing process involving a subjective balancing of a variety of factors and considerations. Among those factors and considerations are the requirements of fairness to the accused, the legitimate public interest in the disposition of charges of serious offences and in the conviction of those guilty of crime, and the need to maintain public confidence in the administration of justice."

34 We are not persuaded therefore that the primary judge erred in holding that the appellant's mental condition, or even the chances of its deterioration however caused, warranted the grant of the stay, and that the majority in the intermediate court erred in relation to that holding. The holding of the primary judge was essentially a factual one and included a discretionary component. His Honour's position was that it was in everyone's interests, including the appellant's that the trial proceed as quickly as possible.

35 The ground of appeal relating to the stay should therefore be rejected. This is not to say that notwithstanding the manifest purposes of the Act, there may not still be cases of mental infirmity calling for the grant of a stay even of the special hearing for which it provides although instances of them are likely to be rare[19]. This is so for two reasons: the Act does not, expressly or by implication, forbid their application; and, common humanity would argue in favour of a stay if the risk were a real one, and the likely exacerbation grave.

The requirements of the Act

36 *Defects in compliance with the Act*: In order to deal with the ground upon which the appellant focussed, that is, as to inadequacy of the primary judge's explanation of the nature of the special hearing, it is necessary to scrutinize what the primary judge actually told the jury (which relevantly we have earlier set out) by reference to s 21(4) of the Act.

37 Although his Honour did tell the jury that the appellant was unfit to be tried because of her mental condition and that the hearing was a special one for

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18 (1993) 177 CLR 378 at 396.

19 See *R v WRC* (2003) 59 NSWLR 273.

that reason, the trial judge's remarks fell short of what the sub-section requires, that the judge *explain* at the commencement of the hearing what unfitness to be tried means, the purpose of the special hearing, and the verdicts which are relevantly available (as set out in s 22 of the Act, in this case not guilty of the offence(s) charged, or, that on the limited evidence available, the accused committed the offences charged). Nor did the trial judge attempt to explain what the legal and practical consequences of their verdict would be. All that he said as to these was that the legal and practical consequences were matters for him. A further defect in his Honour's remarks was his failure to explain to the jury enough about the normal procedures to enable them to understand the respects in which the special hearing would be a departure from them.

38 These were all matters that s 21(4) requires to be, not just touched upon, but explained. In his submissions counsel for the respondent urged that matters of the relevant kind were sufficiently explained by counsel for the appellant in his speech to the jury. We doubt whether this is so. Even if it were, counsel's speeches may not be substituted for the performance of the trial judge's statutory duty.

39 *An appropriate direction*: What is required is that the explanation be, and have the authority of an explanation by the trial judge[20].

40 The precise terms of an appropriate explanation will need adaptation to the facts of the particular case. Here however something to this effect should have been said by the trial judge to the jury:

> " A Tribunal set up under an Act of Parliament has found that this accused is unfit to be tried on the present charge(s) in the normal way because in one or more respects the accused does not have the mental capacity to meet all of the basic requirements of a fair and just trial. Consequently, the law of this State requires that the accused be tried under a special procedure. The special procedure has been laid down by Parliament in an Act with which the Court, which means all of us, including you the jury, must comply.
>
> Her unfitness for a normal trial may or may not be apparent to you as the trial proceeds. That is because unfitness for trial, which is an inability on the part of an accused person, to meet a minimum standard of

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20 cf *Domican v The Queen* (1992) 173 CLR 555 at 562.

mental capacity to be tried fairly, may arise for any one or more of several reasons. She may not understand the nature of the charge against her, or be able to decide whether she has a defence to it. She may not be able to make a rational decision whether she is guilty or not guilty, or how to plead to the charge. She may not be able to understand generally the nature of the criminal proceedings and what their course and outcome may mean to her. The unfitness may be an unfitness to give her lawyers instructions, that is, to tell them adequately what her defence is, or in what respects the prosecution evidence is erroneous, or should be questioned and tested, or an inability to apply herself to the proceedings in an informed or constructive way. It may be that none of these matters will actually be apparent to you. But whether they are or not, you must accept that in one or more ways, of which these are only possible examples, this accused is unfit mentally to be tried in a normal way because for that to occur the law insists that an accused have the mental capacity to do all of these things.

How then, you may ask, is this special hearing to be conducted? In what ways will it be different from a normal criminal trial? Well, it could be different in one or more of the ways to which I have referred, that is, in the way in which the accused is able or unable to participate or contribute to her defence. In every criminal trial an accused person may or may not choose to give evidence. That remains so in a special hearing such as this one, but an unfit person may not be capable of making a reasoned decision about that, or indeed other matters concerning the hearing. At a special hearing the accused person is taken to have pleaded not guilty to the charges against her, unlike in a normal trial in which an accused may enter a plea of either guilty or not guilty. The Act of Parliament that I mentioned before is intended to ensure that a special hearing not prejudice the accused any more than her unfitness already may do. She may raise, or have raised on her behalf whatever defences a fit person could raise in a normal trial. She may, or she may not, give evidence. She must however have legal representation and may not, as some mentally fit accused persons do, choose to represent herself.

What are the purposes of a special hearing? The first is to see that justice is done, as best it can be in the circumstances, to the accused person and the prosecution. She is put on trial so that a determination can be made of the case against her. The prosecution representing the community has an interest also in seeing that justice be done. A special hearing gives an accused person an opportunity of being found not guilty in which event the charge will cease to hang over her head, and if she

requires further treatment that it may be given to her outside the criminal justice system.

Members of the jury, you also need to keep in mind that you will have to reach your verdict on what the Act describes as the limited evidence available. There are various ways in which evidence at a hearing of this nature may be limited. An accused, for example, may be unable to give evidence, or unable, by reason of her mental unfitness to give adequate instructions to her lawyers concerning the calling of witnesses who might assist her case, or, as to matters on which cross-examination could be based.

The next matter which I must explain to you concerns the verdicts which it is open to you to give in this case. In the present case[21] those verdicts are 'not guilty of the offence' or 'the accused person committed the offence' on each of the offences charged.

If you find the accused not guilty then that will be the end of the matter. She will be free and subject to no further criminal process of any kind in respect of the events giving rise to the charge. If however you find that on the limited evidence available she did commit the offence or offences charged, it will be my duty to decide whether, had she been fit to be tried in a normal way, and been convicted, she would have been subjected to a term of imprisonment, and if she would have been, what term would have been appropriate. If however I were to take the view that a term of imprisonment would not have been appropriate I may impose another penalty just as I might in the case of a person fit to be tried, such as a fine or a community service order, or a bond.

In the event that I were to nominate as appropriate a term of imprisonment it would then be for a special Tribunal, the Mental Health Review Tribunal, to decide whether the accused is still suffering from a mental illness and whether she should be detained in hospital for treatment. Her case would then come back to the court to decide whether an order should be made for her detention in hospital or otherwise. It is also possible that the accused could be tried in the normal way for the offence if she should become fit to be so tried before the period equivalent

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21 See s 22(1)(a) and (c). There was no suggestion in this case of a verdict of not guilty on the grounds of mental illness, or guilty of an alternative offence.

to any term of imprisonment I might nominate expires. But this would be a matter for the prosecuting authorities to decide.

I should emphasise that although I am telling you about the legal and practical consequences of any verdict that you may reach in order for you to understand the nature of the special proceeding in which we are engaged, your duty is confined to deciding whether, on the limited evidence available, the prosecution has proved beyond reasonable doubt that the accused committed the offence(s) charged. The consequences of the verdict and what is to happen to the accused thereafter are matters for the Mental Health Review Tribunal, the prosecuting authorities and the Court, not for you."

41 It is not immediately clear why the jury should be burdened with the sort of detail that the Act requires with respect to the legal and practical consequences of their verdict. Perhaps the requirement is intended to give the jury an assurance that a guilty person will not escape the consequences of his or her crime by reason of a temporary mental infirmity, or that a mentally unfit person will be humanely treated, even if convicted. Whatever the reasons, the language of s 21(4) is mandatory and must be given effect.

42 *Conclusion: ground established*: It is no answer for the respondent to say that counsel for the appellant failed to request the trial judge to give the explanation that s 21(4) of the Act requires. No doubt it would have been better if either the prosecutor or the appellant's counsel had done so. But the trial judge's obligation is expressly stated by s 21(4). It is an obligation imposed on the court for the benefit of the community as well as mentally unfit defendants. The requirements of the sub-section cannot be waived on an accused's behalf or on behalf of the prosecution.

43 The respondent argued that even if this ground were to be made out it does not automatically follow that the verdict should be quashed. It was a corollary of that argument that there had been no miscarriage of justice because the remarks made by the trial judge from time to time during the trial, the summing-up, the judge's answer to the jury's question about the mental unfitness of the appellant, and the submissions of counsel in total informed the jury of all that the Act required them to know.

44 The respondent's argument must be rejected. The mandatory requirements of s 21(4) cannot be and were not met by the explanations offered piecemeal over the course of the hearing or in statements by counsel. The explanations required are both limited and specific. They must be given at the commencement of the

trial. That requirement and the content of the explanations indicate that the explanations that *the judge* must give are essential to the special hearing. A departure from any one of the elements identified in sub-ss (2) to (4) deprives the hearing of its fundamental character. Such a departure itself constitutes a miscarriage of justice for the purpose of the *Criminal Appeal Act* 1912 (NSW) and therefore requires the quashing of any conviction entered after such a departure.

45 A verdict after a special hearing is subject to appeal in the same manner as a verdict in an ordinary criminal trial (s 22(3)(c) of the Act). That appeal is brought under s 5(1) of the *Criminal Appeal Act*. Section 6(1) of that Act provides:

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

Although it cannot be said that the failure to comply with s 21 was a "wrong decision of any question of law", it is right to say that there has been a "miscarriage of justice" within the meaning of the substantive ground of appeal in the *Criminal Appeal Act*.

46 The principles concerning "miscarriage of justice" as a substantive ground of appeal were discussed by McHugh J in *TKWJ v The Queen*[22]. After referring to the authorities on "miscarriage of justice" as a substantive ground of appeal, his Honour concluded that "the irregularity may be so material that of itself it constitutes a miscarriage of justice without the need to consider its effect on the verdict." Having regard to the statutory requirements of the Act, the failure to

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22 (2002) 212 CLR 124 at 147 [73].

comply with s 21(4) must also be regarded as a material irregularity that "constitutes a miscarriage of justice without the need to consider its effect on the verdict."

47 Moreover, what occurred at the trial amounts to a "substantial miscarriage of justice" for the purpose of the proviso to s 6(1) of the *Criminal Appeal Act*. The joint judgment of Brennan, Dawson and Toohey JJ in *Wilde v The Queen* states a test appropriate for this case[23]:

> "The proviso has no application 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. If that has occurred, then it can be said, without considering the effect of the irregularity upon the jury's verdict, that the accused has not had a proper trial and that there has been a substantial miscarriage of justice ...
>
> There is no rigid formula to determine what constitutes such a radical or fundamental error. It may go either to the form of the trial or the manner in which it was conducted."

48 A material departure from any of the elements described in s 21(2) to (4) of the Act is a departure from an essential requirement going to the root of the special hearing. Where such a departure occurs, it is unnecessary to consider further whether the miscarriage of justice that has occurred has affected the verdict of the jury. There is no need to weigh up the evidence and consider whether the jury's finding was inevitable. The failure to comply with s 21(4) in this appellant's special hearing is, of itself, a substantial miscarriage of justice with the result that the appeal should be allowed and the verdict quashed.

The taped evidence and the evidence of Ms Coughlan

49 The next ground relates to the directions of the trial judge with respect to the reception in evidence of the taped record of the conversation between Ms Coughlan and the appellant and the in-court evidence of the former. It is necessary first to say something about the true character of the taped evidence. In the Court of Criminal Appeal the appellant argued that the trial judge erred in admitting the evidence because it had been obtained as a result of a number of subterfuges and deceptions. Several were sought to be identified: that

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23 (1988) 164 CLR 365 at 373.

Ms Coughlan exploited her friendship with the appellant; that she claimed to the appellant to have accidentally encountered her and had insisted they take coffee together, and, that Ms Couglan continually disparaged Ms Johnson to the appellant so as to encourage her to speak against Ms Johnson's interests. The answer to these submissions was correctly given by Beazley JA in the Court of Appeal:

> "... there is nothing in the conversation to indicate that the appellant felt overborne, threatened or prevailed upon during the course of the conversation."

50 The further, related submission advanced in the Court of Criminal Appeal, that the answers obtained from the appellant were the result of a series of leading questions designed to elicit certain answers, was sought to be repeated in this Court. It was rejected in the Court of Criminal Appeal by Beazley JA on the basis that the appellant was a "willing participant in the conversation". Indeed it can be said that in some respects the appellant was an enthusiastic participant in it. There is no evidence whatever in the conversation of any mental infirmity on the part of the appellant nor was any proved at that early stage. She was only too willing to volunteer details of her own involvement in the events the subject of the charges. The evidence was therefore properly characterized as confessional evidence.

51 In this Court the appellant's ground was not directed to the admissibility of the taped evidence because special leave to argue such a ground was refused. Instead, the appellant sought to rely on a ground that the trial judge misdirected the jury as to the way in which they should deal with that evidence and the in-court oral evidence of Ms Coughlan. The argument in essence turned out to be little more than a complaint that the taped material contained irrelevant and scandalous matter. Although the appellant also contended that the trial judge "[failed] to explain the tape" she did not develop the submission beyond that. Nonetheless we have examined what the trial judge said of the taped evidence and the in-court evidence of Ms Coughlan, which was not, we would point out, the subject of any request for redirections at the trial. The trial judge's comments regarding these bodies of evidence were entirely appropriate. His Honour drew attention to the greater worldliness of Ms Coughlan and to the possibility that, because of the leading nature of some of the questions she asked the appellant, the answers might not be reliable. He also referred to some inconsistencies between Ms Coughlan's evidence and some of the objective facts. Finally, he summarized uncritically the submissions made on each side with respect to Ms Coughlan. There is nothing in this ground and it must accordingly be rejected.

The failure to call evidence

52 *The prosecutor's suggested duty*: The appellant argued that the prosecution should have adduced detailed evidence of the appellant's mental unfitness so that the jury could understand, or understand better, the respects in which she was disabled, and might therefore be denied full participation in her trial. To some extent the trial judge in referring to Dr Menzies' evidence in relation to the second application, did do this.

53 It is true, however, that at no stage did the jury have the benefit of expert testimony concerning the appellant's mental health. All that they had was the trial judge's economical opening remarks about the appellant's mental health. The appellant's submission, in substance, was that it was unfair to her for the respondent to fail to tender in the special hearing itself detailed evidence of the kind to which we have referred.

54 There is no doubt that the prosecution is under a duty to present the case fairly and completely[24]. Long ago, in *R v Puddick*[25] Crompton J made the following observation of prosecutors:

> "[they] are to regard themselves as ministers of justice, and not to struggle for a conviction"

In *R v Lucas* Smith ACJ said this of a prosecutor's duty to act fairly[26]:

> "For the purpose of establishing such an allegation of unfairness it is not necessary for the applicant to be able to point to the conduct of an identified person or persons concerned in the prosecution as having been blameworthy. It is sufficient for him to show that the totality of the acts of those concerned on behalf of the Crown in the preparation and conduct of the prosecution has operated unfairly against him.

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24 *Richardson v The Queen* (1974) 131 CLR 116 at 119; *Whitehorn v The Queen* (1983) 152 CLR 657 at 663-664, 674; *R v Apostilides* (1984) 154 CLR 563 at 573-577; *Dyers v The Queen* (2002) 210 CLR 285 at 292-293 [11], 298-299 [27], 326-327 [117], [119]. See also *R v Thomas (No 2)* [1974] 1 NZLR 658.

25 (1865) 4 F & F 497 at 499 [176 ER 662 at 663].

26 [1973] VR 693 at 696.

> ... the duty of a prosecutor is to prosecute and not to defend, nevertheless it has long been established that a prosecution must be conducted with fairness towards the accused and with a single view to determining and establishing the truth."

55 *No error is established*: There are however several reasons why the respondent should not be regarded as failing in any obligation to present medical evidence of mental unfitness in this case.

56 First, the Act, which is very explicit as to what should take place at a special hearing, does not require it.

57 Secondly, a special hearing is to be conducted as nearly as may be, as a normal criminal trial. In the latter, although the prosecution is bound to present all arguably credible and relevant evidence, it is not obliged to prove, as may sometimes be the case, that an accused has a very limited intelligence or capacity to comprehend readily what might be obvious to a person of a higher intellect.

58 Thirdly, evidence tendered by the prosecution as to the nature and extent of an accused's mental unfitness might be prejudicial to the accused. It might establish a limited or highly specific form of mental infirmity thereby raising questions in jurors' minds about courses taken or not taken by, or on behalf of, an accused during the trial.

59 And, last, in any event, it has not been shown that there was any actual unfairness to the appellant here, that is apart from any possible unfairness that may exist in undertaking the exercise of conducting the special hearing which the Act mandates. It must be accepted that the New South Wales Parliament, acting within its powers, has so provided. A complaint of unfairness against the statutory procedure cannot avail the appellant.

60 Any of these four matters is an answer to the submission based upon this ground of appeal. It must accordingly fail. That is not to say that events may not happen during the course of a special hearing which could make it appropriate for a trial judge to give a direction about an accused's unfitness, and how it may have affected the accused adversely during the hearing. Whether a trial judge should do so may depend upon whether the accused's counsel seeks a direction of that kind because, it could, in some circumstances, as we have pointed out, disadvantage an accused.

Orders

61 The appellant's appeal must be upheld on the ground of the lack of compliance with s 21(4) of the Act. The appeal should therefore be allowed. The judgment of the Court of Criminal Appeal should be set aside and the conviction of the appellant on the first count of the indictment should be quashed. There should be an order for a retrial. Of course, it remains for the respondent to decide whether, in the circumstances to which the appellant pointed, being the protraction of the matter generally and the appellant's health, together with other relevant matters including considerations of public interest[27], a retrial should in fact take place.

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