HIGH COURT OF AUSTRALIA

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

DIANE McGRATH FINGLETON APPELLANT

AND

THE QUEEN RESPONDENT

Fingleton v The Queen [2005] HCA 34
23 June 2005
B58/2004

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of Queensland made on 26 June 2003 and in their place order:*

   (a) appeal allowed;

   (b) conviction of the appellant quashed; and

   (c) judgment and verdict of acquittal entered on both counts in the indictment.

On appeal from the Supreme Court of Queensland

Representation:

B W Walker SC with S J Hamlyn-Harris for the appellant (instructed by Woods Prince Lawyers)

D F Jackson QC with M J Copley for the respondent (instructed by Director of Public Prosecutions (Qld))

CATCHWORDS

Fingleton v The Queen

Courts and judicial system – Magistrates – Judicial officers' immunities – Immunity conferred upon magistrates in the performance or exercise of an administrative function or power conferred under an Act – Appellant Chief Magistrate proposed to remove Co-ordinating Magistrate from that position – Whether immunity extends to a criminal charge against appellant of unlawful retaliation against a witness.

Criminal law – Unlawful retaliation against a witness – "Without reasonable cause" – Whether trial judge misdirected jury as to the meaning of "reasonable cause" in s 119B of the *Criminal Code* (Q) – Relevance of the meaning of the terms "detriment" and "retaliation" to an assessment of "without reasonable cause".

Constitutional law (Cth) – Federal judicial power – Appellate jurisdiction of the High Court – Criminal matter – Grounds of appeal – Point not taken at trial or before Court of Criminal Appeal – Whether new ground of appeal can be raised before the High Court – Whether following trial point waived or spent – Whether raising new ground deprives proceedings of the character of an "appeal" for purposes of s 73 of the Constitution.

Words and phrases – "appeal", "without reasonable cause", "detriment", "retaliation", "under an Act".

Magistrates Act 1991 (Q), ss 10, 21A.
Criminal Code (Q), ss 30, 119B, 620.
Constitution, s 73.

1 GLEESON CJ. The principal issue in this appeal concerns the protection and immunity conferred upon magistrates by s 21A[1] of the *Magistrates Act* 1991 (Q) ("the Magistrates Act"), which provides:

> "A magistrate has, in the performance or exercise of an administrative function or power conferred on the magistrate under an Act, the same protection and immunity as a magistrate has in a judicial proceeding in a Magistrates Court."

2 In relation to criminal proceedings against a magistrate, the concluding words of that section direct attention to s 30 of the *Criminal Code* (Q) ("the Code"), which provides:

> "Except as expressly provided by this Code, a judicial officer is not criminally responsible for anything done or omitted to be done by the judicial officer in the exercise of the officer's judicial functions, although the act done is in excess of the officer's judicial authority, or although the officer is bound to do the act omitted to be done."

3 The appellant was the Chief Magistrate in Queensland. Following a trial in the Supreme Court of Queensland, before Helman J and a jury, she was convicted of an offence against s 119B of the Code, which prohibits unlawful retaliation against a witness. An alternative charge of attempting to pervert the course of justice was not the subject of a verdict because of the conviction on the primary charge. The appellant was sentenced to a term of imprisonment. An appeal against conviction to the Court of Appeal of the Supreme Court of Queensland was dismissed[2]. The Court of Appeal reduced the appellant's sentence. The custodial part of the sentence has been served.

4 At trial, and in the Court of Appeal, no point was taken concerning s 21A of the Magistrates Act, or s 30 of the Code. Those provisions were first raised by this Court when considering an application for special leave to appeal from the decision of the Court of Appeal. Special leave to appeal was granted.

5 In the Court of Appeal, there was only one ground of appeal. It is an element of the offence created by s 119B of the Code that the proscribed retaliatory conduct is engaged in without reasonable cause. The sole ground of appeal was that no reasonable jury could have found beyond reasonable doubt an absence of reasonable cause in the appellant's conduct. In this Court, seven

---

1 Subsequent to the events that gave rise to these proceedings s 21A has been renumbered as s 51. It is convenient to refer to the statutory provisions as they were in force at the relevant time.

2 *R v Fingleton* (2003) 140 A Crim R 216.

grounds of appeal are pressed, one of which is the same as the ground considered by the Court of Appeal. The first ground is as follows:

> "The provisions of s 119B of the *Criminal Code* (Qld) did not apply to the actions of the appellant; having regard to the provisions of s 30 of the *Code,* and s 21A of the *Magistrates Act* 1991 (Qld)."

6 The respondent accepts that, if the proposition of law upon which that ground is based is correct, then the conviction was obtained in circumstances where there was no liability to conviction, and this Court would have power to set it aside. Senior counsel for the respondent acknowledged that the immunity now relied upon by the appellant exists for the public benefit and not for the private advantage of magistrates, and that if it applied in the case of the appellant it could not be waived. On that basis, the case being one in which the appellant may have had available to her a point of law which was a complete answer to both of the charges against her, the point may be raised for the first time in this Court, in accordance with the principles stated in *Gipp v The Queen*[3] and *Crampton v The Queen*[4]. The same cannot be said of the other new grounds of appeal, but they can be left aside at this stage. It is appropriate to deal with the question of immunity first because, if the appellant's argument is correct, there should never have been a trial of the other issues in the case.

7 In order to place the allegations against the appellant in the appropriate context, it is necessary to begin by examining the functions and powers of the appellant under the Magistrates Act. It was her conduct in relation to those functions and powers that allegedly contravened s 119B of the Code, and also allegedly involved an attempt to pervert the course of justice. It is also necessary to take note of certain other features of the Magistrates Act, which formed part of the background to the appellant's conduct.

The Magistrates Act

8 The following references are to the legislation in its form at the time of the alleged offences. It has since been amended in certain respects.

9 The Magistrates Act is described in its long title as "[a]n Act relating to the office of Magistrates, the judicial independence of the magistracy, and for related purposes".

---

3 (1998) 194 CLR 106.

4 (2000) 206 CLR 161.

10 Part 2 of the Magistrates Act deals with the appointment, jurisdiction, and powers of magistrates. Section 4 states the qualifications for appointment, and s 5 provides for appointment, by the Governor in Council, of "as many Magistrates as are necessary for transacting the business of the Magistrates Courts." Before making a recommendation to the Governor in Council about an appointment, the Minister must first consult with the Chief Magistrate. Sub-sections (3) and (4) provide that the appointment of a magistrate must state the place where the magistrate is to sit and the period (not longer than five years) for which that determination is to apply, provided that the Chief Magistrate and the magistrate may agree upon a change of location before the expiration of such period. Section 7 provides:

> "A Magistrate may exercise, throughout the State, all the jurisdiction, powers and functions conferred on a Magistrate, or on 2 justices, by or under any law of the State."

No doubt the words "throughout the State" explain the purpose of the provision, which is related to concepts of territorial limitations of jurisdiction that were still reflected in the *Justices Act* 1886 (Q) ("the Justices Act") in the form it took in 2002. Section 19 of the Justices Act referred to the exercise of summary jurisdiction in certain circumstances by two or more justices.

11 Part 3 of the Magistrates Act deals with the Chief Magistrate. Section 10, which describes the functions of the Chief Magistrate, provides:

> "10. (1) The Chief Magistrate is responsible for ensuring the orderly and expeditious exercise of the jurisdiction and powers of Magistrates Courts.
>
> (2) Subject to this Act and to such consultation with Magistrates as the Chief Magistrate considers appropriate and practicable, the Chief Magistrate has power to do all things necessary or convenient to be done for ensuring the orderly and expeditious exercise of the jurisdiction and powers of Magistrates Courts, including, for example –
>
> (a) determining the Magistrates who are to constitute Magistrates Courts at particular places appointed under section 22B(1)(c) of the *Justices Act 1886* or who are to perform particular functions; and
>
> (b) issuing directions with respect to the practices and procedures of Magistrates Courts; and
>
> (c) allocating the functions to be exercised by particular Magistrates; and

(d) nominating a Magistrate to be a supervising Magistrate or a coordinating Magistrate for the purpose of the allocation of work of the Magistrates Court.

(3) Subsection (2) does not authorise the Chief Magistrate to promote a Magistrate.

(4) The Chief Magistrate must not make a determination under subsection (2)(a) about the place at which a magistrate is to constitute a Magistrates Court unless the Chief Magistrate –

(a) first –

(i) consults with the magistrate; and

(ii) gives the magistrate written notice of the proposed maximum period that the magistrate is to constitute a Magistrates Court at the place; and

(b) has sufficient and reasonable regard to the magistrate's personal circumstances and all other relevant considerations.

(5) The Chief Magistrate must give a magistrate written notice of a determination under subsection (2)(a) stating –

(a) the place the magistrate is to constitute a Magistrates Court; and

(b) the period the magistrate is to constitute the Magistrates Court at the place; and

(c) the reasons for the determination.

(6) However, subsection (4) does not apply if –

(a) because of urgent circumstances, the Chief Magistrate makes a determination (a '**temporary determination**') under subsection (2)(a) about the place at which a magistrate is to constitute a Magistrates Court; and

(b) under the temporary determination, the magistrate is to constitute a Magistrates Court at the place for no longer than 3 months.

(7) To remove doubt, it is declared that subsection (4) does not affect a condition of appointment or agreement under section 5(3) or (4).

(8) The Chief Magistrate may discipline by way of reprimand a magistrate who, to the Chief Magistrate's satisfaction –

(a) is seriously incompetent or inefficient in the discharge of the administrative duties of office; or

(b) is seriously negligent, careless or indolent in the discharge of the administrative duties of office; or

(c) is guilty of misconduct; or

(d) is absent from duty without leave or reasonable excuse; or

(e) wilfully fails to comply with a reasonable direction given by the Chief Magistrate or a magistrate authorised to give the direction; or

(f) is guilty of conduct unbecoming a magistrate.

(9) If action is contemplated under subsection (8)(d), the Chief Magistrate may appoint a medical practitioner to examine and report on the mental and physical condition of the Magistrate, and may direct the Magistrate to submit to the examination.

(10) If the Chief Magistrate reprimands a Magistrate, the Chief Magistrate must immediately submit a written report on the matter to the Minister.

(11) Action taken by the Chief Magistrate under subsection (8) does not affect the operation of sections 15 and 17."

12 Section 10(2) is of central importance in the present case. At the appellant's trial, Helman J directed the jury that, in the context of s 10(2), nominating a supervising or coordinating magistrate effectively meant appointing a magistrate to that position. That was not in dispute. By virtue of s 25(1) of the *Acts Interpretation Act* 1954 (Q), a power to appoint includes a power to remove or suspend. It was a demand by the appellant made to a coordinating magistrate that he show cause why he should not be removed from that position that constituted the conduct of the appellant which gave rise to the charges against her. The principal question for decision is whether that conduct was "in the performance or exercise of an administrative function or power conferred on the magistrate under an Act" within the meaning of s 21A of the Magistrates Act.

13 As will appear from a recital of the facts, sub-ss (2)(a), (4), (5) and (6) are relevant to an understanding of the background to the appellant's dealings with the coordinating magistrate in question, as are the provisions of Pt 4 of the Magistrates Act. Section 22B of the Justices Act provided for the appointment of districts, and divisions of districts, for the purposes of Magistrates Courts, and for the appointment of places for the holding of Magistrates Courts. Magistrates were empowered to sit at more than one place (s 22B(1A)). Subject to the provisions of s 5 of the Magistrates Act, the Chief Magistrate's responsibilities included the assigning of magistrates to localities throughout the State of Queensland. Obviously, the discharge of that responsibility involved decisions that could affect magistrates significantly. The evidence showed that there was a history of tension between the Chief Magistrate, and her predecessor, on the one hand, and some individual magistrates and the Magistrates Association on the other hand, about that issue. There had been a series of administrative law challenges to such decisions. Part 4 evidently was a legislative response to the problem.

14 Part 4 established a judicial committee to review certain determinations of a Chief Magistrate at the request of a magistrate aggrieved by a reviewable determination (ss 10A, 10B). A "reviewable determination" included a determination under s 10(2)(a) about the place at which a magistrate was to constitute a Magistrates Court (s 3). The members of the committee were to be the Chief Justice of the Supreme Court or a judge of the Supreme Court nominated by the Chief Justice, the Chief Judge of the District Court or a District Court judge nominated by the Chief Judge, and another judge nominated by the Chief Justice (s 10C). The committee was to consider the merits of a reviewable determination and either affirm it or substitute its own determination (s 10E). The committee could determine its own procedures, and the Chief Justice was empowered to issue directions as to procedures (s 10F). The events that gave rise to this case arose out of a magistrate's request for review of a determination by the appellant under s 10(2)(a). The Chief Justice issued a direction that evidence in the proceedings was to be given by affidavit. It was the appellant's response to the making of an affidavit by a coordinating magistrate that resulted in the charges against her.

15 Parts 5 and 6 are presently immaterial. Part 7 contains general provisions including provisions relating to terms and conditions of what was described as the "employment" of magistrates (s 18). It includes s 21A, which appears at the commencement of these reasons. Section 21A was introduced by the *Justice Legislation (Miscellaneous Provisions) Act (No 2)* 1999 (Q). By the same legislation, the *District Court Act* 1967 (Q) was amended by the insertion of s 28AA, which provided that a judge has, in the performance or exercise of an administrative function or power conferred on the judge under an Act, the same protection and immunity as a judge in a judicial proceeding in the court. The Explanatory Notes stated:

> "*Clause 18* [of the Bill] inserts a new s 28AA granting protection and immunity to a judge of District Courts following concern that was expressed by judges about the potential personal liability of judges who authorise the use of surveillance and listening devices and perform or exercise other administrative functions or powers conferred on them under an Act. In the absence of any specific legislative provisions, judges are exposed to potential personal liability. Federal judges exercising these functions and powers are granted immunity in like situations. Accordingly, the amendment provides the same protection and immunity to judges in the performance or exercise of administrative functions as they have in judicial proceedings in their courts."

The facts

16 The appellant's predecessor as Chief Magistrate was Mr Deer. One of the coordinating magistrates nominated by the appellant under s 10(2)(d) of the Magistrates Act was Mr Gribbin, a magistrate at Beenleigh. The position carried with it an annual allowance of $2,000. In September 2002, Mr Gribbin was also Vice-President of the Magistrates Association.

17 On 16 July 2002, the appellant determined that a magistrate, Ms Thacker, should be transferred to Townsville. On 30 July 2002, Ms Thacker filed an application for a review of that determination by the judicial committee. Ms Thacker wrote to the Magistrates Association seeking assistance with her application. In particular, she sought information and evidence relating to the history of transfers of magistrates. On 12 August 2002, Mr Gribbin provided an affidavit to Ms Thacker's solicitors for use in the review proceedings. A copy was given to the appellant's solicitors on 16 August 2002. The appellant made an affidavit in reply on 30 August 2002. In early September 2002, there was friction between the appellant and Mr Gribbin concerning the matter of the agenda for a meeting of coordinating magistrates which was due to take place on 19 September 2002.

18 On 18 September 2002, the appellant sent Mr Gribbin by email a letter calling on him to show cause why she should not exercise her power to withdraw his nomination as a coordinating magistrate and thereby remove him from that position. The day before she sent the letter the appellant obtained legal advice from a solicitor, Mr Searles, who had been retained by the Crown Solicitor to advise the appellant. The appellant showed Mr Searles a draft of a letter which, if sent, would have removed Mr Gribbin. Mr Searles advised that the letter be altered to give Mr Gribbin an opportunity to show cause why he should not be removed. The material parts of the letter were as follows:

> "Could you also explain to me why you sought [sic] fit to supply an affidavit in the matter of Ms Thacker's Review of my decision to transfer her to Townsville. You were critical in it of both Mr Deer and myself in

relation to transfer matters. Is this a matter which you feel should be discussed by you in an affidavit before the Judicial Committee, when you have never raised it with me personally or at a Co-ordinating Magistrate's meeting?

In the circumstances, I feel that I do not have your confidence in my leadership abilities. No other magistrate, certainly not a co-ordinating magistrate has seen fit to enter into any such matters. In fact, in the matter of *Payne v Deer*, I specifically refused to supply an affidavit to Ms Payne's Solicitors because of the need to be seen not to be in dispute with the then Chief Magistrate.

Further, you circulated all other co-ordinating magistrates (except Mr Hine and with no reference to myself), in relation to a proposed agenda item for the forthcoming co-ordinating magistrates meeting. The agenda is, in the end, a matter for my discretion, following consultation with the other Co-ordinating magistrates. No-one put to me that such an item should not be on the agenda. I consider that action on your part, again, to be disloyal to the leadership of the magistracy and disruptive of the morale of the magistracy.

The position of Co-ordinating Magistrate in the Queensland Magistracy is a privileged position. I regularly meet with all Co-ordinating Magistrates who give input into the administration of the courts. Whilst constructive criticism will always be appreciated, there must be loyalty to the Chief Magistrate. As stated, you sought to agitate a view about an item on the agenda for the meeting beginning tomorrow, without my knowledge.

This and the other example I refer to above, manifest to me a clear lack of confidence by you in me as Chief Magistrate. In the circumstances, I ask you to show cause, within seven days, as to why you should remain in the position.

In the circumstances, it is not appropriate that you attend the Co-ordinating Magistrates meeting this Thursday and Friday at Central Courts."

Criminal Code, s 119B

19 Section 119B of the Code provides:

"A person who, without reasonable cause, causes, or threatens to cause, any injury or detriment to a judicial officer, juror, witness or a member of the family of a judicial officer, juror or witness in retaliation because of –

(a) anything lawfully done by the judicial officer as a judicial officer; or

(b) anything lawfully done by the juror or witness in any judicial proceeding;

is guilty of a crime.

Maximum penalty – 7 years imprisonment."

20 The offence involves causing or threatening harm by way of retaliation without reasonable cause. In the conduct of the present case at trial, the elements of retaliation and of absence of reasonable cause were treated as being separate, but related factually. Ordinarily, causing or threatening harm to a witness in retaliation because of something lawfully done by the witness in judicial proceedings would also be without reasonable cause. It is not mere retaliation that attracts the operation of the section. It is causing or threatening injury or detriment in retaliation because of something lawfully done. The occasions on which there would be reasonable cause for such conduct might, in practice, be relatively rare. The qualification, "without reasonable cause", is not related to purely objective conduct. It is related to purposive conduct, that is to say conduct causing or threatening harm in retaliation for lawful conduct by a judicial officer, juror, or witness. As will appear, in the way in which the prosecution and defence cases were conducted at trial, the question of how s 119B operates in a situation where, objectively, there may have been reasonable cause to take or foreshadow some action which would involve detriment, but subjectively a threat was made for the retaliatory purpose described in the section, was not a subject of argument. Nor was it a subject of argument in the Court of Appeal.

The issues at trial and in the Court of Appeal

21 The trial at which the appellant was convicted was a second trial, which followed immediately an earlier trial at which the jury could not agree upon a verdict.

22 Before the first trial there was a directions hearing. Section 592A of the Code provides:

"(1) If the Crown has presented an indictment before a court against a person, a party may apply for a direction or ruling, or a judge of the court may on his or her initiative direct the parties to attend before the court for directions or rulings, as to the conduct of the trial.

(2) Without limiting subsection (1) a direction or ruling may be given in relation to –

(a) the quashing or staying of the indictment; or

...

(e) deciding questions of law including the admissibility of evidence and any step that must be taken if any evidence is not to be admitted."

23 No mention was made, either at the directions hearing, or at the trial, of s 21A of the Magistrates Act or s 30 of the Code. No application was made to quash or stay the indictment. The form of the indictment was such that, on its face, it simply alleged a breach of s 119B without revealing any facts relevant to the application of s 21A or s 30. However, at the directions hearing, counsel and the trial judge discussed particulars of the indictment that had been furnished by the prosecution. It is evident, from the record of the directions hearing, that the facts relevant to an argument based on s 21A and s 30 either appeared from those particulars or were agreed between the parties. It was common ground that the appellant was Chief Magistrate, that Mr Gribbin was a coordinating magistrate, that Mr Gribbin had furnished an affidavit to the judicial committee in support of an application by another magistrate for a review of a determination by the appellant under s 10(2) of the Magistrates Act, that the appellant had sent Mr Gribbin the letter of 18 September 2002, and that it was her conduct in so doing that constituted the alleged contravention of s 119B and the alleged attempt to pervert the course of justice. If the appellant's present argument is correct, then it was only necessary to identify her functions and powers under the Magistrates Act in order to reach the conclusion that she could not be held criminally responsible for the conduct in question. There was no fact in issue requiring the decision of a jury.

24 At the directions hearing, counsel for the appellant, after referring to the particulars furnished by the prosecution, said:

> "But apart from ... facts [about the relationship between the appellant and Mr Gribbin] that put the letter [of 18 September] in context, it would seem the only issues at the trial – the only substantial issues will be the purpose with which she sent the letter on the 18th of September, her intent in sending the letter, and whether there was reasonable cause with respect to the first charge. There are other issues but it would seem on the facts that we have there's not going to be much in contention. They will be the central issues."

25 At the trial, at the conclusion of the case for the prosecution, counsel for the appellant opened the defence case to the jury, and then called the appellant as his first witness. The opening was consistent with what had been said at the directions hearing. The appellant gave evidence about the matters referred to in the letter of 18 September, and the advice she received from Mr Searles about the draft letter. She denied that she sent the letter with intention of deterring

Mr Gribbin and other magistrates from supporting Ms Thacker's case. When asked why she sent the email, she said that there had been friction between her and Mr Gribbin, that she was surprised and hurt by what she regarded as the unfair criticisms of her contained in his affidavit, that she needed the confidence and loyalty of a person in his position, and that his conduct showed she did not have that confidence and loyalty. She denied "absolutely and unequivocally" that she sent her letter "as a payback" for Mr Gribbin's support of Ms Thacker.

26 In his final address to the jury, counsel for the appellant identified "three matters in dispute: whether what [the appellant] did was to threaten to cause a detriment, whether it was a detriment; whether it was done without reasonable cause; and whether it was done in retaliation." As to the question of reasonable cause and retaliation, counsel invited the jury to consider a number of matters, including the Chief Magistrate's need to have a good working relationship with a coordinating magistrate. Counsel for the prosecution contended that the threat to remove Mr Gribbin implicit in the requirement to show cause was an abuse of power. It was not made because of any lack of competence or an inability to perform his duties. Counsel for the prosecution invited the jury to find that "[the appellant] just wanted to humiliate [Mr Gribbin], strip him of that job as a payback and as an example to anyone minded to do anything similar." She argued that "it is unreasonable in the extreme to retaliate against someone who is only telling the truth, who is only giving everything they know in an affidavit to a Judicial Committee to assist that Judicial Committee to do justice between the parties who are the litigants before it."

27 In summing-up, the trial judge told the jury that the prosecution had to establish beyond reasonable doubt "that the accused made the threat to Mr Gribbin in retaliation – that is, as a repayment in kind, or requital, or reprisal – because of his providing the affidavit as he was entitled in law to do." The prosecution case, the judge said, was that the accused was a vengeful person and "that the accused wanted to humiliate Mr Gribbin for providing the affidavit, as a payback, as a punishment, and ... to deter others from doing such a thing." At the conclusion of the summing-up, neither counsel sought any redirections or made any complaint about the way the issues were left to the jury.

28 The sole ground of appeal against conviction to the Court of Appeal was that no reasonable jury could have found beyond reasonable doubt an absence of reasonable cause. As the case was conducted at trial, there was a strong relationship between the issues of retaliation and reasonable cause. This was reflected in the Court of Appeal's statement:

> "The prosecution case at the trial was that the appellant's claim that in sending the email she was acting to resolve a breakdown in their working relationship was a contrivance designed to conceal her true purpose, which was to 'pay back' or exact retribution from Mr Gribbin for having provided the affidavit in the Thacker application."

29 The Court of Appeal analysed the evidence in the light of the way the trial had been conducted, and the issues as left to the jury. Bearing in mind that there was no criticism, either at trial or on appeal, of the trial judge's directions, that is not surprising. The members of the Court of Appeal (McPherson, Davies and Williams JJA) expressed their conclusion by saying that they had "satisfied themselves that on the evidence it was objectively open to the jury to decide that the appellant acted as she did with a view to punishing Mr Gribbin rather than resolving any difficulty supposed to exist between them of working together in performing their respective functions."

30 It would have been possible for both the prosecution and the defence cases to have been framed in a more complex fashion. At one point in his final address to the jury, counsel for the appellant appeared to accept that, on the retaliation issue, the prosecution only had to prove that retaliation was one of the reasons for the appellant's conduct. That, however, was not the way the case for the prosecution was put. The prosecutor made a blunt accusation that retaliation was *the* reason for the conduct, and that is how the trial judge left the case to the jury. Similarly, from the defence point of view, it might have been possible to go into greater detail about the administrative complexities facing the appellant, and the context of workplace relations in which she had to resolve her dispute with Mr Gribbin. At an appellate level, it may often appear that the issues at a jury trial have been over-simplified.

31 In considering the way the prosecution case was put, it is important not to overlook the fact that there were two charges against the appellant. No verdict was taken on the charge of attempting to pervert the course of justice, because it was an alternative to the first charge. Even so, the presence of the alternative charge probably explains the view of the facts for which the prosecution contended. There was no suggestion, either in the addresses by counsel or in the summing-up, that the prosecution case as to the appellant's intention in sending the letter to Mr Gribbin was put in alternative ways, or that the jury were being invited to consider a number of different possibilities. The allegation was that the appellant *just* wanted to humiliate and punish Mr Gribbin, thereby exacting retribution against him and at the same time sending a message to other magistrates as to what might happen to them if they crossed the Chief Magistrate, and in particular if they supported Ms Thacker's case against the Chief Magistrate. The allegation was that this was purely a matter of "payback" and was not in any respect a bona fide attempt to resolve an administrative problem that had arisen within the court. Neither side put to the jury an intermediate possibility, such as that the appellant might have had both a genuine purpose of resolving an administrative issue that arose out of a breakdown of her relations with Mr Gribbin, but at the same time a desire to exact retribution for his support for Ms Thacker and to assert her authority as a warning to other potentially rebellious magistrates. Because of the way the case was fought, the trial judge was not asked to give any directions, and gave no directions, to the jury as to the legal consequences of such a view of the facts. On the s 119B charge, the

prosecution case was that the resolution of an administrative problem resulting from a breakdown in personal relations was *no part* of the true explanation for the appellant's conduct, and was therefore irrelevant to the question whether she acted without reasonable cause. There is a legal proposition, or assumption, involved in that, but it was not the subject of argument. The defence case was that a desire to deal with such a problem was the *sole* explanation of the appellant's conduct, and therefore she acted with reasonable cause. Those competing approaches were consistent with the approaches taken with respect to the charge of attempting to pervert the course of justice. If the appellant had argued that, even if the prosecution view of the facts were true, she had a legal answer to the s 119B charge because objectively there was cause to consider Mr Gribbin's removal, even if it were not an operative cause of her conduct, that would still have left the alternative charge to be answered. Furthermore, if the appellant were now to be permitted to raise such an argument in this Court, success on that point alone would ordinarily result in an order for a new trial, since there has never been a verdict on the second count.

Criminal Code, s 30

32 The criminal law of Queensland was codified in 1899. Save for the fact that it is now expressed in gender-neutral terms[5], s 30 remains in its original form. The section is concerned with criminal responsibility, not with civil liability. The Code defines "criminal responsibility" to mean "liability to punishment as for an offence"[6]. Thus, the provision that a judicial officer is not criminally responsible for anything done or omitted to be done in the exercise of the officer's judicial functions means that a judicial officer does not commit an offence, and is not liable to punishment, by reason of an act or omission that falls within the section.

33 The opening words of s 30 contain an important qualification to the immunity. Section 120 of the Code, which refers in terms to conduct on the part of a holder of judicial office, exposes judicial officers to criminal punishment for various forms of corruption. That qualification is consistent with the common law[7]. Section 136 is another example of an express provision of the kind referred to in s 30. However, neither s 119B, nor s 140 (which deals with attempting to pervert the course of justice), contains the explicit language necessary to engage the qualification to s 30. It was not suggested in argument that the introductory qualification to s 30 touches the present case.

---

5 As authorised by ss 7 and 24 of the *Reprints Act* 1992 (Q).

6 *Criminal Code*, s 1.

7 *Sirros v Moore* [1975] QB 118 at 132 per Lord Denning MR.

34 The Code now defines "judicial officer". The definition was inserted, with effect from 19 July 2002, by the *Criminal Law Amendment Act* 2002 (Q). The Explanatory Notes to the Bill said: "A new definition of 'judicial officer' is now included. As well as judges or magistrates the definition of 'judicial officer' includes members of tribunals, persons conducting hearings of the Crime and Misconduct Commission, arbitrators and umpires." That reflects the view, which was common ground in this appeal, that, from the outset, "judicial officer" in s 30 included magistrates. In any event, it certainly included magistrates by September 2002. In dealing generally, and in the same manner, with all "judicial officers", s 30 put aside distinctions between various levels in the judicial hierarchy which existed at common law in relation to judicial immunity. Those distinctions attracted strong criticism in the United Kingdom from the Court of Appeal in *Sirros v Moore*[8] and the House of Lords in *In re McC (A Minor)*[9]. Section 30 treats all judicial officers in the same way, and confers immunity from criminal responsibility for acts or omissions by the judicial officer in the exercise of the officer's judicial functions, even where an act done is in excess of authority, or an officer is bound to do an act omitted.

35 The immunity provided by s 30 is limited, not only by the introductory words of the section, but also by the words which confer the immunity. It applies only to acts or omissions in the exercise of judicial functions, although conduct in excess of authority has the benefit of the protection. The Code's use of the words "excess of authority" reflects what courts applying the common law have held to be the sense in which "jurisdiction" is used in the context of judicial immunity, that is to say, "the broad and general authority conferred upon [a judicial officer's] court and upon [the judicial officer] to hear and to determine issues between individuals or between individuals and the Crown."[10]

36 We are concerned with the application of the Code, not the common law. Even so, it is material to note the policy of the common law, reflected also in the Code. Most discussion of judicial immunity concerns the possibility of civil liability, including liability for damages, at the suit of an aggrieved litigant. The general principle is as stated by Lord Denning MR in *Sirros v Moore*[11]:

> "Ever since the year 1613, if not before, it has been accepted in our law that no action is maintainable against a judge for anything said or

---

8 [1975] QB 118.

9 [1985] AC 528.

10 *Nakhla v McCarthy* [1978] 1 NZLR 291 at 301.

11 [1975] QB 118 at 132.

> done by him in the exercise of a jurisdiction which belongs to him. The words which he speaks are protected by an absolute privilege. The orders which he gives, and the sentences which he imposes, cannot be made the subject of civil proceedings against him. No matter that the judge was under some gross error or ignorance, or was actuated by envy, hatred and malice, and all uncharitableness, he is not liable to an action."

37 An allegation of judicial misconduct by a dissatisfied litigant often, perhaps even typically, will be accompanied by an accusation of malice or want of good faith in the exercise of judicial authority. In *In re McC (A Minor)*[12], Lord Bridge of Harwich said:

> "It is, of course, clear that the holder of any judicial office who acts in bad faith, doing what he knows he has no power to do, is liable in damages. If the Lord Chief Justice himself, on the acquittal of a defendant charged before him with a criminal offence, were to say: 'That is a perverse verdict', and thereupon proceed to pass a sentence of imprisonment, he could be sued for trespass. But, as Lord Esher MR said in *Anderson v Gorrie*[13]:
>
> > 'the question arises whether there can be an action against a judge of a court of record for doing something within his jurisdiction, but doing it maliciously and contrary to good faith. By the common law of England it is the law that no such action will lie.'"

38 This immunity from civil liability is conferred by the common law, not as a perquisite of judicial office for the private advantage of judges, but for the protection of judicial independence in the public interest. It is the right of citizens that there be available for the resolution of civil disputes between citizen and citizen, or between citizen and government, and for the administration of criminal justice, an independent judiciary whose members can be assumed with confidence to exercise authority without fear or favour. As O'Connor J, speaking for the Supreme Court of the United States, said in *Forrester v White*[14], that Court on a number of occasions has "emphasized that the nature of the adjudicative function requires a judge frequently to disappoint some of the most intense and ungovernable desires that people can have." She said that "[i]f judges were personally liable for erroneous decisions, the resulting avalanche of suits ... would provide powerful incentives for judges to avoid rendering decisions likely to provoke such suits."

---

12 [1985] AC 528 at 540.

13 [1895] 1 QB 668 at 670.

14 484 US 219 at 226-227 (1988).

39 This does not mean that judges are unaccountable. Judges are required, subject to closely confined exceptions, to work in public, and to give reasons for their decisions. Their decisions routinely are subject to appellate review, which also is conducted openly. The ultimate sanction for judicial misconduct is removal from office upon an address of Parliament. However, the public interest in maintaining the independence of the judiciary requires security, not only against the possibility of interference and influence by governments, but also against retaliation by persons or interests disappointed or displeased by judicial decisions.

40 The same considerations lie behind immunity from criminal responsibility, of the kind and to the extent conferred by s 30 of the Code. At common law, judicial officers enjoy no immunity or protection from criminal responsibility for their extra-judicial conduct, and even in respect of their judicial conduct there are well-established limits to their immunity. Judicial corruption of the kind dealt with in s 120 of the Code is an obvious example. Subject to those limitations, however, the public policy which supports immunity from civil liability even in respect of conduct alleged to be malicious and lacking in good faith extends to immunity from criminal responsibility. In *Yeldham v Rajski*[15], a litigant charged a judge with contempt of court (a criminal offence) alleging that the judge knowingly and wilfully abused the process of the court and interfered with the course of justice. The allegations arose out of the way in which the judge had disposed of an application for leave to prosecute a witness for perjury. The New South Wales Court of Appeal dismissed the proceedings, on the ground that the judge was entitled to invoke judicial immunity. Hope A-JA, with whom Priestley JA agreed, said[16]:

> "The basis of the immunity of judges from civil proceedings in respect of their judicial acts, which has been part of the law for centuries, is based on high policy which has been put in a number of ways but in essence is that the immunity is essential to the independence of judges. It is a policy designed to protect the citizen and not merely to give protection to judges. As it seems to me this policy is as equally applicable to criminal proceedings for the acts of judges, in the exercise of their judicial functions, as it is in respect of civil proceedings. ... If the law were that any disgruntled litigant could charge a judge with contempt for being wrong and mala fide in his conclusion, or in arriving at the conclusion without any or any sufficient evidentiary basis, the independence required of judges would be greatly eroded."

---

15 (1989) 18 NSWLR 48.

16 (1989) 18 NSWLR 48 at 69.

41 Because the present case does not fall to be determined under the common law, it is unnecessary to explore the precise boundaries of the common law immunity from criminal responsibility in the exercise of judicial functions[17]. The boundaries of the immunity given by s 30 of the Code are to be found in the language of the section. It was not argued that the allegations of bad faith and malice made against the appellant in the conduct of the case against her at trial, if accepted, would defeat what would otherwise be the operation of s 30, either alone or as picked up by s 21A of the Magistrates Act. Nor are we concerned with the kind of issue that arose on the facts of *Yeldham v Rajski*, concerning the dividing line between the exercise of judicial and administrative or ministerial functions. Some of the powers conferred by s 10 of the Magistrates Act may be so closely allied to the adjudicative function that they ought not to be regarded as purely administrative. It is unnecessary to consider whether s 30 alone would extend to the exercise of such powers because, for the reasons given below, they are covered by s 21A of the Magistrates Act.

Magistrates Act, s 21A

42 This section provides that in performing or exercising an administrative function or power conferred under an Act, a magistrate has the same protection and immunity as a magistrate has in a judicial proceeding in a Magistrates Court. Where what is involved is alleged criminal responsibility, the protection and immunity of a magistrate in judicial proceedings is that conferred by s 30 of the Code. Section 30 means that a magistrate is not criminally responsible for anything done by the magistrate in the exercise of the magistrate's judicial functions, although the act done is in excess of the magistrate's judicial authority. By conferring the same protection and immunity in respect of administrative functions or powers, s 21A has the consequence that a magistrate is not criminally responsible for anything done or omitted to be done by the magistrate in the exercise of an administrative function or power conferred on the magistrate under an Act, although the act done is in excess of the magistrate's administrative authority. This, of course, is subject to the qualification contained in the opening words of s 30: "[e]xcept as expressly provided by this Code".

43 The legislative history of s 21A has been referred to above. A similar legislative provision applies to judges. While the legislative changes do not appear to have been directed solely to criminal responsibility, and the Explanatory Notes relating to District Courts spoke of "the potential personal liability of judges" in general terms, they embraced the matter of criminal responsibility, and proceeded from a concern that, because judicial officers were given by legislation some responsibilities that might be regarded as administrative rather than judicial, the immunity conferred by s 30 required

---

17 See Olowofoyeku, *Suing Judges: A Study of Judicial Immunity*, (1993) at 74-77.

expansion. The particular subject that raised concern was the exercise of power to authorise the use of surveillance and listening devices. It was pointed out that federal judges, exercising that power, had an immunity, and it was considered necessary that State judicial officers should be in the same position. While that was the matter that prompted legislative consideration of the wider topic, it is clear that s 21A extends beyond the function of authorising the use of surveillance and listening devices, to all administrative functions or powers conferred on a magistrate under an Act.

44 In the absence of s 21A of the Magistrates Act, there might have been room for argument about whether s 30 applied to one of the most common of the functions of a magistrate, that is to say, deciding, when a person is charged with an indictable offence, whether the person should or should not be committed for trial. It has often been held that this "is essentially an executive and not a judicial function"[18]. On the other hand this Court, in *R v Murphy*[19], described the function as sui generis, and as having the closest, if not an essential, connexion with an actual exercise of judicial power.

45 That question apart, there are many examples of Queensland statutes which confer on magistrates functions or powers that are commonly described as administrative rather than judicial. The following examples were given in argument. It is common for statutes to confer on a magistrate the power to issue a search warrant. We were informed that, in 2002, there were 78 such statutes in Queensland. The *Assisted Students (Enforcement of Obligations) Act* 1951 (Q) empowered magistrates to approve the execution of a contract by a minor. Under the *City of Brisbane Act* 1924 (Q) a magistrate sits on an employment appeals tribunal. Magistrates have supervisory responsibilities under the *Community Services (Aborigines) Act* 1984 (Q). Under the *Police Powers and Responsibilities Act* 2000 (Q), a magistrate may extend the prescribed detention period for the purposes of questioning a suspect. No doubt many other examples could be found.

46 It is not for this Court to decide the wisdom or fairness of the legislative policy that led the Queensland Parliament to extend the ambit of the immunity from criminal responsibility conferred by s 30; and this case is not concerned with immunity from civil liability. The respondent accepts, as a general proposition, that the protection and immunity contemplated by s 21A of the Magistrates Act adapts, to certain administrative functions and powers, the protection conferred by s 30 of the Code. That adaptation could give rise to problems that do not exist in the present case. Whether particular conduct is

---

18 *Ex parte Cousens; Re Blacket* (1946) 47 SR (NSW) 145 at 146 per Jordan CJ.

19 (1985) 158 CLR 596 at 616.

properly characterised as being in the performance or exercise of an administrative function or power, or whether in a given case it should be seen as a purely personal escapade, may be an issue. It is not an issue in this case. If s 21A otherwise applied to the conduct of the appellant, the conduct that gave rise to the charges against her (calling upon Mr Gribbin to show cause why he should not be removed as a coordinating magistrate) was conduct in the exercise of a power conferred on the appellant, that is to say, the power to nominate and remove coordinating magistrates.

47 The argument for the appellant in this Court was that s 10 of the Magistrates Act conferred on the appellant as Chief Magistrate a series of administrative functions and powers, that she acted in the performance or exercise of those powers, that she had the same protection and immunity as she had in the exercise of her judicial functions, and that, except as expressly provided by the Code, she was not criminally responsible for anything done by her in the exercise of her administrative functions, even if the act done was in excess of her administrative authority.

48 The argument for the respondent turned upon a question of construction of s 21A and, in particular, the words "administrative function or power conferred on [a] magistrate under an Act". The respondent submitted that those words did not cover s 10 of the Magistrates Act itself. The argument called in aid two considerations: one textual; the other related to the rationale of immunity.

49 The Magistrates Act is not itself the source of the civil or criminal jurisdiction exercised by magistrates. Section 7, to which reference has already been made, empowers a magistrate to exercise, throughout the State of Queensland, all jurisdiction, powers and functions conferred on a magistrate by or under any law of the State. Leaving to one side s 10, which is the focus of the present argument, the Magistrates Act does not itself confer jurisdiction, powers and functions on magistrates generally. They are to be found in other legislation.

50 When s 21A refers to "an administrative function or power conferred on the magistrate under an Act" then, beyond question, it is referring, at least in part, to functions or powers conferred under other Acts. The Magistrates Act does not provide, as does s 2(2) of the *Acts Interpretation Act* 1954 (Q), that in the Magistrates Act "a reference to 'an Act' includes a reference to this Act." The question is left open, and is not resolved by ss 6 and 7 of the *Acts Interpretation Act*. The functions and powers conferred on the Chief Magistrate by s 10 are the only administrative functions and powers conferred on a magistrate by the Magistrates Act itself. According to the submission for the respondent, they are not the kinds of administrative functions and powers in contemplation in s 21A. There is, it is said, a textual uncertainty as to whether the words "under an Act" mean "under an Act including this Act". As a matter of general principle, such

uncertainty should be resolved against any extension of the immunity beyond cases for which its necessity is evident[20]. Furthermore, so the argument runs, the rationale for an immunity of the kind conferred by s 21A does not extend to matters of internal court administration of the kind dealt with in s 10.

51 It is clear that s 30 of the Code is in aid of the independent and impartial administration of justice; the exercise of judicial functions without fear or favour. The purpose of s 21A, which extended the s 30 immunity beyond the exercise by magistrates of judicial functions to the exercise of administrative functions, is also related to the independence of the magistracy. Such independence is important in relation to the exercise by magistrates of the various responsibilities conferred on them by other Acts of the kind set out above. What, the respondent asks, does it have to do with matters of internal court administration and discipline of the kind dealt with by the Magistrates Act itself?

52 The answer to that question, and to the respondent's argument, requires closer examination of s 10 of the Magistrates Act. In truth it covers a number of matters closely related to issues of judicial independence. Sub-sections (1) and (2) of s 10 cover the whole range of matters relevant to the orderly and expeditious exercise of the jurisdiction and powers of the Magistrates Courts, and include the organising of court lists, the allocation of magistrates to particular localities, and the assigning of magistrates to particular work. Arrangements of that kind are not merely matters of internal administration. They affect litigants and the public. Within any court, the assignment of a judicial officer to a particular case, or a particular kind of business, or a particular locality, is a matter intimately related to the independent and impartial administration of justice. This was the basis of the decision of the New South Wales Court of Appeal in *Rajski v Wood*[21], where it was held that the nomination or allocation of a judge to hear a particular case was not justiciable. As was pointed out in *Minister for Immigration and Multicultural Affairs v Wang*[22], where it is the function of a head of jurisdiction to assign members of a court to hear particular cases, the capacity to exercise that function, free from interference by, and scrutiny of, the other branches of government is an essential aspect of judicial independence. The same may be said of the capacity to exercise that function free from the threat of civil or criminal sanctions[23]. The responsibilities conferred upon a

---

20 *Gibbons v Duffell* (1932) 47 CLR 520 at 528.

21 (1989) 18 NSWLR 512.

22 (2003) 215 CLR 518 at 523-524 [12].

23 As to the limits on the power to investigate the reasons for a decision to assign a judge to a case, see the decision of the Supreme Court of Canada in *MacKeigan v Hickman* [1989] 2 SCR 796.

Chief Magistrate by s 10 would cover some mundane issues of a kind that arise in the administration of any substantial organisation. On the other hand, some of those responsibilities, and especially those involving decisions which directly or indirectly determine how the business of Magistrates Courts will be arranged and allocated, concern matters which go to the essence of judicial independence. The selection of supervising and coordinating magistrates is a matter that falls into that category. It is, therefore, incorrect to say that the functions and powers conferred on the Chief Magistrate by s 10 are unrelated to the rationale for the immunity in question. As to some of those functions the rationale is directly relevant. As to some it may be of no relevance, or of limited relevance. As to others, its relevance may depend upon the circumstances. Furthermore, it is not the case that decisions of the kind covered by s 10 affect only the conditions of service of individual magistrates. Such decisions affect the assignment of judicial officers to cases. If a Chief Magistrate could be called to account, in civil or criminal proceedings, for decisions about how Magistrates Courts arrange their business, or about the assignment of magistrates to cases, or classes of case, the capacity for the erosion of independence is obvious.

53 In recent years, the Supreme Court of Canada[24], and the Constitutional Court of South Africa[25], have found it necessary to examine the theoretical foundations of judicial independence for the purpose of considering whether arrangements in relation to particular courts satisfied the minimum requirements of that concept. In that context reference was made to "matters of administration bearing directly on the exercise of [the] judicial function."[26] The adjudicative function of a court, considered as an institution, was seen as comprehending matters such as the assignment of judges, sittings of the court and court lists, as well as related matters of allocation of court-rooms and direction of the administrative staff engaged in carrying out that function. Judicial control over such matters was seen as an essential or minimum requirement for institutional independence[27]. The distinction between adjudicative and administrative functions drawn in the context of discussions of judicial independence is not clear cut. Nevertheless, the powers conferred by s10 of the Magistrates Act include powers that fall squarely within the rationale of the immunity in question.

54 Apart from submitting that the words "under an Act" completely exclude functions and powers conferred under the Magistrates Act itself, the respondent

---

24 *Valente v The Queen* [1985] 2 SCR 673; *R v Genereux* [1992] 1 SCR 259; *Reference re: Public Sector Pay Reduction Act* [1997] 3 SCR 3.

25 *Van Rooyen v The State* 2002 (5) SA 246.

26 *Valente v The Queen* [1985] 2 SCR 673 at 708.

27 *Valente v The Queen* [1985] 2 SCR 673 at 709.

has not proposed any intermediate position according to which s 21A could apply to some of the powers conferred by s 10 but not to others. The rationale behind the immunity it confers requires that s 21A be read as covering the exercise by a Chief Magistrate of the powers conferred by s 10 of the Magistrates Act.

Conclusion

55 The appellant should not have been held criminally responsible for the conduct alleged against her. By statute, she was entitled to a protection and immunity that was wrongly denied to her. She is entitled to succeed on her primary ground of appeal.

56 With one exception, the remaining grounds of appeal seek to raise points that were not taken, and in some cases were expressly conceded, at trial and in the Court of Appeal. Those points do not raise any conclusive legal objection to the proceedings or the outcome of the trial, and some of them, if made good, would only result in an order for a new trial. The appellant should not be permitted to pursue those points in this Court.

57 As to the ground that was argued in the Court of Appeal, it is sufficient to say that the reasoning of the Court of Appeal was closely related to the way in which the parties at trial presented and conducted their respective cases. In this Court, the appellant has endeavoured to alter the position that was taken at trial in respect of a number of fundamental issues. Furthermore, she has succeeded in an argument that there should never have been a trial of those issues. In the circumstances, this Court should express no view on the remaining ground of appeal.

58 The appeal should be allowed. The orders of the Court of Appeal of the Supreme Court of Queensland should be set aside. In place of those orders the appeal to the Court of Appeal should be allowed, the appellant's conviction should be quashed, and a verdict and judgment of acquittal on both counts in the indictment should be entered.

59 McHUGH J. I agree that this appeal must be allowed and the appellant's conviction quashed because the acts that were the subject of the charge under s 119B of the *Criminal Code* (Q) were acts done by a magistrate "in the performance or exercise of an administrative function or power conferred on the magistrate under an Act" within the meaning of s 21A of the *Magistrates Act* 1991 (Q)[28]. My reasons for doing so are the same as those of Gummow and Heydon JJ with whose judgment I agree.

60 But I would also quash the conviction on the ground that the learned trial judge failed to put the appellant's true case on "reasonable cause" to the jury and failed to direct the jury as to the meaning of that term and the evidence relevant to its evaluation. To understand why that is so, it is necessary to examine the summing-up in detail, much of which in my opinion did not adequately explain to the jury how they should apply a novel legal provision, set in an unusual context, with legal terms and issues upon which the jurors required clear guidance.

61 The appellant has never complained that the summing-up was generally defective. Ordinarily in such a case, it would not be part of this Court's function to examine the summing-up. Further, the trial was presided over by an experienced judge and an experienced member of the Queensland Criminal Bar represented the appellant at the trial. Those two facts provide a further reason why this Court would not ordinarily examine the adequacy of a summing-up when its adequacy is not a ground of appeal. But, *despite* these considerations, it is necessary to examine the summing-up generally to understand the strength of the ground that *is* raised in this Court.

62 The appellant complains that the "learned trial judge misdirected the jury by not giving them any directions as to the meaning of 'without reasonable cause' in Section 119B of the *Criminal Code*". The appellant did not argue this ground in the Court of Appeal. In that Court, the only ground argued was that no reasonable jury could have found beyond reasonable doubt an absence of "reasonable cause" for the conduct that was the basis of the charge. However, *Crampton v The Queen*[29] holds that there is no constitutional objection to raising a ground of appeal for the first time in this Court although special leave to appeal on such a ground will be allowed only in exceptional circumstances. As will appear, the circumstances of this case are so exceptional that it is appropriate to allow both the immunity ground and the present "reasonable cause" ground to be raised in this Court.

---

28 (Reprint No 3), formerly *Stipendiary Magistrates Act* 1991 (Q).

29 (2000) 206 CLR 161.

Statement of material facts

63 The appellant was the Chief Magistrate of Queensland. Section 10(2)(d) of the *Magistrates Act* 1991 (Q) empowered the Chief Magistrate to nominate a magistrate to be a Co-ordinating Magistrate for the purpose of the allocation of the work of the Magistrates Court. The grant of this power also gave her the power to remove a nominated magistrate[30]. Section 10(2) of the *Magistrates Act* also empowered her to transfer magistrates, but this power was subject to review by a Judicial Committee established under the Act for the purpose of reviewing such decisions.

64 One Co-ordinating Magistrate nominated by the appellant was Mr Basil John Gribbin. He was appointed a magistrate in 1987, and the appellant nominated him as a Co-ordinating Magistrate in April 2000. The position of Co-ordinating Magistrate entailed greater administrative duties than that of a magistrate. They included the allocation of work between magistrates in the area. The position also carried an annual stipend of $2,000. In September 2002 – the month when the events critical to this case took place – Mr Gribbin was also Vice-President of the Stipendiary Magistrates Association of Queensland ("the Magistrates Association").

65 On 26 October 2001, the Magistrates Association had sent a letter to the Attorney-General for Queensland proposing changes to the powers of the Chief Magistrate. Mr Gribbin was not a President, Vice-President or Secretary of the Association at that time, and it is not clear that he was even a member of the Executive. The letter was signed by the then President. However, Mr Gribbin testified that the appellant was not consulted about the issues raised in the letter.

66 On 17 December, the appellant made a phone call to Mr Gribbin during which she complained that none of the matters in the letter had been raised with her despite ample opportunity to do so, particularly at the September 2001 meeting of Co-ordinating Magistrates. Mr Gribbin said that during this conversation the appellant had told him that there was a conflict of interest between his position on the Magistrates Association and his position as Co-ordinating Magistrate. He said that she attempted to deliver an ultimatum to the effect that he must choose between these positions and could not maintain both of them. However, this dispute between the appellant and Mr Gribbin seemed to have been resolved after an e-mail from the appellant which Mr Gribbin described in evidence as "a complete backdown".

67 In July 2002, the appellant determined that another magistrate, Ms Anne Thacker, should be transferred to Townsville. Later that month, Ms Thacker

---

30 *Acts Interpretation Act* 1954 (Q), s 25(1)(b)(i).

filed an application for a review by the Judicial Committee of that determination. She wrote to the Magistrates Association seeking assistance with her application for review.

68 On 12 August 2002, Mr Gribbin provided an affidavit to Ms Thacker's solicitors for use in the review proceedings. The appellant filed an affidavit in reply on 30 August 2002. In his affidavit, Mr Gribbin outlined the process for transferring magistrates between centres and the statutory change to that system that was effected in 1991 by the *Stipendiary Magistrates Act*, which conferred upon the Chief Magistrate the power to make transfer decisions. In his affidavit, Mr Gribbin said that the appellant's exercise of her power was "difficult to tie to a clear policy approach", that there had been many "forced transfers" and that magistrates generally felt "susceptible to arbitrary, unadvertised, involuntary transfers". In evidence, Mr Gribbin said that at that time he considered the appellant to be an "appalling Chief Magistrate". Mr Gribbin agreed that, before expressing his view of her policies in his affidavit, he had not told the appellant that her transfer policy was unclear. He said that there had been a "measure of friction" between him and the appellant but that it had subsided by the time he wrote the affidavit in the application by Ms Thacker.

69 On 4 September 2002, Mr Gribbin received an amended draft agenda for a Co-ordinating Magistrates meeting which was to take place on 19 and 20 September 2002. One of the items added to the agenda was "Role of the Association".

70 On 9 September 2002, Mr Gribbin sent an e-mail about this agenda to several magistrates who were to attend the September meeting of the Co-ordinating Magistrates. His e-mail expressed the concerns he had about that item and sought to initiate discussion about it with other Co-ordinating Magistrates. Mr Gribbin said he did not send the e-mail either to the appellant or to her Deputy, Mr Hine, but that he "fully intended to publish [his] concerns at the meeting to both of them".

71 On 18 September 2002, the appellant sent Mr Gribbin a letter by e-mail calling on him to show cause why she should not exercise her power to withdraw his nomination as a Co-ordinating Magistrate. Before sending the e-mail, she consulted Mr David Graham Searles, who was retained by the Queensland Law Society in relation to professional misconduct prosecutions. He advised the appellant in relation to the application by Ms Thacker and in relation to an earlier transfer issue.

72 The original draft letter that the appellant showed to Mr Searles provided for the removal of Mr Gribbin. However, Mr Searles advised her that the letter should be altered so as to give Mr Gribbin an opportunity to show cause why he should not be removed. Relevantly, the amended letter stated:

> "Could you also explain to me why you sought [sic] fit to supply an affidavit in the matter of Ms Thacker's Review of my decision to transfer her to Townsville. You were critical in it of both Mr Deer and myself in relation to transfer matters. Is this a matter which you feel should be discussed by you in an affidavit before the Judicial Committee, when you have never raised it with me personally or at a Co-ordinating Magistrate's meeting?
>
> In the circumstances, I feel that I do not have your confidence in my leadership abilities. No other magistrate, certainly not a co-ordinating magistrate has seen fit to enter into any such matters. ...
>
> Further, you circulated all other co-ordinating magistrates (except Mr Hine and with no reference to myself), in relation to a proposed agenda item for the forthcoming co-ordinating magistrates meeting. The agenda is, in the end, a matter for my discretion, following consultation with the other Co-ordinating magistrates. No-one put to me that such an item should not be on the agenda. I consider that action on your part, again, to be disloyal to the leadership of the magistracy and disruptive of the morale of the magistracy.
>
> The position of Co-ordinating Magistrate in the Queensland Magistracy is a privileged position. I regularly meet with all Co-ordinating Magistrates who give input into the administration of the courts. Whilst constructive criticism will always be appreciated, there must be loyalty to the Chief Magistrate. As stated, you sought to agitate a view about an item on the agenda for the meeting beginning tomorrow, without my knowledge.
>
> This and the other example I refer to above, manifest to me a clear lack of confidence by you in me as Chief Magistrate. In the circumstances, I ask you to show cause, within seven days, as to why you should remain in the position.
>
> In the circumstances, it is not appropriate that you attend the Co-ordinating Magistrates meeting this Thursday and Friday at Central Courts."

73 As a result of sending this letter, the appellant was charged with an offence under s 119B of the *Criminal Code* and with attempting to pervert the course of justice under s 140 of the *Criminal Code*.

74 Section 119B of the *Criminal Code* provides:

> "A person who, without reasonable cause, causes, or threatens to cause, any injury or detriment to a judicial officer, juror, witness or a member of the family of a judicial officer, juror or witness in retaliation because of –

(a) anything lawfully done by the judicial officer as a judicial officer; or

(b) anything lawfully done by the juror or witness in any judicial proceeding;

is guilty of a crime.

Maximum penalty – 7 years imprisonment."

75 The appellant was subsequently tried in respect of the two charges. The jury convicted her of the offence under s 119B of the Code and were directed that the charge of attempting to pervert the course of justice was an alternative count. As a result, the jurors were not required to return a verdict in respect of the charge of attempting to pervert the course of justice.

76 Subsequently, the Court of Appeal of Queensland dismissed the appellant's appeal against her conviction, and this Court granted her special leave to appeal against the order of the Court of Appeal dismissing her appeal to that Court.

The requirements of a summing-up

77 Section 620 of the *Criminal Code* declares that, after the evidence has concluded and counsel have addressed the jury, "it is the duty of the court to instruct the jury as to the law applicable to the case, with such observations upon the evidence as the court thinks fit to make." The court does not discharge that duty by merely referring the jury to the law that governs the case and leaving it to them to apply it to the facts of the case. The key term is "instruct". That requires the court to identify the real issues in the case, the facts that are relevant to those issues and an explanation as to how the law applies to those facts[31]. As McMurdo P said in *Mogg*[32], ordinarily the duty imposed on a trial judge in respect of a summing-up requires the judge to identify the relevant issues and relate those issues to the relevant law and facts of the case. In the same case, after referring to s 620 Thomas JA said[33]:

"The consensus of longstanding authority is that the duty to sum up is best discharged by referring to the facts that the jury may find with an

---

31 cf *Alford v Magee* (1952) 85 CLR 437 at 466.

32 (2000) 112 A Crim R 417 at 427 [54].

33 (2000) 112 A Crim R 417 at 430 [73].

> indication of the consequences that the law requires on the footing that this or that view of the evidence is taken." (footnote omitted)

78 The statements of the learned President and Thomas JA show that the law concerning a summing-up in trials under the *Criminal Code* is no different from the law in trials at common law. Their Honours' statements are consistent with the statements of Gaudron ACJ, Gummow, Kirby and Hayne JJ in *RPS v The Queen*[34] concerning the duty of a trial judge in jurisdictions that have no counterpart to s 620:

> "The fundamental task of a trial judge is, of course, to ensure a fair trial of the accused. That will require the judge to instruct the jury about so much of the law as they need to know in order to dispose of the issues in the case. No doubt that will require instructions about the elements of the offence, the burden and standard of proof and the respective functions of judge and jury. Subject to any applicable statutory provisions it will require the judge to identify the issues in the case and to relate the law to those issues. It will require the judge to put fairly before the jury the case which the accused makes." (footnotes omitted)

79 As Diplock LJ pointed out in *R v Mowatt*[35], the "function of a summing-up is not to give the jury a general dissertation upon some aspect of the criminal law, but to tell them what are the *issues of fact* on which they must make up their minds in order to determine whether the accused is guilty of a particular offence." (emphasis added)

80 A summing-up is radically defective unless it adequately explains "to the jury the nature and essentials of" the offence with which a person is charged[36]. Where the offence involves statutory terms, it is usually "imperative that the jury be specifically directed as to the criteria to be applied and the distinctions to be observed in determining" whether particular conduct is within the terms of the section[37].

81 In the present case, I think that the summing-up was defective in material respects. Furthermore, it did not comply with the above principles. In fairness to the learned trial judge, it has to be emphasised that his directions to the jury tracked the arguments that counsel for the appellant and the Crown put to the

---

34 (2000) 199 CLR 620 at 637 [41].

35 [1968] 1 QB 421 at 426.

36 *McBride v The Queen* (1966) 115 CLR 44 at 47.

37 *McBride v The Queen* (1966) 115 CLR 44 at 50.

jury. In my view, the defects in the summing-up resulted from the prosecution case being built upon an erroneous application of s 119B to the facts of the case. To use the words of Windeyer J[38] in a similar context, that had the consequence that "[t]he trial of this action got off to a bad start." And it was not improved when counsel for the appellant did not seriously challenge the conceptual structure of the prosecution case, perhaps because it raised factual issues that he thought gave his client a forensic advantage. In these circumstances, it is not surprising that the summing-up of the learned trial judge followed the conceptual structure of the case accepted by counsel and the factual arguments put by each counsel.

82 No doubt the arguments of counsel for the appellant at the trial reflected his belief that the appellant's best chance of acquittal lay in putting the issues in the way that he did. His failure to ask the judge for the legal directions that should have been given may also have reflected the belief that putting issues to the jury that did not reflect the course of his address might have confused the jury and made the chance of acquittal less likely. He may have thought that his client's chance of acquittal would not be improved, but would be likely to be harmed, if he asked the judge to direct the jury in accordance with what I think were the real issues posed by the s 119B charge and the evidence. Similarly, he may have thought that the best interests of his client would not be advanced by a close interpretation of the various terms of the section. But if he held these views, he was mistaken because it led to the appellant's true case not being put before the jury.

83 Whatever the offence and however the accused's case is conducted, the law requires that a judge's summing-up comply with the principles to which I have referred. A trial judge is bound to put to the jury every lawfully available defence open to the accused on the evidence even if the accused's counsel has not put that defence and even if counsel has expressly abandoned it[39]. Barwick CJ stated the relevant principles in *Pemble v The Queen*[40]:

> "There is no doubt that the course taken by counsel for the appellant at the trial contributed substantially to the form of the summing up. If the trial had been of a civil cause, it might properly be said that the trial judge had put to the jury the issues which had arisen between the parties. But this was not a civil trial. The decision of the House of Lords in *Mancini v Director of Public Prosecutions* following Lord Reading's judgment in

---

38 *Australian Consolidated Press Ltd v Uren* (1966) 117 CLR 185 at 201.

39 *Pemble v The Queen* (1971) 124 CLR 107.

40 (1971) 124 CLR 107 at 117-118.

> *R v Hopper* and its influence in the administration of the criminal law must ever be borne in mind (see *Kwaku Mensah v The King*). Whatever course counsel may see fit to take, no doubt bona fide but for tactical reasons in what he considers the best interests of his client, the trial judge must be astute to secure for the accused a fair trial according to law. This involves, in my opinion, an adequate direction both as to the law and the possible use of the relevant facts upon any matter upon which the jury could in the circumstances of the case upon the material before them find or base a verdict in whole or in part." (footnotes omitted)

84 After giving due respect to the advantage that counsel and the learned trial judge had in hearing the evidence and absorbing the atmosphere of the trial, I am nevertheless convinced that the summing-up was defective in radical respects. I do not think that the jury received the assistance that they needed in respect of a novel offence that is formulated in imprecise language and had to be applied to evidentiary issues and factual distinctions of some subtlety. No doubt the course taken by counsel on each side put the learned trial judge in a difficult position. To a considerable extent, he would have had to instruct the jury on matters that counsel who then appeared for the appellant had eschewed. But as Barwick CJ makes clear in *Pemble*, the proper administration of the criminal law requires nothing less. The right of every accused to a fair trial according to law cannot automatically depend on the forensic choices of the counsel who represents the accused.

The summing-up

85 The summing-up commenced by describing the offences laid in the indictment. The learned judge gave standard directions concerning the functions of himself and the jury, the onus and standard of proof and the need for each verdict to be unanimous. He instructed the jury that the opening speeches and closing addresses of counsel were not evidence although their submissions and comments had to be carefully considered. He told them that, although he would comment on some of the evidence, the fact that he did so did not necessarily mean it had more weight than other evidence. He identified the witnesses by name and the positions that they held. He reminded the jury that, although they had heard a good deal of evidence concerning discord among magistrates in particular on the subject of transfers, "the rights and wrongs of the controversy concerning transfers are not for you to determine." His Honour then said:

> "In this case a question arises, in relation to both charges, as to the accused's state of mind when she did what the Crown has alleged against her. In relation to the first charge, the question arises whether she did what she did in retaliation. On the second charge, the question arises whether she did what she did with the intention of perverting, et cetera, the course of justice. So her state of mind is relevant.

> The Crown alleges on the first count that she did what she did in retaliation, as a payback; on the second count, that she did what she did with the intention of perverting, et cetera, the course of justice. And the Crown relies on circumstantial evidence."

86 Later, his Honour again referred to the Crown submission that what the appellant did was "by way of retaliation with the intention of inflicting a punishment on Mr Gribbin".

87 These were the only references his Honour made to the appellant's state of mind in respect of the s 119B charge although in my opinion her state of mind was the critical issue in respect of the "reasonable cause" issue. And, arguably, "reasonable cause" was the key issue in the case. Thus, on the critical issue of "reasonable cause" the jury had no assistance concerning the relevance of the appellant's state of mind. That the judge's directions concerning the appellant's state of mind were limited to the retaliation issue is not surprising. Counsel for the appellant put the issue of "retaliation" in the forefront of the appellant's defence. He told the jury that the "retaliation" issue was the most complicated of the three issues in the case because it concerned an analysis of the appellant's mind. He appears to have overlooked that her beliefs concerning Mr Gribbin were fundamental to another of the issues he mentioned – "reasonable cause".

88 After these directions, the judge gave a standard direction in relation to proof of circumstantial evidence. After telling the jury that certain tape recordings and not the transcripts of them were evidence, he came "to the law that applies to these offences." His Honour described the offence the subject of the first count. His Honour then said:

> "In this case the Crown must prove beyond reasonable doubt, first, that Mr Gribbin was a witness in a judicial proceeding. A 'judicial proceeding' includes, under our law, any proceeding had or taken in or before any tribunal in which evidence may be taken on oath. The judicial committee constituted to review the accused's determination concerning Ms Thacker's transfer was such a tribunal, and Ms Thacker's request that the judicial committee review the accused's determination was a judicial proceeding. Mr Gribbin became a witness in the proceeding when his affidavit was filed.
>
> Secondly, the Crown must prove beyond reasonable doubt that the accused threatened to cause an injury or detriment to Mr Gribbin. The Crown must prove beyond reasonable doubt that the accused threatened to cause an injury or detriment to Mr Gribbin. A loss of the status of coordinating magistrate and of the extra remuneration in addition to salary as a magistrate that goes with that status could be a detriment. It is for you to decide whether such a loss would be a detriment. To be a detriment, the benefit in question must be something more than a trifle.

> Thirdly, the Crown must prove beyond reasonable doubt that the accused made the threat to Mr Gribbin in retaliation – that is, as a repayment in kind, or requital, or reprisal – because of his providing the affidavit as he was entitled in law to do. The Crown must prove beyond reasonable doubt that the accused made the threat to Mr Gribbin in retaliation, as a repayment in kind, or requital, or reprisal, because of his providing the affidavit as he was entitled in law to do.
>
> Fourthly, the Crown must prove beyond reasonable doubt that the accused made the threat without reasonable cause. You have heard evidence of a difficulty presented by an apparent inability of a coordinating magistrate and the Chief Magistrate to work harmoniously and constructively together in performing their respective functions. That difficulty could constitute reasonable cause for the Chief Magistrate to call upon the coordinating magistrate to show cause why the coordinating magistrate should remain as a coordinating Magistrate. But whether such a difficulty would be a reasonable cause for the accused's sending the e-mail that has led to the charges before you when she did, and in the circumstances then existing, is for you to determine. Remember that such a cause must be reasonable. Please also remember that, in the end, the Crown must prove absence of reasonable cause. The Crown must prove absence of reasonable cause beyond reasonable doubt.
>
> As I have said, if you are not satisfied beyond reasonable doubt that the Crown has proved any one of those elements of the offence of retaliation against a witness, the accused must be acquitted of that charge."

89 In my view, the learned trial judge's directions did not assist – and indeed misled – the jury in relation to elements of the charge. First, his Honour told the jury that "[a] loss of the status of coordinating magistrate and of the extra remuneration in addition to salary as a magistrate that goes with that status could be a detriment" for the purpose of the section. However, the injury or detriment to which Mr Gribbin was subjected was the requirement that he respond to a "show cause" notice that might lead to the loss of status and remuneration if his answer was not regarded as sufficient. There is a difference, and in the context of this case and s 119B it is more than one of degree, between a threat to demote and calling on a person to show cause why that person should not be demoted with a consequential loss of status and remuneration. Calling on a person to show cause is not necessarily a threat. This Court does not threaten a respondent when it issues an order nisi calling on that person to show cause why a particular constitutional writ should not issue out of the Court. Of course, in certain circumstances a jury might find that a show cause notice is indeed a threat. But the jury's attention in this case should have been drawn to the distinction between a direct threat of demotion and a show cause notice that could lead to demotion so that they could make a judgment as to whether it was a threat. Necessarily, that would require instruction as to what is involved in the procedure where a

show cause notice is issued. Furthermore, the distinction between a threat to demote and a show cause notice that might lead to demotion is critical to other issues under s 119B.

90 The precise nature of the threat, for example, is relevant to and ordinarily determinative of the issue of "reasonable cause". There is a world of difference between a reasonable excuse for making a direct threat of a loss of status and remuneration and a reasonable cause for issuing a notice calling upon a person to show cause why, in the absence of a satisfactory explanation, that person should not lose that status and remuneration. It will always be harder to justify the making of the direct threat than it will be to justify the making of the show cause notice unless the jury conclude the show cause notice was a sham.

91 Second, the learned judge defined retaliation "as a repayment in kind, or requital, or reprisal – because of his providing the affidavit as he was entitled in law to do." In other contexts, "repayment in kind", "requital" or "reprisal" may serve as synonyms for "retaliation". But I do not think that any of these terms explain the meaning of "retaliation" in s 119B. The section assumes that there may be a "reasonable cause" for the retaliation. It is hard to see how a reprisal, repayment in kind or requital in relation to a witness could be the subject of a reasonable cause. Those concepts imply revenge. And it is hard to see how a revengeful response could be the subject of a reasonable cause. For the same reason, it is difficult to see how "retaliation" can mean "payback", an expression much used by counsel for the prosecution to describe the sending of the show cause notice by the appellant to Mr Gribbin.

92 The difficulty in giving the phrase "in retaliation" a sensible meaning in the context of s 119B arises from the fact that it is largely, if not wholly, superfluous and is merely descriptive of the effect of the rest of the section. A person who "causes ... any injury ... to a ... witness ... *because of* ... anything lawfully done by the ... witness" has acted "in retaliation" for the doing of that thing. Except for emphasis, it is difficult to see how the phrase "in retaliation" adds anything of substance to the section.

93 "Retaliation" implies a causal connection for a particular reason. Used in a context where the "retaliation" may constitute reasonable cause, the term suggests that, in s 119B, it simply means "a response" because of something done by a judicial officer, juror or witness. If the reason for the response constitutes a reprisal or a repayment in kind, *the reason* will destroy the notion of "reasonable cause" in most, if not all, cases. But in s 119B it is the "response" that constitutes the "retaliation". To construe "retaliation" in the manner that the learned trial judge did would render the notion of "reasonable cause" largely irrelevant. "Retaliation" and "reasonable cause" are conceptually different. No directions should be given that might make one or other superfluous in deciding a charge brought under s 119B.

94 Third, the judge told the jury that the "difficulty presented by an apparent inability of a coordinating magistrate and the Chief Magistrate to work harmoniously and constructively together in performing their respective functions ... could constitute reasonable cause for the Chief Magistrate to call upon the coordinating magistrate to show cause ...". But with great respect, this statement does not do justice to the appellant's case on the issue of "reasonable cause". And the matter was aggravated by the judge's failure to assist the jury as to the meaning of "reasonable cause" or to identify for their consideration the circumstances that were relevant to that issue.

95 In the e-mail that was the subject of the charge, the appellant informed Mr Gribbin, "I feel that I do not have your confidence in my leadership abilities." At the end of the e-mail she said:

> "The position of Co-ordinating Magistrate in the Queensland Magistracy is a privileged position. I regularly meet with all Co-ordinating Magistrates who give input into the administration of the courts. Whilst constructive criticism will always be appreciated, there must be loyalty to the Chief Magistrate. As stated, you sought to agitate a view about an item on the agenda for the meeting beginning tomorrow, without my knowledge.
>
> This and the other example I refer to above, manifest to me a clear lack of confidence by you in me as Chief Magistrate. In the circumstances, I ask you to show cause, within seven days, as to why you should remain in the position.
>
> In the circumstances, it is not appropriate that you attend the Co-ordinating Magistrates meeting this Thursday and Friday at Central Courts."

96 In her evidence, the appellant said that she "felt that my working relationship with Mr Gribbin had reached a point where I felt he lacked confidence in my leadership abilities and I lacked confidence in his – my ability to work with him on the Coordinating Magistrates meeting." She was asked:

> "So have you given us all of the reasons why you decided to send him this e-mail calling on him to show cause why he shouldn't be removed from that position? -- I think I have said that I believed our working relationship, with him as Coordinating Magistrate, given the expanded role – I had no criticism of him running the Beenleigh Court, but a lot of people could do that. I needed his confidence. I needed his loyalty. Not blind loyalty, but loyalty, because this sort of thing is very disruptive, and so I thought it had come to an end and that's why I sent it.

> Well, did you send it as a payback for the fact that he'd supported Ms Thacker in her appeal against your transfer decision? -- Absolutely and unequivocally not."

97 The evidence of Mr David Searles, a solicitor who had advised the Queensland Law Society on professional misconduct, supported the appellant's case. He told her that she had to give Mr Gribbin an opportunity to deal with the matters raised against him saying:

> "He may very well change his mind and you may work harmoniously together. So give him the opportunity."

Mr Searles also said that the appellant "was not wanting to pick a fight with Mr Gribbin. She was wanting – hoping they could work things out". Mr Searles said:

> "[S]he expressed the view – I don't know whether it was on this occasion or on another occasion – that he was a very experienced Magistrate and she would benefit by having him on side but in her view he wasn't on side, he was agitating against her and she felt it very uncomfortable."

98 Thus, the evidence of the appellant was that she believed Mr Gribbin was not loyal to her and did not have confidence in her leadership of the Magistrates Court. As a result, she did not have confidence in him and believed that, unless he cooperated, he had to be removed. It was because of these beliefs that she called on him to show cause why he should not be removed from his office. For the Crown to succeed in the prosecution, it had to prove beyond reasonable doubt that she did not hold that belief or, if she did, that it was not a "reasonable cause" for her e-mail. Unless the jury were satisfied that she did not have that belief, they had to consider whether holding that belief was a "reasonable cause" for sending the show cause notice and whether that belief caused her to send it. That meant that the Crown had to prove *inter alia* that her belief did not constitute a "reasonable cause" for issuing a notice to Mr Gribbin calling on him to show cause why he should retain the office of Co-ordinating Magistrate.

99 Unfortunately, the trial judge did not put the issue of the appellant's state of mind to the jury in connection with the question of whether she had "reasonable cause" for what she did. In his summing-up, as I have pointed out, the learned judge made reference to the appellant's state of mind only in relation to retaliation. He said:

> "In this case a question arises, in relation to both charges, as to the accused's state of mind when she did what the Crown has alleged against her. In relation to the first charge, the question arises whether she did what she did in retaliation."

This was certainly true but the hypothesis of the section is that what is done in "retaliation" may be the subject of "reasonable cause". Thus, it was not sufficient simply to direct the jury that her state of mind was relevant in determining whether she was retaliating against Mr Gribbin. Clearly his actions were the cause of her sending the e-mail. Her e-mail was a response to his actions. In that sense, the giving of the affidavit with its critical content as well as the issue of the agenda item precipitated the e-mail and made it virtually inevitable that the jury would find it was "in retaliation" for them. It was vital to the issue of "reasonable cause", however, whether the reason for the "retaliation" was her belief that Mr Gribbin had lost confidence in her and that she had no confidence in him. The reason for the "retaliation" is fundamental to the issue of "reasonable cause".

100 And in this case, as I have indicated, the state of mind of the appellant was central to the "reasonable cause" issue. Instead of referring to her state of mind, however, his Honour referred to a difficulty presented by "an apparent inability of a coordinating magistrate and the Chief Magistrate to work harmoniously and constructively together" and told them that this could constitute a reasonable excuse. To direct the jury in this way failed to put the appellant's case on "reasonable cause" to the jury in the way that the law required, given her evidence about her beliefs concerning Mr Gribbin.

101 The direction that his Honour gave invited the jury to look at the objective facts of the conflict between Mr Gribbin and the appellant rather than the appellant's beliefs and their relationship to the sending of the e-mail. It invited the jury to determine for themselves whether "an apparent inability ... to work harmoniously and constructively" with Mr Gribbin was "reasonable cause" for "[a] loss of the status of coordinating magistrate and of the extra remuneration in addition to salary as a magistrate that goes with that status". It invited the jury to decide the "reasonable cause" issue without taking into consideration the subjective beliefs of the appellant in relation to working with Mr Gribbin. The question for the jury on this issue was whether the sending of the e-mail by a person holding the appellant's beliefs constituted "reasonable cause".

102 The learned judge's directions also gave authority to the following submission of counsel for the Crown:

> "[Counsel for the appellant] has suggested to you that if you find that a detriment was caused and if you find that it was in retaliation, then you must look at reasonable cause. [Counsel for the appellant] has suggested to you a number of factors which together might establish a reasonable cause for the accused to retaliate against Mr Gribbin for his evidence in the circumstances.
>
> Now, the first one that [counsel] said was that it was within the accused's power to remove him; it wasn't an abuse of power. But, ladies and

> gentlemen, the Crown would submit to you that for the accused to remove Mr Gribbin is an abuse of power *if it is not done because of his inability to perform the duties of his position*. It is an abuse of power to remove him because he has put in an affidavit that's on another person's side. That's an abuse of power, because *the only reason that he should be removed, you might think, is if he can no longer do his work. If he is not competent, not able and too lazy, or one of those types of reasons.* Not because of this affidavit." (emphasis added)

103 This submission of the Crown was erroneous. It could not possibly be an abuse of power for a Chief Magistrate – or for that matter any public office holder – to call on a subordinate to show cause why the subordinate should not be removed if the Chief Magistrate has lost confidence in the loyalty of the subordinate. Moreover, the italicised passages in this submission turned the issue of "reasonable cause" into a merits case. The appellant was not required to show that Mr Gribbin was incompetent or lazy or that she believed that he was for her to succeed on the "reasonable cause" issue.

104 The evidence and the law called for a different direction from that given by the learned trial judge. His Honour should have directed the jury that they had to acquit the appellant unless they found beyond a reasonable doubt that:

- she did not hold the beliefs to which she testified, or
- if she held them, they did not constitute a "reasonable cause" for the show cause notice, or
- if she held them, they were not the reason that gave rise to the show cause notice.

105 It is true that this was not the way that the appellant's counsel had put her case on "reasonable cause" to the jury. He told the jury:

> "So when you look at all of those circumstances – I will just summarise them for you – remember, you are asking yourselves did she have good cause to do what she did; is it within her power to do what she did; the detriment he was going to suffer would be minimal; it occurred in the context of a quarrel between senior Magistrates about administrative matters; she needed and deserved and was entitled to have a good working relationship with senior Magistrates and that was being frustrated by this dispute between them; did she have other reasons for retaliating against him which were not frivolous? The answers are, 'Yes', and I have listed them for you.
>
> So when you look at those matters, ladies and gentlemen, my submission to you is you would feel very comfortably satisfied that she did have good

> cause to do what she did. Retaliation or otherwise, payback or otherwise, she had good cause to do it. If that is your thinking, then your verdict is not guilty."

106 Earlier in his submissions, counsel had said:

> "Ask yourselves in what context was it done, and my suggestion is this: it was done in the course of a squabble or a quarrel between senior Magistrates over some aspects of the administration of Magistrates Courts in Queensland. That's where it has its origin. That's the context in which it happened. A squabble, a quarrel, each of them assuming a stance, no doubt each of them convinced that their own stance was reasonable and proper but opposed to each other in this dispute about administrative matters; that's the context in which it happened."

107 But, as *Pemble* decides, whatever course counsel for an accused person may see fit to take, the trial judge has a duty to secure the fair trial of the accused according to law. That requires a proper "direction both as to the law and the possible use of the relevant facts upon any matter upon which the jury could in the circumstances of the case upon the material before them find or base a verdict in whole or in part."[41]

108 Moreover, the summing-up on the "reasonable cause" issue was defective in three other important respects. First, the learned trial judge did not give the jury any assistance as to what would constitute reasonable cause or what that term meant. In *Taikato v The Queen*[42], Brennan CJ, Toohey and Gummow JJ and I discussed the meaning of the similar term "reasonable excuse" in a provision of the New South Wales *Crimes Act*. We said:

> "[T]he reality is that when legislatures enact defences such as 'reasonable excuse' they effectively give, and intend to give, to the courts the power to determine the content of such defences. Defences in this form are categories of indeterminate reference that have no content until a court makes its decision."

109 The indeterminacy of the term "reasonable cause" makes it necessary for a jury in a case like this to be given all possible assistance as to the circumstances that should be taken into account in determining whether a reasonable cause existed. As the Queensland Court of Appeal pointed out in *R v Campbell*[43], in

---

41 (1971) 124 CLR 107 at 117-118.

42 (1996) 186 CLR 454 at 464-466.

43 [1997] QCA 127.

relation to the similar term "reasonable and probable cause", it "is not without potential difficulty". The Court of Appeal in *Campbell* thought that the expression raised an objective test, that it was determined by "what a reasonable person would consider as reasonable or probable" and that "more complex directions and fuller explanations than were contained in the trial judge's summing-up in this case will sometimes be required."[44] The same comment can be made in respect of the expression "reasonable cause". A fuller explanation of "reasonable cause" required a direction that the jury had to determine whether a reasonable person holding the appellant's beliefs would have been justified in sending the appellant's e-mail to a Co-ordinating Magistrate in whom she had lost confidence and who had no confidence in her. It also required a direction that contained a close examination of the function of a Co-ordinating Magistrate and the relationship of that position with the office of Chief Magistrate. Only by examining that relationship could the jury evaluate whether the beliefs of the appellant constituted a "reasonable cause".

110 Second, in determining the "reasonable cause" issue, it was also important to distinguish between the effect on Mr Gribbin and what he may have perceived as the reason for the issue of the show cause notice and the appellant's reason for giving the notice. Understandably, Mr Gribbin thought that he was to be downgraded as a punishment for giving an affidavit in the application by Ms Thacker in respect of her transfer to Townsville. But the relationship between Mr Gribbin's perception of the appellant's reason for the notice and the appellant's reason for the notice was not necessarily a reflexive one. In the industrial and social conflict that had arisen from the appellant's policies concerning magistrates, Mr Gribbin and the appellant might each say, "You should see it from my side." But for the purpose of s 119B and the issue of "reasonable cause", the only side that mattered was the appellant's side. The effect on Mr Gribbin and his perception of her purpose were irrelevant. If the reason for the appellant's show cause notice was the belief that Mr Gribbin had no confidence in her and as a result she had no confidence in him, she had a strong case on the issue of "reasonable cause". Given the trial judge's direction as to what was the threat and therefore the potential for the jury to think that Mr Gribbin was in fact being punished for giving an affidavit, the issue of the appellant's beliefs – her mental state – and the relationship between the position of Co-ordinating Magistrate and the office of Chief Magistrate needed to be the subject of clear directions to the jury.

111 Third, in determining the issue of "reasonable cause", the jury should have been directed as to what was involved in giving the show cause notice and what its consequences might be. Unless the jury were convinced that the appellant did not hold the beliefs which she set out in the e-mail, they had to make a judgment

---

44 [1997] QCA 127.

as to whether it was reasonable to call upon Mr Gribbin to show cause because of those beliefs. The jury should have been directed that, in determining the "reasonable cause" issue, it was not a necessary consequence of a show cause notice that loss or detriment would flow from the issuing of the notice. Whether it will have that consequence depends on the addressee's response and its effect on the person giving the notice. In the present case, for example, Mr Gribbin might have asserted his loyalty and his confidence in the appellant or claimed that she had no basis for not having confidence in him. Mr Searles, the solicitor advising the appellant, told her that Mr Gribbin "may very well change his mind and you may work harmoniously together." Moreover, Mr Searles said that the appellant "had expressed to me her wish that she and Mr Gribbin could patch up their differences because she saw him as a very experienced Magistrate and one who could give her assistance in the running of the Courts."

112 Unfortunately, Mr Gribbin did not reply directly to the grounds asserted by the appellant in the show cause notice because he perceived it as an attempt to intimidate him. His e-mail to her dated 19 September stated:

> "Your e-mail of 18 September 2002 contains a direct threat to cause me a detriment on account of my having supplied an affidavit in the matter of Magistrate Thacker's proceedings before the Judicial Committee.
>
> That committee is constituted, inter alia, by the Chief Justice and another Judge of the Supreme Court. Accordingly I consider that your threatening behaviour towards a witness in those proceedings is capable of constituting either a contempt of the Supreme Court or an attempt to pervert the course of justice.
>
> Further, your attempt to exclude me from attending the meeting of Co-ordinating Magistrates can only compound that threat.
>
> I intend to be present at that meeting.
>
> Any attempt by you to exclude me will leave me no option but to consider taking steps to bring the matter to the notice of the Judicial Committee."

113 If the jury were not convinced that the Crown had disproved the appellant's claim that she had lost confidence in Mr Gribbin, it is difficult to see how they could conclude that that belief was not a "reasonable cause" for sending the show cause notice. That is so, even if reasonable people might think that she should not have lost confidence in him simply because of the matters to which she referred or that it was unfair to place Mr Gribbin at risk of losing his status and remuneration because of those matters. If the Chief Magistrate has lost confidence in a subordinate occupying a particular position and calls on that person to show cause why he or she should not be removed from the position, it is difficult to see how the conduct of the Chief Magistrate is unreasonable *in*

issuing the show cause notice. Removal of the subordinate may in fact be unreasonable after the subordinate has responded. But it is hard to see how the *issuing* of the notice by a Chief Magistrate in such circumstances would not be reasonable.

114 Careful directions on the issue of "reasonable cause" were all the more important because of the theory of the prosecution case. It attributed bad faith to the appellant from beginning to end. Its theory impliedly rejected the claim that the appellant had lost confidence in Mr Gribbin. Instead, it contended that the show cause letter was simply a step, forced upon her by Mr Searles' advice, in a plan to punish Mr Gribbin for filing an affidavit in the Thacker application and to deter other magistrates from doing likewise. The prosecution theory of the case rejected any claim that the appellant thought that she was acting in the best interests of the administration of the Magistrates Courts. Its theory was that the e-mail was nothing more than an instrument to terrify magistrates so that they would fear to support other magistrates who appealed against her transfer decisions. It was a remarkable theory involving as it did the assumption that the appellant was prepared to remove a magistrate who, *ex hypothesi*, she believed was loyal and competent so that she could assert power over the magistracy. But its very boldness, aided by the forensic claim of "payback", made it imperative for the learned trial judge to put the appellant's true case clearly to the jury.

115 In my opinion, the summing-up was defective in fundamental respects. Each of those respects had an impact on the issue of "reasonable cause". Because that issue was dependent on other issues such as "detriment" and "retaliation", misdirection or non-direction in respect of the latter issues inevitably meant that the directions concerning "reasonable cause" were inadequate. The appellant's grounds of appeal, however, raise only the adequacy of the directions concerning "reasonable cause" itself. As it happens, the directions or lack of them concerning "reasonable cause" were themselves defective. Consequently, this ground of appeal must succeed as well as the claim of immunity under s 21A of the *Magistrates Act* 1991.

Order

116 The appeal should be allowed. The order of the Court of Appeal should be set aside. In its place should be substituted an order that the appeal to that Court be allowed and an acquittal entered in favour of the appellant on both counts in the indictment.

117 GUMMOW AND HEYDON JJ. Before the commencement of the trial of the appellant in the Supreme Court of Queensland on an indictment alleging breach of s 119B of the *Criminal Code* (Q) ("the Code")[45], there had appeared from particulars furnished by the prosecution and from agreement between the parties the primary facts to found an application under s 592A of the Code to quash the indictment for trespassing upon the protection and immunity of the appellant as Chief Magistrate of Queensland which was conferred by s 21A of the *Magistrates Act* 1991 (Q) ("the Magistrates Act").

118 No such application under s 592A was made. However, the fundamental issue provided by s 21A of the Magistrates Act is now the first ground of the appeal to this Court against the decision of the Queensland Court of Appeal to uphold the appellant's conviction.

119 Section 21A states:

> "A magistrate has, in the performance or exercise of an administrative function or power conferred on the magistrate under an Act, the same protection and immunity as a magistrate has in a judicial proceeding in a Magistrates Court."

120 In his oral submissions, counsel for the respondent accepted that no immunity provided by s 21A could have been waived and that, if the first ground of appeal is now made good, the conviction is liable to be quashed.

121 The appeal in this Court thus turns upon the construction of s 21A of the Magistrates Act. The submissions for the respondent fix upon the phrase therein "conferred on the magistrate under an Act". The respondent seeks to introduce a limitation upon those words so that the phrase is to be understood as if it read "under any Act other than this Act".

122 Section 10 of the Magistrates Act conferred upon the appellant a range of administrative functions or powers. They included the nomination of coordinating magistrates, the allocation of magistrates to particular localities and the power of reprimand. Indeed, it was a demand made by the appellant upon a coordinating magistrate to show cause why he should not be removed from that post which gave rise to the charge against her under s 119B of the Code. Attainment of the evident purpose of s 21A will be limited if it were to be given the qualified reading for which the respondent contends.

---

45 There was a second count of attempting to pervert the course of justice but, in the events that happened, this was not the subject of a verdict.

123 For these reasons, which concern the construction of s 21A, and those on this issue developed by the Chief Justice in his judgment, the appellant was not liable to be held criminally responsible for the conduct alleged against her.

124 That being so, the subsidiary grounds of appeal do not arise. They canvass questions of the construction of s 119B and various aspects of the conduct of the trial. Nor is this the occasion to consider the perimeter of the common law doctrines respecting judicial immunity.

125 The essential point is that, as a matter of law, the appellant should not have been put to trial. In that circumstance, it will be inappropriate to enter upon any consideration of the other issues or of their merits.

126 We should add that we agree with what is said by Hayne J respecting *Truong v The Queen*[46].

127 The appeal should be allowed, the orders of the Queensland Court of Appeal set aside and in place thereof the appeal to that Court should be allowed, the conviction of the appellant quashed, and there be entered a judgment and verdict of acquittal on each ground of the indictment.

---

46 (2004) 78 ALJR 473; 205 ALR 72.

128 KIRBY J. This appeal from a judgment of the Court of Appeal of the Supreme Court of Queensland[47] concerns an extraordinary case.

129 Ms Diane Fingleton ("the appellant"), then the Chief Magistrate in Queensland, was convicted of an offence against the *Criminal Code* (Q) ("the Code"). She was sentenced to be imprisoned. Her conviction, following a jury verdict of guilty, was confirmed by the Court of Appeal[48]. Her sentence of imprisonment for twelve months was varied by that Court which suspended the sentence for an operational period of two years after the appellant had served six months imprisonment[49]. Upon the making of these orders, the appellant resigned as Chief Magistrate. She did so before making application to this Court for special leave to appeal. Such leave was later sought and granted. Meanwhile, the appellant had served the custodial part of her sentence. She now seeks the setting aside of her conviction.

130 In a sense, this appeal illustrates a clash between two principles important to the proper administration of justice. Each of these principles is reflected in the Queensland legislation invoked before this Court. On the one hand, there is the principle providing an immunity to judicial officers in respect of things done and omitted to be done in the exercise of their functions as such. That principle, together with protected tenure in office, reinforces the independence of mind and action of judicial officers, essential to the proper discharge of their functions. On the other hand, there is a further principle that forbids anyone from causing, or threatening to cause, injury or detriment to a witness in judicial proceedings. Self-evidently, judicial proceedings would be undermined, and their just and lawful outcome frustrated, if, without reasonable cause and in retaliation against a person for becoming a witness, threats or other detriments were occasioned to such a witness.

131 In the remarkable circumstances of this case, the second principle was allowed to prevail in the courts below. It did so without any consideration, either at trial or in the Court of Appeal, of the first. When the law is properly applied to the facts, the first principle prevails. It removes "criminal responsibility" on the part of the appellant that was essential to sustain the conviction recorded against her. She should not have been prosecuted, still less tried and convicted, for she was entitled to the immunity belatedly invoked on her behalf. Her conviction must be set aside.

---

47 *R v Fingleton* (2003) 140 A Crim R 216.

48 *Fingleton* (2003) 140 A Crim R 216 at 224 [23].

49 *Fingleton* (2003) 140 A Crim R 216 at 226 [33].

The facts, legislation and arguments

132 *The facts and legislation*: The facts are described in the reasons of Gleeson CJ in terms that I accept[50]. In one respect, it is unfortunate to recount once again the events and exchanges that led the appellant to her predicament. The chief point of the immunity (now upheld) is to avoid the kind of judicial and public scrutiny of such circumstances as has now repeatedly occurred[51]. The immunity, once it is held to exist, applies because of the law's acceptance that, for reasons of public interest higher even than the accountability and transparency of the exercise of public power, such exercise (in a case of the present type) should not be examined in a criminal or civil court.

133 On the other hand, it is as well that the background to the case should be explained so that, years hence, the events of these proceedings will be remembered for such lessons as they teach. And also because the outcome now favoured by this Court demonstrates the extent to which the immunity, found applicable to the case, operates to exclude judicial and public scrutiny, notwithstanding the adverse interpretation inferentially placed by the jury upon aspects of the appellant's conduct.

134 The reasons of Gleeson CJ contain the relevant provisions of the *Magistrates Act* 1991 (Q) ("the Magistrates Act")[52] and of the Code. The former provisions describe the applicable powers, duties and responsibilities of the Chief Magistrate in Queensland. They contain the extension, in respect of the performance or exercise of an administrative function or power, of the immunity enjoyed by a magistrate in judicial proceedings in the Magistrates Court[53]. The Code contains a general provision for the immunity of judicial officers in the exercise of *judicial* functions[54]. It is this provision that is picked up and extended to the "performance or exercise of an *administrative* function or power" by provision of the Magistrates Act. As well, the Code contains a section expressing the criminal offence of retaliation against a witness with which the appellant was charged and of which she was convicted[55]. It is unnecessary to repeat any of this statutory material.

---

50 Reasons of Gleeson CJ at [16]-[18]. See also reasons of McHugh J at [63]-[76].

51 At trial, in the Court of Appeal, now in this Court, in the media and before the public.

52 Reasons of Gleeson CJ at [10]-[11].

53 Magistrates Act, s 21A. See reasons of Gleeson CJ at [1].

54 The Code, s 30. See reasons of Gleeson CJ at [2].

55 The Code, s 119B. See reasons of Gleeson CJ at [19].

135 *The appellant's arguments*: It is clear enough that the threshold point upon which the appellant now succeeds in this Court was overlooked by the prosecutor, by all counsel in the courts below, by the trial judge and by the Court of Appeal. No mention of it is made in the directions hearing that took place before the trial[56]. That would have been the natural and proper time and place for such a fundamental point to have been raised, on a motion to quash or stay the indictment. Nor was the point mentioned during the trial (or, so far as appears, in the earlier trial of the appellant that resulted in an order for retrial when the first jury failed to reach a verdict). Neither was it raised before, or by, the judges of the Court of Appeal. In this respect, the case bears a certain similarity to the circumstances that arose in *Giannarelli v The Queen*[57]. Here, as there[58], the legal point that proves fatal to the successful prosecution of the appellant was first raised in this Court[59].

136 On the return of the appeal, once the immunity issue was raised, it assumed predominance in the argument addressed to this Court. It may seem surprising that the question of immunity did not occur to anyone earlier. Analogous questions have arisen, under the general principles of the common law (apart from the statutory provisions invoked here), in several cases in recent years, both in Australia[60] and overseas[61]. Such cases have extended both to civil and criminal proceedings against judicial officers. Such proceedings have included those concerned with the discharge of judicial functions, properly so called, and also with administrative functions ancillary to such functions[62].

---

56 Under the Code, s 592A. See reasons of Gleeson CJ at [22].

57 (1983) 154 CLR 212.

58 (1983) 154 CLR 212 at 217, 221. In *Giannarelli* the point was raised "in other proceedings" at first instance after the Court of Criminal Appeal dismissed the appeals of the appellants but before the application for special leave to appeal to this Court: see *Giannarelli v Wraith* (1988) 165 CLR 543 at 554.

59 See [2004] HCATrans 380 at line 17.

60 See eg *Gallo v Dawson* (1988) 63 ALJR 121; 82 ALR 401; *Rajski v Powell* (1987) 11 NSWLR 522.

61 See eg *Sirros v Moore* [1975] QB 118; *Nakhla v McCarthy* [1978] 1 NZLR 291 at 301; *Re Clendenning and Board of Police Commissioners for City of Belleville* (1976) 75 DLR (3d) 33; *Imbler v Pachtman* 424 US 409 (1976).

62 eg *Yeldham v Rajski* (1989) 18 NSWLR 48. The challenge there concerned a State Supreme Court judge's refusal to grant leave to prosecute a witness for perjury,

(Footnote continues on next page)

137 Leaving aside the statutory provisions that govern the outcome of this appeal, the close relationship between institutional arrangements for the assignments of judicial officers and the discharge of the judicial function[63] ought to have set legal alarm bells ringing concerning any attempt to have a court, specifically a criminal court, intrude into the internal exchanges between the appellant, as Chief Magistrate in Queensland, and Magistrate Gribbin, a coordinating magistrate. If the question of immunity was ever contemplated by anyone, perhaps it was rejected because of the rules, now overtaken by statute and the common law, that formerly drew artificial distinctions in this respect between judicial officers at different ranks in the hierarchy[64]. More likely, the immunity was simply overlooked because of the press of business, the novelty of the circumstances or a slip up, easy enough to happen in human affairs.

138 As a consequence of the belated presentation of the immunity argument, it becomes necessary, in my view, to address three issues. Only if the appellant were to fail on those issues, would this Court have to consider the other arguments advanced in this Court on her behalf[65]. Those arguments, like that concerning immunity, were also new, in the sense that they had not been specifically relied on in the Court of Appeal. In that Court, the sole point that

---

such refusal being held to be ministerial or administrative in character. See also *Imbler* 424 US 409 (1976).

63 *Rajski v Wood* (1989) 18 NSWLR 512 at 519 referring to United Nations, Basic Principles on the Independence of the Judiciary, cl 14: "The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration."

64 See *Sirros v Moore* [1975] QB 118 at 134-136; *Maharaj v Attorney-General of Trinidad and Tobago (No 2)* [1979] AC 385 at 404 (PC); *Attorney-General (NSW) v Agarsky* (1986) 6 NSWLR 38; *Rajski v Powell* (1987) 11 NSWLR 522 at 528-529.

65 The appellant also argued (1) that her conduct manifestly fell outside the expressions "without reasonable cause" and "threatens to cause ... detriment" and "because of" in s 119B of the Code and that the trial judge's directions to the jury on those matters were inadequate; (2) that a person who supplied an affidavit to a judicial proceeding but who was not called to give oral evidence was not a "witness" within the meaning of s 119B of the Code; and (3) that the prosecution had been obliged, as a matter of fundamental fairness, to call as a witness in the prosecution case the solicitor, retained by the Crown Solicitor to advise the appellant, on whose advice the appellant acted in sending the letter that was alleged to constitute the offence with which she was charged. The Crown Prosecutor declined to call that witness, obliging the appellant to do so in the defence case.

was argued in contest to the conviction of the appellant of the offence against s 119B of the Code, was that no reasonable jury could have found beyond reasonable doubt an absence of reasonable cause for the appellant's threat to remove Magistrate Gribbin from the office of coordinating magistrate[66].

The issues

139 The issues that I will consider, relevant to the immunity point, are:

(1) *The constitutional "appeal" issue*: Whether, the ground of immunity not having been propounded at trial or in the Court of Appeal, this Court, in discharging, as here, its constitutional function of hearing and determining "appeals" from judgments, orders and sentences of the Supreme Court of a State, may correct the orders of such a court for *error*, although that court was never invited to, and did not, pass upon the matter, later invoked, in reaching its subject "judgment, order and sentence".

(2) *The waiver or spent ground issue*: Whether the failure of the appellant, at the directions hearing or on her arraignment, or otherwise, to raise the issue of immunity now argued, constituted a waiver of the point[67]. Alternatively, whether it represented an instance where the appellant's right to immunity, deriving as it was said from the combined operation of s 30 of the Code and s 21A of the Magistrates Act, was "spent". And whether the circumstances were such as to exclude any "miscarriage of justice" necessary to justify intervention by a court, including this Court, in a criminal appeal.

(3) *The judicial immunity issue*: Whether, if the foregoing constitutional and procedural impediments are overcome, the appellant can make good her belated appeal in this Court to an immunity from criminal responsibility, having regard to three possible reasons for denying such immunity:

    (a) That, within s 21A of the Magistrates Act, the immunity provided with respect to the performance or exercise of an administrative function or power "under an Act" did not apply to the function or power relevant to this case, namely the exercise by the appellant as Chief Magistrate of her powers with respect to the nomination of Magistrate Gribbin as a coordinating magistrate (and hence the

---

66 (2003) 140 A Crim R 216 at 219 [9].

67 *Truong v The Queen* (2004) 78 ALJR 473 at 493 [110]; 205 ALR 72 at 99.

termination of such nomination) under s 10 of the Magistrates Act[68];

(b) That, within the language of s 21A of the Magistrates Act, and in particular having regard to the verdict of the jury, the appellant's conduct was not to be characterised as the performance or exercise by her of functions and powers "conferred on the magistrate under an Act" but rather as a personal and aberrant activity of her own, that took her outside her judicial and administrative functions and powers, and hence beyond the immunities provided by the Queensland laws; or

(c) That, within the opening words of s 30 of the Code, the provisions upon which the counts of the indictment found against the appellant relied for the two offences alleged against her were "expressly provided by this Code", so as to exclude the application of the statutory immunity from criminal responsibility in this case.

140 Before this Court, the prosecution sought to argue only one of the foregoing issues in order to sustain the conviction of the appellant. This was issue (3)(a). However, subject to considerations of procedural fairness, it is not ultimately for parties, by their arguments, agreements or conduct of litigation, to control the application by this Court of the law applicable to a case before it[69]. In this appeal, that principle applies even more clearly because of the history of apparent oversight of relevant arguments earlier in the proceedings. I therefore propose to deal with all of the identified issues. Doing so will demonstrate that this case is one that properly invites the application of the legal immunity. It obviates the consideration of the other issues argued by the appellant to which, however, I will make some brief closing reference.

The constitutional "appeal" issue

141 *Appeal where no prior determination*: A controversy has existed in the past as to whether the failure of a party to raise a ground before the trial and intermediate courts means that such party cannot thereafter establish error of the courts below, necessary to warrant disturbance of their orders by an appellate court such as this. Over my objection, this Court has applied a strict view of the

---

68 Section 10 is set out in the reasons of Gleeson CJ at [11]. Under the *Acts Interpretation Act* 1954 (Q), s 25, the power to appoint includes the power to remove or suspend, at any time, a person appointed to an office.

69 *Roberts v Bass* (2002) 212 CLR 1 at 54 [143]. In criminal appeals see *Conway v The Queen* (2002) 209 CLR 203 at 241-242 [102]-[104].

meaning of "appeals", appearing in s 73 of the Constitution[70]. Thus, it has concluded that the Constitution, in providing for the form of appeal that it does, has excluded the reception of new facts not proved in the courts below[71]. This strict view of the appellate function undoubtedly affords a foundation for an argument that, if a party fails to raise a point before the trial and intermediate courts, that party cannot thereafter contend that such courts were in *error* in disposing of the case without deciding the point, if it was only raised for the first time in this Court.

142 In *Gipp v The Queen*[72], McHugh and Hayne JJ referred to this point. Their Honours did so by reference to the jurisdiction conferred on this Court by s 73 of the Constitution. They also noted the terms in which the constitutional jurisdiction in appeals is to be discharged (to "give such judgment as ought to have been given in the first instance") in accordance with the *Judiciary Act* 1903 (Cth), s 37[73]. By reference to the jurisdiction of the Court of Appeal of Queensland in that case, McHugh and Hayne JJ appeared to favour the view that, constitutionally, the appellate jurisdiction of this Court does not extend to setting aside a judgment of a State or federal court upon a ground not earlier argued in such courts[74]. If this were the correct view of s 73 of the Constitution, it would deny the appellant any chance now to invoke the immunity argument raised in these proceedings. That argument would simply not give rise to an "appeal" of the limited kind for which the Constitution provides.

143 *The flexible constitutional rule*: Such a possibility, which was inconsistent with this Court's past authority and practice[75], did not find favour with the other members of the Court in *Gipp*[76]. It is the majority opinions in *Gipp*, and necessarily not the dissenting opinions in that case, that establish the

---

70 *Eastman v The Queen* (2000) 203 CLR 1 at 12-13 [17]-[18], 25-26 [75]-[76], 41 [131]-[133], 63 [190], 96-97 [290]; cf at 93 [277], 117-118 [356].

71 eg *Mickelberg v The Queen* (1989) 167 CLR 259 at 271, 297-299.

72 (1998) 194 CLR 106.

73 (1998) 194 CLR 106 at 126 [57].

74 (1998) 194 CLR 106 at 128-129 [65].

75 See eg *Giannarelli v The Queen* (1983) 154 CLR 212 at 221, 230-231; *Pantorno v The Queen* (1989) 166 CLR 466 at 475.

76 (1998) 194 CLR 106 at 116 [23], 153-155 [135]-[138], 169 [184].

relevant constitutional principle[77]. Later cases such as *Crampton v The Queen*[78] simply affirm and reinforce what was held and decided in *Gipp*.

144 The tension between the view of constitutional "appeals" adopted in *Gipp* and that taken in other cases concerning the admissibility of new evidence in appeals in exceptional circumstances, remains for resolution by this Court. Since *Gipp*[79] it has been accepted that this Court has the jurisdiction and power, in determining "appeals" within s 73 of the Constitution, to permit new grounds to be raised before it for the first time "[i]n exceptional cases, where serious error is brought to light … which concerns a 'manifest miscarriage of justice'"[80]. The appellant so submitted. The respondent did not deny this Court's power.

145 So long as a matter remains alive within the Australian judicature and, specifically, whilst it is before this Court, it is competent for this Court, under the Constitution, to permit a new ground to be raised, although that ground was never previously relied upon and was not earlier determined adversely to the party later relying upon it. It is important to acknowledge this point at the outset for it provides the constitutional moorings for this case without which the appellant would be out of court without any consideration of her new arguments.

The waiver or spent ground issue

146 *The principle of finality*: But should the appellant be denied the opportunity belatedly to raise the immunity ground, having regard to the way in which her defence was conducted below? It was not disputed that, at her trial, in the pre-trial directions hearing and on the first appeal, the appellant was represented by competent senior counsel. The formula referring to "serious error" belatedly brought to light concerning a "manifest miscarriage of justice" is unilluminating when a decision-maker reaches the decision in a particular case. Where experienced counsel did not raise the point, should this Court permit it to be argued for the first time, at such a late stage in these proceedings?

147 Both in civil and criminal appeals, this Court has repeatedly refused leave to parties to propound new points, argued for the first time before it. Commonly, this refusal is justified by the "elementary rule of law that a party is bound by the

---

77 cf reasons of Hayne J at [195].

78 (2000) 206 CLR 161.

79 See eg *Crampton* (2000) 206 CLR 161 and *Heron v The Queen* (2003) 77 ALJR 908; 197 ALR 81. See reasons of McHugh J at [62].

80 *Gipp* (1998) 194 CLR 106 at 154 [136].

conduct of his or her case"[81]. That rule has been stated by six Justices of the Court in *University of Wollongong v Metwally (No 2)*, in the context of civil proceedings, in clear terms[82]:

> "Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so."

148 In criminal appeals, this rule is tempered, to some extent, by the ordinary focus of the governing legislation upon issues of "miscarriage of justice" and by the heightened concern of the law with questions of liberty, status and reputation typically involved. Nonetheless, the law's proper anxiety about finality of litigation, and about the costs and other burdens that litigation occasions, focuses attention, in cases such as the present, upon the question of whether "special" or "exceptional" circumstances are shown that warrant a belated reliance on a new point. This obstacle cannot be brushed aside. Consistency in the treatment of appeals requires that this issue be given specific attention in this appeal. Obviously, it would be quite wrong if it were thought that an ordinary prisoner would be refused leave to raise a point but a former judicial officer would be given special treatment.

149 In the present case, two factual elements and two legal considerations need to be weighed in deciding the availability of the issue of immunity now presented. So far as the factual elements are concerned, they are (1) the quality of the appellant's representation at trial and on the appeal and (2) the tactical decision that arguably appears to have been taken by the appellant's then legal representatives to present the case to the jury (and to the Court of Appeal) in a simple, black-and-white way. As Gleeson CJ has pointed out[83], there were several intermediate possibilities for the presentation of the appellant's defence to the jury. However, her case was presented in a particular way. In the Court of Appeal, nuanced arguments for the appellant were likewise disclaimed. Presumably, this course was adopted so as to simplify the questions for decision (especially before the jury) and to withdraw attention from the detail of the facts so as to address the primary battleground that was chosen as the one inferentially judged most favourable to the appellant. Presumably, this was the suggestion that the jury were bound, in the circumstances, to have a reasonable doubt

---

81 *Liftronic Pty Ltd v Unver* (2001) 75 ALJR 867 at 875 [44]; 179 ALR 321 at 331. See also *University of Wollongong v Metwally (No 2)* (1985) 59 ALJR 481 at 483; 60 ALR 68 at 71; *Coulton v Holcombe* (1986) 162 CLR 1 at 8-9.

82 (1985) 59 ALJR 481 at 483; 60 ALR 68 at 71.

83 Reasons of Gleeson CJ at [30].

concerning the presence of a "reasonable cause" for the conduct of the appellant, and (the related point) that they were bound to have a reasonable doubt that the appellant's actions were performed "in retaliation" against Magistrate Gribbin for giving a witness statement to the judicial proceeding.

150 *The Court's approach in Truong*: Potentially a serious obstacle for the appellant in raising in this Court the new legal ground of immunity is suggested by analogy to the Court's recent decision in *Truong v The Queen*[84]. In that case, Mr Truong had sought, for the first time before the Court of Appeal of Victoria, to raise an objection to his trial and conviction of charges of kidnapping and murder, upon the basis that the *Extradition Act* 1988 (Cth) forbade the trial on the offences charged because the trial constituted a breach of the "speciality" requirement contained in that Act[85]. Such breach was said to have arisen because the Act demanded that an extradited person, surrendered to Australia, "shall not … be ... tried in Australia for any offence" other than (relevantly) the offence for which he or she was surrendered by the foreign state.

151 As here, the appellant's legal representatives in *Truong* had not noticed, or raised, the extradition point at the trial. Specifically, they had not done so at the correct moment, which was held to be at the stage of the arraignment of Mr Truong, prior to the commencement of the trial. In resistance to this point, the prosecution argued in this Court, when the point was renewed, that Mr Truong had waived his right to rely on the suggested departure from the statutory requirements of "speciality". Alternatively, it was submitted that he should be denied relief on the basis of his failure to raise the point earlier. This, it was said, meant that the issue was "spent" or that no "miscarriage of justice" had thereby occurred, warranting the intervention of this Court[86].

152 Because of what appeared to have been oversight on the part of those representing Mr Truong at trial, in failing to notice the point (rather than any tactical decision to hold it in abeyance), no member of this Court considered that waiver afforded a correct category with which to deny Mr Truong the opportunity to argue the breach of the law of "speciality" in this Court. Nevertheless, Gummow and Callinan JJ (who were members of the majority in *Truong*), whilst finding an arguable question on the suggested breach of the requirement of "speciality", decided that such point had been lost once Mr Truong's trial commenced. Their Honours said[87]:

---

84 (2004) 78 ALJR 473; 205 ALR 72.

85 *Extradition Act* 1988 (Cth), s 42(a)(i).

86 Because of the terms of the *Crimes Act* 1958 (Vic), s 390A.

87 *Truong* (2004) 78 ALJR 473 at 493 [110]; 205 ALR 72 at 99 (footnote omitted).

> "It was with the arraignment that, in ordinary usage, the trial may be said to have commenced. Reference is made … to ss 390A and 391 of the *Crimes Act*. It is not useful to use the term 'waiver' in this context. The reasons why the point was not taken do not appear in the record. But there is no suggestion that the appellant was the victim of any malpractice in this regard. In the absence of such a plea and in the face of the pleading of the general issue by the plea of not guilty, the appellant's personal right derived from s 42 [of the *Extradition Act*] was spent."

153 In his reasons in *Truong*, Hayne J concluded that s 42 of the *Extradition Act* did not apply in the manner alleged by Mr Truong[88]. However, his Honour also rejected Mr Truong's attempt belatedly to rely on the argument on the basis that the circumstances of that omission indicated that there was no "miscarriage of justice" that would justify this Court's intervention[89]:

> "[O]nce the appellant, on being arraigned, pleaded not guilty he could not later, having been convicted, say that he should not have been tried. On arraignment he could have entered, as a special plea[90], the plea that his trial would contravene s 42 of the Act. Not having done so, even if the premise for this second contention had been made out, there would have been no miscarriage of justice warranting the intervention of the Court of Appeal[91]."

154 In my reasons in *Truong*[92], I held that it was inappropriate to consider the prosecutor's objection to the belated reliance on the argument of "speciality" in terms of waiver[93]. However, by reference to the language and policy of s 42 of the *Extradition Act*, designed to prevent a trial contrary to the rule of "speciality" happening *at all*, I concluded that, to uphold the language and object of the statutory immunity from such a trial, this Court should permit the appellant, although belatedly, to rely on his objection. Important considerations of public

---

88 *Truong* (2004) 78 ALJR 473 at 507 [197]; 205 ALR 72 at 119. The relevant provisions of the *Extradition Act* 1988 (Cth) are set out in the reasons of Hayne J at [198].

89 *Truong* (2004) 78 ALJR 473 at 507 [198]; 205 ALR 72 at 119.

90 *Crimes Act* 1958 (Vic), s 390A.

91 *Crimes Act* 1958 (Vic), s 568(1).

92 *Truong* (2004) 78 ALJR 473 at 498-502 [138]-[162]; 205 ALR 72 at 106-111.

93 *Truong* (2004) 78 ALJR 473 at 501 [157]; 205 ALR 72 at 110.

law, not just private rights, were involved. I disagreed that the point had been "spent" once the trial commenced and after Mr Truong had undergone the trial that ensued. I concluded that the lateness in raising the point did not exclude a miscarriage of justice.

155 *Consistent approaches to new grounds*: Upon the approach that I took in *Truong*, there is no difficulty in the present appellant's raising in this Court the immunity point that was not raised on her behalf in the courts below. As in *Truong*, the point is one that concerns a large question of public policy. There, as here, it is a ground directly relevant to whether there should have been a criminal trial *at all*, as propounded by the prosecution. The issue was expressly reflected in *Truong* (as the immunity is here) in the terms of the governing legislation. As here, the point in *Truong* was not one concerned solely with the rights of the appellant before this Court but with wider considerations of legal policy. Moreover, in the view that I took in *Truong*, procedural rules and impediments, at least in such matters, could not be allowed to impede consideration of the substance of the complaint, namely that an important aspect of the statute law of the State had been overlooked and therefore not applied.

156 In *Truong*, in words that I consider equally applicable to the present appeal, I said[94]:

> "In the present case it is difficult to believe that, if the appellant could make good his objection to the lawfulness of his trial, he would lose the opportunity to be heard on that issue simply because of a delay in raising it. Much less substantial grounds of objection to less serious convictions carrying much shorter sentences have been permitted by this Court, notwithstanding a failure of the prisoner to raise the objection at trial. Here, the appellant submitted that the conduct of *any trial at all*, on the offences in the presentment, was contrary to the express command of … law. If this was so, it is arguable that the 'proviso' is inapplicable, being designed to defend a lawful trial which was flawed in its conduct, not one which explicit … legislation said should not be conducted at all."

157 The controversy that arose in *Truong* between the approach that I favoured and the approach taken by the majority to the belated point raised there, is reflected in other recent decisions of this Court where there have been similar divisions of opinion[95]. I adhere to the views that I have earlier expressed. In my opinion, neither waiver, nor procedural loss of the point as "spent", nor a

---

94 *Truong* (2004) 78 ALJR 473 at 501 [154]; 205 ALR 72 at 110 (footnotes omitted) (emphasis in original).

95 See eg *Conway v The Queen* (2002) 209 CLR 203 at 241 [102].

suggested lack of a "miscarriage of justice" stand in the way of the appellant's now relying on the immunity argument. That argument is one that concerns obedience to statute law enacted by Parliament. Equally, it involves a high policy for the administration of justice, expressed in that law. Yet can the belated attempt of the appellant in this case to rely on the immunity now invoked be upheld by this Court, consistently with the approach that the majority adopted so recently in *Truong*?

158 Obviously, if my view were applied there is no difficulty once this Court considers that the circumstances are sufficiently "special" or "extraordinary", so as to warrant a determination of the belated point. But I was in dissent in *Truong*. The express prohibition in the federal legislation in *Truong* was upon the conduct of a "trial". Arguably therefore, as Gummow and Callinan JJ concluded, once that "trial" had commenced (and particularly after it was completed) the opportunity for raising the objection was lost forever. So it is said, for good or ill, the offence to the provisions of the *Extradition Act* had occurred and it was necessary to consider what followed. I do not find this point of suggested distinction very satisfying given that immunity from trial *at all* was the common purpose of each enactment invoked by the respective accused in this case and in *Truong*. However, as those who rejected the immunity in *Truong* are content to admit of the distinction, I will not struggle to deny it given that I disagree with the supposed rule on which the exception operates.

159 Although the respondent in this Court did not raise any of the foregoing points, it is important for this Court to notice them to ensure the application of a consistent approach to belated grounds of appeal in criminal appeals before it. Self-evidently, it should not matter that such a ground is raised by a convicted sex offender[96] or by a convicted foreign kidnapper and murderer[97] or by a convicted judicial officer[98]. This Court must approach, and must be seen to approach, such cases in a consistent and impartial way. Properly, an appeal such as the present is subject to close scrutiny. No special favours must be accorded, or appear to be accorded, to a person such as the appellant. This Court must act in a principled fashion, holding the scales evenly whatever the character of the alleged offence or identity of the offender. That is certainly the way in which I have endeavoured to approach the cases.

160 *Conclusion: no procedural impediment*: No impediment of waiver, no procedural barrier and no want of a miscarriage of justice arise in this appeal to

---

96 As in *Gipp* (1998) 194 CLR 106.

97 As in *Truong* (2004) 78 ALJR 473; 205 ALR 72.

98 As in the present appeal.

suggest that the appellant should be denied the opportunity of reliance on the immunity overlooked below. Specifically, as others have stated, the immunity in question here, although protective of individual judicial officers, does not exist solely for that purpose[99]. It exists for the wider public benefit of preventing curial and other public interventions into the internal arrangements of courts, and the independent performance and exercise of administrative functions and powers, specifically those relevant to the assignment of judicial officers to hear and determine cases within such courts. If such matters could be the subject of judicial proceedings, the result would be the risk that those with money, power or determination could vex judicial officers by challenging (and thereby seeking to influence) assignments within courts of the judicial officers who will participate in, and determine, cases.

161 Subject to what follows, the foregoing immunity is expressly provided for by s 21A of the Magistrates Act. There is no relevant procedural impediment to the appellant's raising the point belatedly. She should be permitted to do so.

The judicial immunity issue

162 *The reference to "an Act"*: To my mind, there is an undecided question as to whether the appellant's exercise of her functions and powers concerning the nomination of colleagues who will determine the judicial officers within the Magistrates Court who would hear cases, involves the exercise of her "*judicial* functions" within s 30 of the Code. If it does, there was no need to rely on the extension of that immunity in the Magistrates Act to an "*administrative* function or power". However, it is unnecessary to decide that point[100].

163 Assuming that, properly classified in the light of the statute law of Queensland, the internal arrangements of the magistracy of the State affecting the assignment of cases (and specifically the nomination or withdrawal of the nomination of a magistrate to be a supervising magistrate[101]) were

---

99 Similarly, in respect of the *Extradition Act* considered in *Truong*, public policy considerations existed for permitting a belated invocation of the *Extradition Act* to succeed: defence of the sovereignty of the nations engaged in extradition; insistence that Australia, like other nation states, comply with "speciality" conditions on a reciprocal basis; and avoidance of abuse of extradition procedures generally. These are not considerations personal to the prisoner, nor arguably to be waived by him. They concern extradition states and their respective rights and duties.

100 cf reasons of Gleeson CJ at [44].

101 Within the Magistrates Act, s 10(2).

"administrative" and not "judicial" in character, the appellant relied on s 21A of the Magistrates Act to extend the statutory immunity for the exercise of her "judicial" functions to that "administrative" decision and the steps necessarily involved in it.

164 The respondent resisted such an extension. It did not address what I have described as the unresolved point. Its resistance relied on the argument that one of the preconditions stated in s 21A was not established, namely that the administrative function or power in question must be one "conferred on the magistrate under an Act". The respondent's argument[102] was that the identified phrase did not cover s 10 of the Magistrates Act but was a reference to some other and different Act. Otherwise, it was submitted, s 21A would have contained words such as "including this Act".

165 Section 21A of the Magistrates Act is ambiguous. Legislative ambiguity is a common visitor to this Court[103]. Resolving such uncertainties involves a court in looking for textual and other clues as to the purpose of Parliament in adopting the language chosen. Such clues may be derived from considerations of legal principle and policy that throw light on the interpretative task in hand.

166 So far as considerations of text and structure are concerned, it is true that, had it been intended that s 21A of the Magistrates Act would refer to functions and powers conferred by its own provisions, it would have been common, even perhaps usual, for explicit reference to have been made to functions or powers conferred by that Act itself. It is also fair to say that the use of the indefinite article ("an") lends some support to the respondent's submission.

167 As against these arguments, the Magistrates Act is undoubtedly "an Act". Reference to it is not expressly excluded, as it might have been (by use of a phrase such as "other than this Act"). The Magistrates Act includes provisions for the performance of administrative functions and powers, including by the Chief Magistrate. The language chosen is stated in general terms. It is not intended to provide, nor is it suitable for, a restriction on the application of the immunity to the instance of telephonic interception, nominated in the Explanatory Notes that accompanied the Bill inserting what became s 21A of the Magistrates Act[104].

---

102 See reasons of Gleeson CJ at [48].

103 *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563 at 580 [42].

104 Justice Legislation (Miscellaneous Provisions) Bill (No 2) 1999 (Q), Explanatory Notes at 8, 10; cf reasons of Gleeson CJ at [15] where the Explanatory Notes are quoted.

168 The only possible reason of legal principle and policy for confining the interpretation of s 21A as the respondent submitted is the law's strong disposition against immunities that derogate from an individual's ordinary legal obligations to others, and to the community, on a footing of full equality before the law[105]. In the event of a real doubt, legislation will normally be construed so as to uphold such equality and to confine the immunity. This follows on the assumption that, had the legislature intended to depart from such an interpretation, it would have said so in plain terms. This principle is but one instance of the general approach of the courts to construe statutes favourably to the observance of fundamental rights and duties, of which equality before the law is one[106].

169 I give full weight to this consideration in the present case. However, the express terms of s 10 of the Magistrates Act are virtually impossible to reconcile with a view of s 21A of the same Act that would exclude the application of s 21A to the performance or exercise of the "administrative" functions or powers provided in s 10 (if administrative be their correct classification). Moreover, the very large number of plainly "administrative" functions and powers of magistrates, contained in numerous Queensland statutes[107], makes it extremely difficult to see a consistent legislative policy that would extend the immunity to them but deny it to the performance or exercise of the sensitive and important functions and powers conferred by s 10 of the Magistrates Act.

170 *Conclusion: appellant entitled to immunity*: It follows that the preferable interpretation of the phrase "under an Act" in s 21A of the Magistrates Act is that it includes reference to that Act itself. In this, I agree with the other members of this Court.

171 The consequence is that, at the least, the appellant was entitled to the immunity provided by the express extension in s 21A of the Magistrates Act of the general judicial immunity provided in s 30 of the Code against criminal responsibility. The appellant may invoke that immunity in this Court, albeit

---

105 cf *Gibbons v Duffell* (1932) 47 CLR 520 at 528, 534; *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 554-558 [91]-[101], 600-601 [228], 602-603 [234]-[236]; *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 79 ALJR 755 at 811 [317]; 214 ALR 92 at 170.

106 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 553 [11], 562-563 [43], 577 [90], 592-593 [134] and cases there cited.

107 Referred to in the reasons of Gleeson CJ at [45].

belatedly, as she has done. Subject to what follows, because the immunity applied to the appellant's relevant acts and omissions, she should not have been charged, or tried, for an offence against s 119B of the Code, as contained in the indictment. The alternative offence with which she was charged, against s 140 of the Code, upon which the verdict of the jury was not taken[108], stands in the same position.

172 *Characterisation of the exercise of functions*: A second potential argument of a textual kind should be mentioned. Although not pressed by the respondent, it is proper for this Court, in deciding this appeal, to deal with it. It concerns the ambit of the immunity for which s 30 of the Code provides. Hence it concerns the extended ambit which s 21A of the Magistrates Act enacts.

173 In s 30 of the Code it is stated (with emphasis here added) that the immunity from criminal responsibility applies "for anything done or omitted to be done by the judicial officer *in the exercise of* the officer's judicial functions". By extension under s 21A of the Magistrates Act, the same immunity applies "for anything done or omitted to be done by the judicial officer *in the exercise of*" an "administrative function or power" of that officer. It is necessary, therefore, to characterise the conduct that is impugned. Simply because an action is performed by a person who is a judicial officer does not, without more, attract the immunity. Nor does the fact that the action was done during work hours, in or from the judicial officer's chambers, on official notepaper or otherwise with an outward semblance of official conduct, afford the immunity if the reality posited by the legislation is missing[109].

174 Can it be said, in this case, that the verdict of the jury, finding the appellant guilty of the offence against s 119B of the Code, indicates, or suggests, a characterisation by the jury of her conduct, or some of it, as involving the conclusion that the appellant stepped outside the "exercise of [her] administrative function or power", in order to pursue a personal "payback" or retribution or private vendetta against Magistrate Gribbin[110]? A suggestion similar to this appears to have been made by the prosecution at the trial. So, does the jury's verdict indicate a rejection of the characterisation of the "function or power" necessary to attract the statutory immunity to the actions of the appellant? Is it such that this Court should reject the appellant's belated appeal to the immunity point or, possibly, commit that issue to be retried with explicit reference to it before a new jury?

---

108 Relating to attempting to pervert the course of justice.

109 *R v Johnson* (1805) 7 East 65 [103 ER 26].

110 cf reasons of Gleeson CJ at [27]-[29].

175 In this case, these questions should be answered in the negative. First, although "retaliation" and "lack of reasonable cause" were certainly pressed upon the jury, this was because of the terms of s 119B of the Code[111]. No consideration whatever was given by the jury to any issue of judicial immunity. This was because no such issue was raised before or during the appellant's trial. The jury's verdict cannot, therefore, be taken as affirming a characterisation of the appellant's actions relevant to the application of s 30 of the Code, as extended by s 21A of the Magistrates Act.

176 Secondly, the purpose of the immunities provided by the cited provisions of the Queensland statute law is to forestall, in the cases to which they apply, the very kind of proceedings that occurred in this instance, involving as they did curial examinations of the exercise of functions and powers which the statutory provisions aimed to remove from such accountability, and do so for important principles of public policy supportive of judicial independence. It would defeat the expression and policy of the legislation and be wholly inappropriate to introduce an obligation in every case to examine all the facts so as to provide the characterisation of the "true nature" of what was done or omitted to be done by the judicial officer as *within* or *outside* the exercise of that officer's functions[112]. To require this would be to undermine the achievement of the purpose of the immunity. It would render it ineffective in practice and would be contrary to the obvious object of the Queensland Parliament in enacting the provisions as it did.

177 Cases might arise in which an issue as to the characterisation of the judicial officer's functions and powers is presented so as, arguably, to take the exercise of those functions and powers out of the immunity provided for in the legislation. It is unnecessary in this appeal to explore the circumstances in which that might be so. It is sufficient to say that the exercise by the appellant of the functions and powers conferred on her under s 10 of the Magistrates Act with respect to Magistrate Gribbin, as now disclosed in all its detail in these proceedings, is clearly within the classification of a performance or exercise of an administrative function and power such as conferred on her by s 10 of the Magistrates Act. If the immunity point had been raised at the proper time (namely when any charge for criminal responsibility was being considered by the prosecution, at the directions hearing or on any arraignment of the appellant), the facts then known would have demanded classification of the appellant's conduct

---

111 The terms of s 119B of the Code are set out in the reasons of Gleeson CJ at [19].

112 See the recantation of the analogous introduction of a requirement of "good faith" mentioned by Lord Denning MR in *Sirros v Moore* [1975] QB 118 at 135 applied in *Attorney-General (NSW) v Agarsky* (1986) 6 NSWLR 38 at 40 but "refined" in *Rajski v Powell* (1987) 11 NSWLR 522 at 536, 539.

as falling within s 30 of the Code. Certainly, it would have fallen within that provision as extended by s 21A of the Magistrates Act. The second textual issue must therefore be decided in the appellant's favour.

178 *The provision for express exceptions*: The third textual consideration was likewise not advanced for the respondent. However, it too should be dealt with. It concerns the opening words of s 30 of the Code, by which the immunity there afforded (including as the foundation for the extension to an "administrative" function and power by s 21A of the Magistrates Act) is to apply "[e]xcept as expressly provided by this Code".

179 Can it be argued that s 119B (dealing with retaliation against witnesses in judicial proceedings) and s 140 (dealing with an attempt to pervert the course of justice) contain language indicating that the sections fall within the exception so provided?

180 This question is answered by considering what the "express" provision contemplated by the opening words of s 30 of the Code intended. Simply because a person is a judicial officer, he or she is not immune from responsibility for criminal conduct, such as stealing from court funds or improperly interfering with the performance by a colleague of that colleague's judicial functions. However, the reference to the "express" provision by the Code is to those sections of the Code that create specific offences that, in terms, are incompatible with the immunity for which s 30 of the Code provided. Thus, certain provisions of the Code deal explicitly with offences specifically applicable to a judicial officer. Instances include ss 120 (corruption) and 136 (acting oppressively or when interested).

181 Tested by this standard, neither s 119B nor s 140 constituted an express provision of the Code for the criminal responsibility of a judicial officer as such. Each section is stated in general terms. Each imposes liability on "a person". Neither is expressed as applicable to "a person who, being a justice ..."[113]. Such offences do not, therefore, fall within the express derogations from immunity for which the Code provides. The third textual issue should likewise be decided in favour of the appellant.

Conclusions and orders

182 *The operation of immunity*: The result is that no impediment, of a constitutional or procedural kind, stands in the way of the appellant's relying in this Court on the belated argument based on her immunity from criminal responsibility for the offences with which she was charged and upon one of

---

113 cf the Code, s 136.

which, under s 119B of the Code, she was convicted. The immunity is a complete answer to the counts of the indictment upon which the appellant was tried. Because of this, the appellant should not have been charged, still less tried, let alone convicted of that offence.

183 The large public policy for which the immunity is provided was a complete defence for the appellant. It was available at the threshold. It is one which the appellant is entitled to raise belatedly, and in effect retrospectively, because it defends interests that go far beyond her personal entitlements. She did not waive it. It is not spent. The failure to give effect to it constitutes a "miscarriage of justice". This is so despite the fact that the immunity was not relied upon in a timely manner, as it should have been. In the result, the appellant's conviction should be quashed.

184 This conclusion means that this Court is not required to consider the appellant's residual arguments raising further textual contentions that were not addressed in the courts below and presenting additional contentions on the merits, to the effect that the jury's verdict was unreasonable and contrary to the evidence.

185 *The residual merits grounds*: Having concluded that the immunity applies, it is inappropriate to examine the "merits" arguments in any detail, for doing so may tend to undermine the very purpose for which the law provides that immunity[114].

186 However, the record of this case, as it was permitted to proceed, is indelible. The public trial of the appellant cannot be undone. Out of fairness to her, this Court should, in my opinion, make it clear that she has not succeeded on a purely "technical" point where she failed on the "merits" before the jury in a battleground selected by her, with expert legal advice. The appellant, in my opinion, had substantial arguments on the merits that will not now be reached. In particular, she had significant points to make in her complaint that the conduct of the prosecution by the respondent[115] and the directions given to the jury by the trial judge were flawed[116]. The fact that the appellant succeeds in this Court on

---

114 Reasons of Gleeson CJ at [56]-[57].

115 In particular, in failing to pay regard to the immunity provided by law; in charging the appellant at all in the circumstances; and in declining to call a witness in the prosecution case.

116 In particular, in relation to the meaning of s 119B of the Code and in relating the key provisions in that section to the evidence in the trial. See the reasons of McHugh J at [115].

the basis of a statutory immunity does not mean (so far as I am concerned) that she did not also have significant arguments on the legal and factual merits in her appeal.

187 *Importance of immunity of judicial officers*: In any event, the provision of the immunity from criminal prosecution to the appellant, for her exchanges with Magistrate Gribbin, is not divorced from the merits of the matters in issue in the trial, when those merits are viewed in a wider context. Sometimes, legal immunities from criminal and civil responsibilities cannot be justified. I always regard such immunities with vigilance and strictness. Unless they are provided by valid and clear law, they need sometimes to be confined in their operation and sometimes to be abolished[117].

188 Judicial independence from external pressure from litigants and others is one of the legal immunities that can be fully justified. It is supported by reference not only to legal authority but also to legal principle and policy, including considerations of the protection of human rights and fundamental freedoms and the functions of the judiciary in securing those ends. Such immunity is an essential precondition to the rule of law. The independence of judicial officers comes at a price. It is a price that our society has long been prepared to pay. That price is the immunity provided by law. The Queensland Parliament has enacted, and also extended, that immunity. It protects the public interest, not just the interests of individual judicial officers[118].

189 The Supreme Court of the United States explained the rationale for this immunity. Speaking of constitutional and common law principles akin to those which in Australia preceded the Queensland laws, that Court said in *Pierson v Ray*[119]:

> "Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it adopted the doctrine, in *Bradley v Fisher*[120]. This immunity applies even when the judge is accused of acting maliciously and corruptly, and it 'is not for the

---

117 See eg *Brodie* (2001) 206 CLR 512 at 601 [228], 602-604 [234]-[237]; *D'Orta-Ekenaike* (2005) 79 ALJR 755 at 810-811 [314]-[317]; 214 ALR 92 at 169-170.

118 Kirby, "Independence of the Legal Profession: Global and Regional Challenges", (2005) 26 *Australian Bar Review* 133.

119 386 US 547 at 553-554 (1967) per Warren CJ for the Court quoted in *Rajski v Powell* (1987) 11 NSWLR 522 at 534.

120 13 Wall 335 (1872).

> protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.'[121] … [A judge's] errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation."

190 From the early days of our legal system, it has been recognised that such an immunity will sometimes expel other legal values that are also precious. Yet so important is judicial independence, that the immunity necessary for it to survive is afforded by statute and the common law and possibly, in Australia, as an implication in the Constitution itself. It is afforded notwithstanding that it will occasionally derogate, within its defined applications, from the criminal and civil responsibility of all persons equally before the law. Lord Bridge of Harwich explained this in *In re McC (A Minor)*[122], in terms applicable to the Queensland laws invoked in this case. Where the immunity applies in terms of the law, the possibility that, in a rare case, it might be abused or that it might occasionally mask a wrong or ill-judged action by a judicial officer must be tolerated for the wider good that the immunity defends[123]:

> "[I]t is less harmful to the health of society to leave that party without a remedy than that nine hundred and ninety-nine honest judges should be harassed by vexatious litigation alleging malice in the exercise of their proper jurisdiction."

191 Where that jurisdiction concerns internal arrangements, directly and indirectly affecting the assignment of judicial officers to hear cases, it is especially important that interference from outside a court should be rebuffed. The immunity in such cases is fully justified as essential to the performance of the judicial function. It should not be cut back. Especially is this so because, under the Queensland laws invoked in this case, Parliament has taken the pains not only to enact the immunity in conventional terms but to extend it in a way protective of a person in the position of the appellant from the criminal prosecution to which she was subjected.

---

121 *Scott v Stansfield* (1868) LR 3 Ex 220 at 223 quoted in *Bradley v Fisher* 13 Wall 335 at 350 (1872).

122 [1985] AC 528.

123 *In re McC (A Minor)* [1985] AC 528 at 541. See also *Anderson v Gorrie* [1895] 1 QB 668 at 670-671.

192 I agree in the orders proposed by Gleeson CJ.

193 HAYNE J. I agree with the reasons of Gummow and Heydon JJ.

194 I add something only to deal with the suggestion that there may be some difference between what is done in this case, when the appeal is allowed on a point that was not raised in the courts below, and what was done in *Truong v The Queen*[124]. In *Truong*, effect was not given to a point, raised for the first time in the intermediate court, because it had not been raised at trial.

195 Examination of the principles to be applied may begin at various points. For present purposes, it is appropriate to begin with the Court's decision in *Crampton v The Queen*[125], not with the earlier decision in *Gipp v The Queen*[126]. The views expressed by McHugh J and me in our dissenting opinions in *Gipp*, about taking a point for the first time in this Court, were rejected by a majority of the Court in *Crampton*. It is *Crampton*, not the dissenting opinions in *Gipp*, that states the relevant principle[127]: there is no constitutional inhibition upon the jurisdiction of the Court to entertain an appeal under s 73 of the Constitution on grounds raised for the first time in the Court, but special leave to appeal on such grounds will be granted only in exceptional circumstances. This is such a case.

196 On the hearing of the appeal, there was no submission made that the appellant waived the point upon which she now relies – whether by pleading to the indictment preferred against her, or in some other way. On the contrary, the respondent expressly conceded that the Court could and should entertain the point which is decisive of the appeal. Effect must be given to that concession. It is not a concession about the Court's jurisdiction. That would not bind the Court. But, after *Crampton*, there is no question about the Court's jurisdiction. The respondent not making the submission that the point now raised was given up by the appellant at trial, or cannot now be raised, it is not for this Court to say of its own motion that the appellant is barred from making the argument.

197 Given the position adopted by the respondent, only fleeting reference was made in oral argument to *Truong*. Views expressed about the differences between that case and the present are, therefore, unassisted by argument. It is as well, however, to say something shortly about *Truong*.

---

124 (2004) 78 ALJR 473; 205 ALR 72.

125 (2000) 206 CLR 161.

126 (1998) 194 CLR 106.

127 (2000) 206 CLR 161 at 171-172 [12]-[14] per Gleeson CJ, 184 [52], 185 [57] per Gaudron, Gummow and Callinan JJ, 206-207 [122] per Kirby J, 216-217 [155]-[156] per Hayne J.

198 The provision at issue in *Truong* was s 42(a) of the *Extradition Act* 1988 (Cth). That section provided:

> "Where an extraditable person in relation to Australia is surrendered to Australia by a country (other than New Zealand), the person shall not, unless he or she has left, or has had the opportunity of leaving, Australia or, in a case where the person was surrendered to Australia for a limited period, has been returned to the country:
>
> (a) be detained or tried in Australia for any offence that is alleged to have been committed, or was committed, before the surrender of the person, other than:
>
> (i) any offence in respect of which the person was surrendered or any other offence (being an offence for which the penalty is the same or is a shorter maximum period of imprisonment or other deprivation of liberty) of which the person could be convicted on proof of the conduct constituting any such offence; or
>
> (ii) any other offence in respect of which the country consents to the person being so detained or tried, as the case may be".

The reference to "shall not … be … tried" is important in considering whether the appellant in that case, by pleading not guilty and thus going to trial, gave up the argument that he was not to be tried.

199 By contrast, in the present case, the immunity which the appellant had was an immunity which would be engaged upon demonstrating certain facts including, for example, that she held office as Chief Magistrate and had done what she did in performing functions or exercising powers conferred on her as Chief Magistrate. (I leave aside any question about acts in excess of authority.) In this case, it seems that none of the facts relevant to the application of s 21A of the *Magistrates Act* 1991 (Q) was in issue. It may have been open, then, to the appellant to apply to stay the indictment before entering a plea, or to move, after entering a plea, for a directed verdict of acquittal. But her pleading to the indictment constituted no waiver of the immunity. First, the immunity is not personal to her; it is not for the holder of the office to waive it. Secondly, pleading not guilty to the indictment did not foreclose the appellant from making the argument that the facts alleged against her, even if proved, revealed no criminal responsibility.

200 I agree in the orders proposed by Gleeson CJ.