HIGH COURT OF AUSTRALIA

GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

ANDREW MARK MALLARD APPELLANT

AND

THE QUEEN RESPONDENT

Mallard v The Queen [2005] HCA 68
15 November 2005
P77/2004

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Court of Criminal Appeal of the Supreme Court of Western Australia dated 3 December 2003 and, in place thereof, order that the conviction of the appellant be quashed, and that there be an order for retrial of the appellant.*

On appeal from the Supreme Court of Western Australia

Representation:

M J McCusker QC with J J Edelman for the appellant (instructed by Clayton Utz)

B W Walker QC with B Fiannaca for the respondent (instructed by Director of Public Prosecutions (Western Australia))

CATCHWORDS

Mallard v The Queen

Criminal law – Appellant convicted of murder – Appellant petitioned for mercy – Attorney-General referred petition to Court of Criminal Appeal – Whether non-disclosure of exculpatory evidence by prosecution denied appellant a fair trial or fair chance of acquittal – Scope of jurisdiction of Court of Criminal Appeal on Attorney-General's reference under s 140(1)(a) *Sentencing Act* 1995 (WA) – Duty to consider the "whole case" – Whether Court of Criminal Appeal erred in refusing to consider evidence adduced at trial – Whether jury verdict unreasonable or unsupportable – Whether jury verdict could not be supported having regard to the evidence – Whether a substantial miscarriage of justice occurred – Whether a retrial should be ordered.

Appeal – New trial – Petition for mercy – Reference of whole case to Court of Criminal Appeal – Scope of proceedings in Full Court.

Words and phrases – "fresh evidence", "new evidence", "whole case", "as if it were an appeal".

Criminal Code (WA), ss 21, 689(1).
Sentencing Act 1995 (WA), s 140(1)(a).

1 GUMMOW, HAYNE, CALLINAN AND HEYDON JJ. The appellant was tried and convicted by the Supreme Court of Western Australia (Murray J with a jury) of the murder of Mrs Lawrence, the proprietor of a jewellery shop, at Perth on 23 May 1994. The trial lasted 10 days. The appellant unsuccessfully appealed to the Court of Criminal Appeal of Western Australia. After he had served eight years of his sentence of life imprisonment in strict security, he petitioned for clemency. The Attorney-General for Western Australia referred the petition to the Court of Criminal Appeal which dismissed the appeal. The appeal to this Court raises questions as to the way in which the Court of Criminal Appeal should proceed in determining a reference of such a petition and the evidence to which it may have regard in doing so.

The legislation

2 Part 19 of the *Sentencing Act* 1995 (WA) ("the Act") both preserves the royal prerogative of mercy and makes alternative provision for its effective exercise by the Court of Criminal Appeal. The relevant provisions are as follows:

> "**Part 19 – Royal Prerogative of Mercy**
>
> **137 Royal Prerogative of Mercy not affected**
>
> This Act does not affect the Royal Prerogative of Mercy or limit any exercise of it.
>
> **138 Effect of pardon**
>
> (1) A pardon granted in the exercise of the Royal Prerogative of Mercy has the effect of discharging the offender from the effects of the sentence imposed for the offence and of any other order made as a consequence of the offender's conviction.
>
> (2) A pardon does not quash or set aside the conviction for the offence.
>
> **139 Governor may remit order to pay money**
>
> The Governor may remit the whole or part of any sum of money that an offender is, under this Act or any other written law, ordered to pay as a penalty, or by way of forfeiture or estreat, or compensation, or costs, in relation to the offence, whether to the Crown or not.

140 Petition may be referred to CCA

(1) A petition for the exercise of the Royal Prerogative of Mercy in relation to an offender convicted on indictment, or to the sentence imposed on such an offender, may be referred by the Attorney General to the Court of Criminal Appeal either –

(a) for the whole case to be heard and determined as if it were an appeal by the offender against the conviction or against the sentence (as the case may be); or

(b) for an opinion on any specific matter relevant to determining the petition.

(2) The Court of Criminal Appeal must give effect to the referral.

141 Offender may be paroled

(1) In the exercise of the Royal Prerogative of Mercy in relation to an offender who is sentenced to imprisonment, the Governor may make a parole order in respect of the offender.

(2) An offender may be paroled under subsection (1) whether or not he or she is or will be eligible for parole and despite section 96(3).

(3) The release date is that set by the Governor.

(4) The parole period is that set by the Governor; but it must be at least 6 months and not more than 5 years.

(5) Part 3 of the *Sentence Administration Act 1995* applies in respect of the parole order and to the offender to whom the parole order applies."

3 Part 19 was enacted in replacement of s 21 of the *Criminal Code* (WA) which read:

"**Royal prerogative of mercy not affected**

21 Nothing in this Code affects Her Majesty's royal prerogative of mercy, but the Attorney General on the consideration of any petition for the exercise of Her Majesty's mercy having reference to the conviction of a person on indictment or to the sentence passed on a person so convicted, may, if he thinks fit, at any time either –

(a) refer the whole case to the Court of Criminal Appeal, and the case shall then be heard and determined by the Court of Criminal Appeal as in the case of an appeal by a person convicted; or

(b) if he desires the assistance of the Court of Criminal Appeal on any point arising in the case with a view to the determination of the petition, refer that point to the Court of Criminal Appeal for their opinion thereon, and the Court shall consider the point so referred and furnish the Attorney General with their opinion thereon accordingly."

4 Provision for the referral of petitions for clemency to the courts owes its modern origin to public adverse reaction to the excessive imposition of capital punishment in the nineteenth and earlier centuries. As the capital statutes were repealed so as to apply the death penalty to fewer offences, appeals for pardons to the Crown tended to be made in cases of asserted miscarriages of justice, despite the anomaly to which a successful petition might give rise, that a person who has in fact come to be considered to have been wrongly convicted or innocent, is pardoned, and not acquitted of the crime. The importance of this avenue of recourse to justice, effectively controlled by the Executive, declined, after the introduction of the *Criminal Appeal Act* 1907 (UK) to establish the Court of Criminal Appeal, although no attempt was made to abolish it. It proved fortunate that this was so because there was, initially at least, a judicial reluctance to allow appeals in criminal cases, occasioned in part no doubt by the sanctity accorded, and usually desirably so, to the verdict of a jury, and less desirably, to the legal conservatism of some of the judiciary of the day.

5 The provision with which the Court is concerned in this case is similar in substance to provisions in other States[1].

6 The significance of this history for present purposes, is that the exercise for which s 140(1)(a) of the Act provides is effectively both a substitute for, and an alternative to, the invocation, and the exercise of the Crown prerogative, an exercise in practice necessarily undertaken by officials and members of the Executive, unconfined by any rules or laws of evidence, procedure, and appellate conventions and restrictions. That history, briefly stated, argues in favour of an

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1 See *Crimes Act* 1900 (NSW), ss 474B and 474C; *Crimes Act* 1958 (Vic), s 584; *Criminal Law Consolidation Act* 1935 (SA), s 369; *Criminal Code* (Q), s 669A; *Criminal Code* (Tas), s 419.

approach by a court on a reference of a petition by the Attorney-General to it, of a full review of all the admissible relevant evidence available in the case, whether new, fresh or already considered in earlier proceedings, however described, except to the extent if any, that the relevant Part of the Act may otherwise require.

7 The Attorney-General for the State of Western Australia referred this petition to the Court of Criminal Appeal under s 140(1)(a) of the Act. Criminal appeals are the subject of s 689 of the *Criminal Code*, which provides as follows:

> "**689 Determination of appeals in ordinary cases**
>
> (1) The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal, if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:
>
> Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.
>
> (2) Subject to the appeal provisions of this chapter the Court of Criminal Appeal shall, if they allow an appeal against conviction, quash the conviction and either direct a judgment and verdict of acquittal to be entered or order a new trial.
>
> (3) On an appeal against sentence the Court of Criminal Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict or which may lawfully be passed for the offence of which the appellant or an accused person stands convicted (whether more or less severe) in substitution therefor as they think ought to have been passed and in any other case shall dismiss the appeal.
>
> (4) On an appeal against sentence the Court of Criminal Appeal may have regard to whether or not the appellant or a convicted person has failed wholly or partly to fulfil an undertaking to assist law

enforcement authorities that caused the sentencing court to reduce the sentence that it would otherwise have passed."

The proper approach

8 Insight into the cautious way in which the Court of Criminal Appeal here (Parker, Wheeler and Roberts-Smith JJ) conceived its function under the Act and the *Criminal Code* can be gained from these passages in that Court's unanimous judgment[2]:

> "It was accepted on both sides that on reference the court had a duty to consider the 'whole case'. The court is required to consider the case in its entirety, subject only to the limitation that it is bound to act upon legal principles appropriate to an appeal.
>
> However, there was at times a tendency for counsel for the petitioner to refer to this proposition as if it justified the hearing afresh of evidence at trial and evidence called on the appeal, without regard either to the verdict of the jury or to the previous decision of the Court of Criminal Appeal in this case. That was particularly noticeable in the petitioner's opening submissions, in which very detailed submissions were put as to discrepancies between the evidence of various witnesses as to the timing of certain events. Those matters were before the jury at the petitioner's trial, although of course they were not marshalled and emphasised in precisely the way in which the petitioner now seeks to marshal and emphasise them."

9 Their Honours then reviewed the authorities with respect to the identification and reception of evidence as fresh evidence. They drew a distinction between "new evidence", that is, evidence available but not adduced at trial, and "fresh evidence", which appellate courts ordinarily will receive, on the basis that it did not then exist, or, if it did, could not then have been discovered with reasonable diligence. Their whole approach thereafter proceeded on the basis of the passages that we have quoted, that is, as if there were serious inhibitions upon that Court's jurisdiction to consider, not just the evidence that was adduced at the trial, but also its relevance to the further evidence that the appellant sought to introduce and rely upon in the reference.

10 It seems to us that the approach was an erroneous one. Subject only to what we will say later about the words "as if it were an appeal" which appear in

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2 *Mallard v The Queen* (2003) 28 WAR 1 at 5 [7]-[8].

s 140(1)(a) of the Act, the explicit reference to "the whole case"[3] conveys no hint of any inhibition upon the jurisdiction of the Court of Criminal Appeal on a reference. Indeed, to the contrary, the words "the whole case" embrace the whole of the evidence properly admissible, whether "new", "fresh" or previously adduced, in the case against, and the case for the appellant. That does not mean that the Court may not, if it think it useful, derive assistance from the way in which a previous appellate court has dealt with some, or all of the matters before it, but under no circumstances can it relieve it of its statutory duty to deal with the whole case. The history, as we have already mentioned, points in the same direction. The inhibitory purpose and effect of the words "as if it were an appeal" are merely to confine the Court to the making of orders, and the following of procedures apposite to an appeal, and further, and perhaps most relevantly, to require the Court to consider whether the overall strength of the prosecution case requires the Court to apply the proviso contained in s 689(1) of the *Criminal Code*.

11 This construction of Pt 19 of the Act is consistent with the approach of Toohey and Gaudron JJ (Mason CJ and Brennan J agreeing) in *Mickelberg v The Queen*[4]:

> "The words of s 21(a) of the Code, so far as they require 'the whole case ... [to] be heard and determined', permit of only one meaning. It is the whole case which must be passed upon by the application of legal principles appropriate to criminal appeals. That being so, the power to exclude matters from consideration is properly to be seen as an aspect of the inherent power of a court to control its own proceedings. That power will authorize the exclusion of issues which are frivolous or vexatious[5]. However, subject to an issue being properly excluded as frivolous or vexatious, it is, in our view, the duty of a court to which there has been a reference of the whole case to pronounce upon the whole case as presented."

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3 *Sentencing Act* 1995 (WA), s 140(1)(a).

4 (1989) 167 CLR 259 at 312.

5 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612; *Tringali v Stewardson Stubbs & Collett Ltd* (1966) 66 SR (NSW) 335; *Metropolitan Bank v Pooley* (1885) 10 App Cas 210.

12 It is also consistent with the construction adopted by Lord Diplock (Lords Scarman, Roskill, Brandon of Oakbrook and Templeman agreeing) in *R v Chard*[6] of like language of s 17(1)(a) of the *Criminal Appeal Act* 1968 (UK):

> "In my view, which I understand is shared by all your Lordships, the words of paragraph (a) of subsection (1) in their natural and ordinary meaning are free from any trace of ambiguity; the person whose case which resulted in his conviction is the subject matter of the reference is to be treated for all purposes as if he were a person upon whom there is conferred by section 1 of the Criminal Appeal Act 1968 a general right of appeal to the Court of Appeal on any ground which he wishes to rely (whether it be of law or fact or mixed law and fact), without need to obtain the prior leave of that court.
>
> ...
>
> Since it is the 'whole case' that is referred, this must include *all* questions of fact and law involved in it ..." (emphasis added)

13 It follows that in proceeding as it did, the Court of Criminal Appeal erred in law. The question remains however, whether that error induced or caused a miscarriage of justice, the same question as would exercise the mind of the Executive were it to deal with a petition rather than refer it to the Court of Criminal Appeal for determination. The answer to that question may only be given after a consideration of the facts, not only as they emerged at the trial, but also as they emerged in the Court of Criminal Appeal, no matter what descriptive term the evidence adduced there might be given. It is elementary that some matters may assume an entirely different complexion in the light of other matters and facts either ignored or previously unknown.

Facts

14 Mrs Lawrence was alone in her shop when she was violently assaulted with a heavy instrument which has never been found. The assault occurred in the late afternoon. She was discovered, barely alive, but terminally injured, in a pool of her own blood, by her husband. The appellant had, on a previous occasion or occasions, been in the shop. He was a user of marijuana. Earlier on the day of the assault, he had been briefly in the custody of police officers. Following the death he was repeatedly interviewed by police officers, both while he was in hospital for the treatment of mental infirmity, and elsewhere. Only one of the

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6 [1984] AC 279 at 289-291.

interviews was recorded. During the interviews he made some highly fanciful, indeed incredible assertions and claims, as well as apparently inculpatory, confessional statements.

15 Some witnesses at the trial, with varying degrees of credibility, swore that they had seen the appellant in or about the shop at or about the time of the murder. It is sufficient for immediate purposes to say, that the whole of the evidence at the trial, including that of the appellant, despite conflicts in it, was sufficient to sustain a verdict of guilty.

16 On the reference however, further evidence was adduced. It also became apparent that a deal of it had been in the possession of investigating police before, and during the trial, and had not then been disclosed to the appellant. (Whether any of it was in the possession of the Director of Public Prosecutions is a question that is unnecessary to investigate.) Some, at least, of that evidence, the respondent concedes should have been disclosed pursuant to cll 57-60 of the Statement of Prosecution Policy and Guidelines made and gazetted pursuant to the *Director of Public Prosecutions Act* 1991 (WA).

"**Disclosure of Crown Case**

57. The Crown has a general duty to disclose the case in-chief for the prosecution to the defence.

58. Normally full disclosure of all relevant evidence will occur unless in exceptional circumstances full disclosure prior to the trial will undermine the administration of justice, or when such disclosure may endanger the life or safety of a witness.

Disclosure of Information to the Defence

59. When information which may be exculpatory comes to the attention of a prosecutor and the prosecutor does not intend adducing that evidence, the prosecutor will disclose to the defence –

(a) the nature of the information;

(b) the identity of the person who possesses it; and

(c) when known, the whereabouts of the person.

60. These details should be disclosed in good time."

17 At this point it is relevant to note that the recent case of *Grey v The Queen*[7] in this Court stands as authority for the proposition that the prosecution must at common law also disclose all relevant evidence to an accused, and that a failure to do so may, in some circumstances, require the quashing of a verdict of guilty. As will appear, the evidence which was not produced before or at this trial, was certainly no less cogent than the evidence which was not disclosed in *Grey*.

18 Some of the further evidence related to the alleged murder weapon. In one interview, the appellant was asked what the assailant's weapon was. He replied, "A wrench". The appellant was asked to, and did draw a wrench, with the word "Sidchrome" on it. That drawing was an exhibit of which much was made at the trial. The deceased's husband said in evidence, with little conviction, that he thought that there may have been a Sidchrome spanner missing from a shed which his late wife used as a workshop behind the shop. The respondent had stressed both in opening and closing the prosecution case at the trial that the wrench drawn by the appellant was the murder weapon.

19 When the appellant gave evidence he denied that he had told the police that Mrs Lawrence had been killed with a wrench. He said that his sketch of the wrench was:

> "a sketch of a supposed weapon that we were talking about in our theory which I said was a gas wrench to be used on acetylene equipment. I have no idea what a gas wrench looks like. That is what I assumed it would look like in my theory."

There was in fact no acetylene equipment in the workshop.

20 During the reference a number of contradictory facts were brought out for the first time and highlighted. These included that experiments had been done on behalf of the respondent with a crescent-shaped wrench of the kind said to be the murder weapon. The experiments conducted by a forensic pathologist and police officers, included the striking with a copper anode (of the kind kept in Mrs Lawrence's workshop), and a wrench, of a pig's head in an attempt, unsuccessful, to replicate Mrs Lawrence's wounds.

21 Other facts relevant to the nature of the murder weapon are these. Residues of rust and Prussian Blue pigment had been found in Mrs Lawrence's

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7 (2001) 75 ALJR 1708; 184 ALR 593.

wounds. The composition of Sidchrome wrenches is such that they rarely rust. Sidchrome spanners were sold unpainted. A layer of blue paint from a forklift located near the deceased's premises did contain Prussian Blue pigment. The forensic pathologist who undertook the experiment said that a wrench could not have caused many of the injuries because it would cause blunt, crushing-type injuries rather than the cuts and lacerations suffered by Mrs Lawrence. He had examined a variety of tools, including spanners, in a friend's workshop and had been unable to find one capable of matching the wounds sustained by Mrs Lawrence. Similarly, two investigating police officers, Detectives Brandon and Carter, had attempted without success to locate a wrench which would be likely to produce wounds similar to those inflicted on the scalp of Mrs Lawrence. In 2002, at the request of those acting on behalf of the appellant, the pathologist, Dr Cooke, performed a further experiment with a pig's head, using a Sidchrome spanner supplied to him, and again was not able to replicate the injuries sustained by Mrs Lawrence. Whether or not a pig's head would be susceptible to cutting and deformation in a way similar to a human head, was not the subject of detailed expert evidence, but clearly the prosecution's experts, in undertaking the experiment must have thought it to be of some utility.

22 The disposition by the Court of Criminal Appeal of some of this relevant, potentially at least partially, exculpatory evidence was unsatisfactorily summary and almost entirely speculative[8].

> "The material relating to the rust and the paint can be quickly disposed of. Although the petitioner's drawing of the wrench labelled it a 'Sidchrome', he also described it as 'rusty'. Two obvious possibilities, if a wrench/spanner were the relevant weapon, were either that he was mistaken in his recollection as to the brand, or alternatively that rust had adhered to it as a result of its having been stored with or used on some rusty object.
>
> So far as the paint was concerned, it does not seem to have been suggested at trial that the entire weapon was blue. Rather, it appears from the outset to have been more likely that it had some blue adhering to it. A layer of blue paint from the forklift was indistinguishable from the blue paint specks found in the deceased's head wounds. However, paint of that colour and composition is relatively common. There were further layers in the paint from the forklift, which were of a composition not reflected in material found in Mrs Lawrence's head wounds. For that reason

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8 (2003) 28 WAR 1 at 22 [88]-[90].

> Mr Lynch, principal chemist at the Chemistry Centre WA, said in evidence on this appeal that he considered it unlikely that the forklift was the source of the paint in Mrs Lawrence's wounds.
>
> So far as the rest of the material is concerned, although it has a number of nuances and variations, the broad thrust of the petitioner's submission can be summarised as being to the effect that: a wrench could not have been the murder weapon; and this fact was known to the prosecution but not disclosed to the defence. Had the jury known that it could not have been the weapon, doubt would have been cast on the petitioner's confession to use of a wrench as the weapon. That proposition falls to be evaluated against the evidence given at trial, and the evidence given before us, as to the likely weapon."

23 It was not for the Court of Criminal Appeal to seek out possibilities, obvious or otherwise, to explain away troublesome inconsistencies which an accused has been denied an opportunity to explore and exploit forensically. The body of unpresented evidence so far mentioned was potentially highly significant in two respects. The first lay in its capacity to refute a central plank of the prosecution case with respect to the wrench. The second was its capacity to discredit, perhaps explosively so, the credibility of the prosecution case, for the strength of that case was heavily dependent on the reliability of the confessional evidence, some of which was inexplicably not recorded, although it should have been recorded.

24 The Court of Criminal Appeal also seems to have been overly impressed by evidence adduced by the respondent in rebuttal of the appellant's alibi, that he had at the time of the murder, been knocking on various doors looking for marijuana, from witnesses who said that they had heard no-one knocking on their doors. The disproof and rejection of the alibi did not mean that the appellant should on that account alone have been convicted.

25 The appellant's evidence at the trial was that he had left a taxi at Bel Air Apartments, without paying (telling the taxi driver, Mr Peverall that he was going inside for money), shortly after 5 pm. While the driver waited, he entered the foyer and went through to another building, Dover Court, and then up to the top floor of it, to see whether the taxi had left. This he said, took about 20 minutes. Mr Peverall in examination in chief, said that he dropped the appellant off at Bel Air at about 4.45 to 5 pm and waited for about 20 minutes before returning to a nearby taxi rank and accepting a radio call at 5.22 pm. In cross-examination, after being shown evidence that he had given at a previous hearing that it could have been just before, or just after 5 o'clock, he said that it was "nearer to 5 o'clock". Uncontradicted evidence at the trial was that the time

taken to walk from Bel Air flats to Mrs Lawrence's shop was five minutes, or by another route, two minutes and 40 seconds. Both routes followed a path, directly in front of Bel Air, where Mr Peverall was waiting for the appellant to return to pay his fare. Mr Peverall was of course looking out for him. That Mr Peverall did not see him strongly suggests that he did not pass that way.

26 The body of evidence just summarized was capable, not only of establishing the appellant's absence from the scene of the murder at the time of it, but again, also of weakening the credibility of the confessional evidence. This was not a case, indeed few are, where the respective bodies of evidence can be taken as being in watertight compartments.

27 It is to the confessional evidence that we now turn. It consisted of the sum of an unrecorded interview by Detective Sergeant Caporn on 10 June 1994, a further unrecorded interview by another police officer, Detective Sergeant Brandham on 17 June 1994, and a short videotaped interview after the unrecorded interview on that day.

28 On the morning of 10 June 1994 the appellant was discharged from Graylands Hospital to answer a charge at the Central Law Courts in Perth. It was then that he was first interviewed. At 12.50 pm he was taken by police officers from the Central Law Courts to a police station where he was interviewed over a period of eight hours and 20 minutes with seven intervals. At trial he said that during the interview on 10 June 1994, he "was in total confusion to the point where anything that he [Detective Sergeant Caporn] suggested to me I would adopt." He was not, it may be observed, cautioned or charged during, or immediately before that interview.

29 The interview on 17 June 1994 was unrecorded. It lasted three hours. It was (to the knowledge of those conducting it) conducted after the appellant had spent most of the previous evening at a nightclub, had been beaten, and had had little sleep.

30 After the unrecorded interview of 17 June 1994, there was a videotaped interview of less than 30 minutes, described by the Court of Criminal Appeal as of a "very unusual nature". At the beginning of the interview, the appellant said: "I want to be video recorded so that I can be cleared." His closing words were that his account was "my version, my conjecture, of the scene of the crime." In this interview, he often spoke of himself in the third person (for example, "initially I entered into the room, or this person entered the room ... thinking that he was on his own"). He also spoke about Mrs Lawrence as if he were speculating about her conduct rather than reporting his observations of it (for example, "I would say she would have done ..."). Several times he was

interrupted by the interviewers (for example, when he said, "Judging by the damage that was shown to me in photographs ..."). During it he offered further suggestions about the murder, such as:

> "DET SGT BRANDON [sic]: ... You said that you approached her from the rear of the shop and she asked you 'What are you doing here?'
>
> MR MALLARD: Yeah.
>
> DET SGT BRANDON: Is that right?
>
> MR MALLARD: That's right.
>
> DET SGT BRANDON: Okay. And that you said to her that you were going to rob her. This is what you told us. Okay?
>
> MR MALLARD: This is what I imagine this person would say.
>
> ...
>
> DET SGT BRANDON: ... Now, you also said that she gave you a purse?
>
> MR MALLARD: A purse.
>
> DET SGT BRANDON: All right.
>
> MR MALLARD: I would say it would have to be a matching purse. Being a woman of taste, she would have had a matching handbag and a matching purse. At a last resort, I would have gone for a Glomesh bag.
>
> DET SGT BRANDON: Okay. All right. You told us that she was dressed in what?
>
> MR MALLARD: A skirt of some sort. Again, being a woman of taste and sophistication, she would have had to be --- worn a nice skirt like this, but one that joins up.
>
> ...
>
> DET SGT BRANDON: Right, and I think you said that you virtually ran there [the Stirling Bridge] from the scene?
>
> MR MALLARD: Would have had to.
>
> DET SGT BRANDON: Yeah.

MR MALLARD: Or caught a train much --- probably at North Fremantle, but I don't think so because the tapes --- there's no videotapes of that day.

DET SGT BRANDON: No problems.

MR MALLARD: So he was either very fit or he had a push-bike."

31 The Court of Criminal Appeal described the circumstances and contents of the appellant's "confessions" as "peculiar", adding that the appellant "said a number of things which were, to say the least, odd." Nonetheless, the Court concluded that the appellant had "persist[ed] in a pattern of grudging confession as his untrue accounts were rejected, together with a continuing attempt to mislead where possible." One of the peculiarities of course, was the appellant's use of the third person in referring to the killer. For example, in the interview of 10 June 1994 he spoke of the "evil person" who killed Mrs Lawrence, and of the emotions that this person would be feeling, also saying "it's murder and that's not me."

32 The Court of Criminal Appeal did not refer to other peculiarities of the confession, which was illogically punctuated by denials that he was the murderer. During one interview, he agreed to give, and gave, a blood sample, saying "This will clear me."

33 In the Court of Criminal Appeal the respondent submitted that 15 facts could be identified in the appellant's confession which only the murderer could know. In response, the appellant submitted that these were in truth inconsistent with known or established facts. The appellant submitted that the Court of Criminal Appeal erred in declining, as it did, to consider this submission. This error was a consequence of the Court's self-imposed limitation upon its duty to consider the whole case. Had the Court considered that submission it would have been bound to uphold it in part at least.

34 Some examples will suffice. One to which we have already referred and need not repeat, is the evidence about the Sidchrome spanner which falls into the relevant category. The evidence of the blood patterns was different from the pattern that would probably have resulted had he struck Mrs Lawrence where he said he did. The evidence about the point, and his means of entry was, to say the least, unlikely to be true in the light of other evidence with respect to the securing of the front door of the shop.

35 During one of the interviews the appellant said that he had "locked eyes" with a girl, Miss Barsden, the young daughter of an employee of the deceased. At trial, she said that she had seen a man in the shop, when the car in which she

was seated was stationary, and that this person "ducked down" (beneath the counter) when he realized she was looking at him. Evidence was adduced at the reference of an ophthalmologist who had tested the appellant's eyesight and found it to be impaired to such an extent as to cast doubt on his ability to "lock eyes" with anybody. The eyewitness' evidence at the reference was relevantly as follows:

> "Q: Right?
>
> A: And I stared at him what I felt was longer than he was aware that I was looking at him. I feel that in my process of staring at this person, that when that person realised that someone was looking at him, and this is why I think he – anyway – the minute that I feel he saw me, he ducked down.
>
> Q: Yes, so your recollection – and you have put it here, 'The man saw me looking at him.' Your view was that he realised you were looking at him and then ducked down?
>
> A: Yes, I think so.
>
> Q: Sure. Would you agree that you couldn't say that you actually made eye contact with him in the sense of eyes looking into eyes?
>
> A: No, but I feel that in the process of staring at him and the process – that I feel that he looked directly at me and then that was followed by him bobbing down. I feel that he became aware that I was watching him.
>
> Q: Quite. If you're looking at someone and that person has turned towards you and then suddenly bobs down, you would assume that he must have seen you looking at him?
>
> A: Yes.
>
> Q: Coming back to my question, you're not saying, are you, that you were staring into each other's eyes?
>
> A: When he could see me he was ...
>
> Q: Pardon?
>
> A: I could see him. I could see his eyes. I was looking at him. I feel that. Now, it's more that he saw me than eye contact ...

Q: Pardon? Eye to eye contact or ...?

A: No. I was looking at him.

Q: Yes?

A: And I feel that when he saw me looking at him ..."

36 This witness, Miss Barsden, described the man whom she saw in the shop as a man of about six feet in height. The appellant is in fact six feet seven inches tall. The facial hair she described on the man she saw also differed from the appellant's, and it is likely that the headwear of the latter in turn differed from that which she observed on the man whom she saw in the shop.

37 It is highly improbable that the perpetrator of the crime would not have had some of Mrs Lawrence's blood spattered on him or her. We interpolate that there were photographs in the possession of the respondent at the time of the trial of a large pool of blood on the floor of Mrs Lawrence's premises which, like the evidence of the experiments to which we have referred, were not produced until the reference. None of the deceased's blood was detected on the appellant or his clothing. The evidence was that the appellant explained its absence by saying that he had washed his clothes in salt water because salt water obstructed or distorted the results of scientific testing. Credible, subsequent, scientific evidence was introduced to the effect that salt water was not present in his clothing, and that had the appellant's clothes been immersed in it as he claimed, the heavy rain falling at the time would not have been sufficient to wash all salt out of the clothing.

38 It is unnecessary to do more than refer briefly to some of the other matters relied on by the respondent as facts peculiarly within the knowledge of the murderer and known to the appellant. On examination, it can be seen that several of them were not in fact accurately or completely stated by him. His assessment of the number of blows struck was, for example, approximate and varied from time to time. There was in fact no necessary correspondence between the appellant's description of Mrs Lawrence's clothing and what in fact she was wearing when she was attacked. Similarly, there were discrepancies between the appellant's description of the premises and its actual configuration. The appellant denied that he had said much of what was attributed to him in the interviews by the police officers. The absence of any recording of most of the interviews is in these circumstances most unfortunate.

39 Enough appears to indicate that there was substance in the appellant's contention in this Court that the Court of Criminal Appeal wrongly declined to entertain a submission that most or all of the matters said by the respondent to be

uniquely within the murderer's knowledge, were not objectively true, or were contradicted by other matters, or were equivocal, or were patently false: and, in consequence, for those and other reasons, including the appellant's denial that he had said what was attributed to him about them, the so-called confessions were unreliable.

40 There were numerous other matters relied on by the appellant, but we need refer to only one of them, his mental infirmity. The respondent submitted that the evidence of the appellant's psychiatric condition presented at the reference was neither fresh nor new: it was materially identical to evidence adduced at the voir dire at the trial in relation to the admissibility of the appellant's interviews with police. It was dealt with in this way by the Court of Criminal Appeal[9]:

> "One of the particulars of 'fresh evidence' which is relied upon to establish that the petitioner's confessions were unreliable and should not have been admitted, or that a jury which had that evidence would be likely to have a reasonable doubt relating to them, is said to be the evidence of the psychiatric illness of the petitioner which is contained in affidavits of Dr Patchett.
>
> ...
>
> On the other hand, although expert psychiatric evidence may have assisted the thrust of the submission outlined above, by confirming the petitioner's grandiose and unusual speech and thought patterns, there were apparent disadvantages associated with it. The evidence of Dr O'Dea at the voir dire described the petitioner at the relevant time as having been in a 'manic' state. He was described as liable to become 'up-tight and upset' and verbally threatening in situations of stress. He was described as having a 'rich fantasy life' but as being able to determine whether his ideas were fact or fantasy. The last of those observations might well have supported an inference that in his confessions, and particularly in the videotaped confession, the petitioner was quite able to distinguish between being asked about his own movements and being asked about some hypothetical murderer. The discussion of his 'manic' state could well have led to or strengthened a view that he was the type of person who might react disproportionately if, during the course of a robbery, Pamela

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9 (2003) 28 WAR 1 at 37-39 [169]-[175].

Lawrence became upset and hysterical, as the police alleged that he had said she did."

41 There is considerable force in much of what the Court of Criminal Appeal said of the psychiatric evidence, its availability, its potential to damage the defence, and the forensic legitimacy of a decision not to lead it before a jury. But it had to be considered with the other evidence in obedience to a mandate to consider the whole of the case, and the whole of the case includes the evidence contradicting aspects of the appellant's confession. All of that provides a basis for further argument in favour of an inference that it should be treated as being of no or little reliability.

42 In submissions counsel for the respondent made several concessions as to some of the matters that we have discussed. We need not repeat them. They were all properly made. They alone, the respondent accepted, would require that the conviction be quashed, unless the proviso, that no substantial miscarriage of justice had occurred, should be applied. He submitted it should be. We are unable to agree. The non-presentation of the evidence to which we have referred, and having the significant forensic value that we have identified, alone, precludes this. Taken with the other evidence that we have discussed, the appellant is entitled to have the verdict quashed. This rather than a remission of the case to the Court of Criminal Appeal to decide the reference in accordance with these reasons is the appropriate course because the only possible correct conclusion there would be that the conviction should be quashed.

43 We would not however accede to the appellant's submission that a new trial should not be ordered. The appellant has already served many years of imprisonment. The case for the prosecution has now been shown to have its defects. But it also has its strengths. Those strengths include some parts of the confessional evidence, assuming it may, in the light of s 570D of the *Criminal Code*[10] which was not then, but is now in force, be received. Its strengths also

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10 Section 570D of the *Criminal Code* (WA) provides:

"**Accused's admissions in serious cases inadmissible unless videotaped**

(1) In this section –

'**admission**' means an admission made by a suspect to a member of the Police Force or an officer of the Corruption and Crime Commission, whether the admission is by spoken words or by acts or otherwise;

(Footnote continues on next page)

included the other circumstantial evidence. Having regard however to what has in total passed and emerged it would remain well open to the respondent to elect not to have the appellant retried if it were so minded.

'**serious offence**' means an indictable offence of such a nature that, if a person over the age of 18 years is charged with it, it can not be dealt with summarily and in the case of a person under the age of 18 years includes any indictable offence for which the person has been detained.

(2) On the trial of an accused person for a serious offence, evidence of any admission by the accused person shall not be admissible unless –

(a) the evidence is a videotape on which is a recording of the admission; or

(b) the prosecution proves, on the balance of probabilities, that there is a reasonable excuse for there not being a recording on videotape of the admission; or

(c) the court is satisfied that there are exceptional circumstances which, in the interests of justice, justify the admission of the evidence.

(3) Subsection (2) does not apply to an admission by an accused person made before there were reasonable grounds to suspect that he or she had committed the offence.

(4) For the purposes of subsection (2), '**reasonable excuse**' includes the following –

(a) The admission was made when it was not practicable to videotape it.

(b) Equipment to videotape the interview could not be obtained while it was reasonable to detain the accused person.

(c) The accused person did not consent to the interview being videotaped.

(d) The equipment used to videotape the interview malfunctioned."

Gummow J
Hayne J
Callinan J
Heydon J

44 The appeal should be allowed, the orders of the Court of Criminal Appeal set aside and in place thereof it should be ordered that the conviction of the appellant be quashed, and that there be an order for retrial of the appellant.

45 KIRBY J. This appeal[11] concerns the exercise by the Court of Criminal Appeal of Western Australia, in 2003, of powers conferred upon it to determine a petition invoking the Royal Prerogative of Mercy[12]. Mr Andrew Mallard ("the appellant") protests his innocence of the murder of Mrs Pamela Lawrence ("the deceased"). Her death occurred in Perth on 23 May 1994. At his trial, the appellant was found guilty by a jury and was convicted. An appeal against his conviction was dismissed in 1996 by the Court of Criminal Appeal[13]. An application made to this Court in 1997 for special leave to appeal was refused[14].

46 In 2003, the Court of Criminal Appeal having once again rejected the appellant's "appeal"[15], application for special leave was renewed. This time it was successful. Whereas the earlier attempt to engage the attention of this Court was addressed principally at the suggested miscarriage of justice occasioned by interviews by police, partly unrecorded and unconfirmed[16], the present appeal has been concerned with the "whole case"[17] brought against the appellant at trial and the defects and errors said to have arisen there, with the suggested consequence that the jury's verdict of guilty was unreasonable or unsustainable[18], warranting the setting aside of the appellant's conviction. In particular, whilst maintaining the 1997 complaints concerning the unrecorded and unconfirmed confessions to police, the appellant added new and different criticisms about the conduct of his trial. The chief thrust of the appellant's present submissions to this Court

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11 From the Court of Criminal Appeal of the Supreme Court of Western Australia: *Mallard v The Queen* (2003) 28 WAR 1.

12 Pursuant to the *Sentencing Act* 1995 (WA), s 140 ("the Sentencing Act"). The text of the section is set out in the reasons of Gummow, Hayne, Callinan and Heydon JJ at [2] ("the joint reasons").

13 *Mallard v The Queen* unreported, Court of Criminal Appeal (WA), 11 September 1996 (Malcolm CJ, Ipp and Wallwork JJ).

14 *Mallard v The Queen* P52/1996 (24 October 1997) noted (1997) 191 CLR 646 (Toohey and McHugh JJ and myself). No objection was raised by either party to this appeal to my participation in the disposition.

15 The reference of the petition to the Court of Criminal Appeal engages the jurisdiction of the Court of Criminal Appeal "as if it were an appeal by the offender". See Sentencing Act, s 140(1)(a) set out joint reasons at [2].

16 *Mallard v The Queen* P52/1996 (24 October 1997), special leave transcript at 2.

17 Sentencing Act, s 140(1)(a).

18 *Criminal Code* (WA), s 689(1) ("the Code").

concerns the suggested non-disclosure (or suppression) by the prosecution of material evidence which, it was said, had deprived the appellant of a fair trial[19].

47 In my opinion, the appellant has, on this occasion, made good his complaints about his trial. The Court of Criminal Appeal, in deciding the issues raised in the appellant's petition, erred both in its approach and in its conclusions. The appellant's conviction must be quashed and consequential orders made.

The facts and legislation

48 The background facts are stated in the joint reasons[20]. Also set out in those reasons are the provisions of the Sentencing Act, providing for the reference of the appellant's petition to the Court of Criminal Appeal[21], and the provisions of the Code[22] which govern the determination of an appeal to the Court of Criminal Appeal. Pursuant to the Sentencing Act, a petition, once referred, is taken to be such an appeal[23].

49 The provisions of the Code contain a "proviso" permitting the judges in the appellate court to dismiss an appeal "if they consider that no substantial miscarriage of justice has actually occurred"[24]. Essentially, in the second "appeal" before the Court of Criminal Appeal, the case turned on the application of the "proviso". This was so, because, properly, the prosecution conceded that, in a number of respects, material evidence ought to have been disclosed to the

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19 Two issues argued in the Court of Criminal Appeal in 2003 were excluded by order of the Panel which heard the second special leave application (McHugh, Hayne and Callinan JJ). The first was the specific relevance of the appellant's psychiatric illness, which was propounded as an explanation of his peculiar statements and speculations in his "confessions" to police. The evidence showed that the appellant was suffering from bipolar or unipolar disorders and had spent time in Graylands Mental Institution in Perth, including at a time close to the murder of the deceased. See (2003) 28 WAR 1 at 37-39 [169]-[176]. The second was an argument concerning the use of polygraph tests. This issue was dealt with by the Court of Criminal Appeal: see (2003) 28 WAR 1 at 44-76 [201]-[374].

20 Joint reasons at [14]-[39].

21 ss 137-141. See also the previous provision of the Code, s 21 set out in the joint reasons at [3].

22 s 689(1) and (2). See joint reasons at [7].

23 s 140(1).

24 s 689(1).

defence at trial by the prosecution but had not been[25]. This concession (whether or not involving the Director of Public Prosecutions in the non-disclosure[26]) arguably established the existence of an unreasonable or unsustainable verdict.

50 The continued concentration by the Court of Criminal Appeal upon the appellant's attack on the confessional evidence[27], together with the narrow view which that Court took of its jurisdiction and powers, diverted their Honours from a proper consideration of the cumulative effect of the non-disclosure (or suppression) of evidence material to the appellant's guilt of the crime charged (or, as expressed by the appellant, of his innocence of that crime).

The issues

51 *Four issues in the appeal*: There are four issues in the appeal:

(1) *The "whole case" issue*: Whether the Court of Criminal Appeal erred in the approach that it adopted with respect to the hearing of the appeal that was before it on the reference by the Attorney-General. Whether, given its obligation to hear "the whole case" and to determine such case as required by law[28], that Court was obliged to consider and determine all questions of fact and law involved in the case (as the appellant contended) or authorised to adopt the narrower approach that it had done (as the respondent argued).

(2) *The unsustainable verdict issue*: Whether, within the Code[29], and adopting the correct approach to the "whole case", the Court of Criminal Appeal erred in failing to conclude that the verdict of the jury (and thus the conviction) should be set aside on the ground that it was unreasonable or could not be supported having regard to the evidence or otherwise that there had been a miscarriage of justice.

(3) *The proviso issue*: Whether, if it is concluded that the verdict of the jury was unreasonable or was otherwise flawed, the appellant's conviction should nonetheless be sustained on the basis that, by reference to the

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25 (2003) 28 WAR 1 at 25 [106], 29 [126], 32 [137].

26 (2003) 28 WAR 1 at 79 [387].

27 (2003) 28 WAR 1 at 16 [58].

28 Sentencing Act, s 140(1)(a).

29 s 689(1).

entirety of the evidence, no substantial miscarriage of justice had actually occurred.

(4) *The disposition issue*: Whether, if the foregoing issues are decided in the appellant's favour, this Court should enter an acquittal (as the appellant submitted) or direct a retrial (as the respondent urged).

52 *Common ground in some issues*: On the bases stated in the joint reasons, I agree that the Court of Criminal Appeal erred in its approach to the discharge of its functions. It took too narrow a view of its jurisdiction and powers. This was inconsistent with the statutory language (with its reference to "the whole case") and with relevant decisional authority addressing the same or similar statutory provisions[30].

53 I also agree with the joint reasons that, once the correct approach is adopted and the evidence at trial analysed, this is not a case where the proviso should be applied[31]. For the reasons stated, and to bring this protracted saga closer to finality, the proper course is for this Court to dispose of the proceedings and not to remit them for a third hearing in the Court of Criminal Appeal.

54 These conclusions confine my reasons to the errors in the trial that render the jury's verdict unreasonable or unsupportable (most especially the multiple instances of non-disclosure or suppression of material evidence by the prosecution) and the actual order of disposition that should be made. I will deal with these points in turn. They ultimately bring me to a conclusion identical to that reached in the joint reasons.

The cumulative instances of non-disclosure

55 *Instances of non-disclosure*: The facts relevant to this aspect of the appeal emerge both from the evidence at the appellant's trial (which lasted ten days) and from "fresh" evidence agreed in the Court of Criminal Appeal in the present proceedings.

56 The facts are detailed and complex. They are sketched in outline in the joint reasons. However, it is important to consider the cumulative effect of the non-disclosure or suppression of material evidence in the hands of the police and thus available to the prosecution. It is the cumulation, variety, number and importance of such evidence that is critical to my conclusion that a miscarriage

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30 *Mickelberg v The Queen* (1989) 167 CLR 259 at 312; *R v Chard* [1984] AC 279 at 291. See joint reasons at [10].

31 Joint reasons at [42].

of justice occurred in the appellant's trial. I shall mention the most important of this evidence in summary form:

(1) *The pig's head experiment*: A significant element in the prosecution case against the appellant was his alleged confession that he had committed the brutal murder of the deceased using a wrench, which he had procured from a shed at the rear of the deceased's jewellery shop, to strike the deceased's head. The appellant's explanation of the reference to the wrench was that it was simply his "theory" of the mechanism of the deceased's death. But at trial the term "wrench" was repeatedly used to describe the murder weapon as if it was established that this was the way the death of the deceased had been caused. A sketch by the appellant of a Sidchrome wrench became an exhibit in the trial.

What was not disclosed at the trial to those representing the appellant (but disclosed to the Court of Criminal Appeal in a comprehensive summary of facts agreed between the parties[32]) was that, before the trial, an experiment had been conducted for police by striking a pig's head with a wrench similar to that drawn by the appellant in order to compare the wounds thereby inflicted with those disclosed in the deceased's head. The conclusion of those conducting this experiment was that the wounds were "dissimilar". After a second test conducted with a similar wrench, Dr Cooke, a forensic expert, concluded that such a wrench "could not have caused many of the injuries to the Deceased because it had a blunt crushing type mechanism rather than a chopping type mechanism". Although the experiment with the pig's head was discussed by Dr Cooke with police officers and with the prosecutor before the trial, the conduct of the experiment and its outcome were not revealed to the defence.

(2) *The salt-water experiment*: There was strong evidence at the trial that the infliction of multiple blows on the skull of the deceased would have caused a spattering of blood in all directions. This was confirmed by the blood spatters around the partition in the deceased's shop where the deceased was first attacked. One small spot of blood alone was found on the only shoes that the appellant owned. It was proved not to be blood from the deceased. It was consistent with the appellant's own blood.

The appellant's "confession" to police had him going "down to the river ... and wash[ing] his clothing" after the attack, inferentially to remove blood stains. At the point of the river identified in this "confession", the clothes would have been exposed to the presence of salts in the river water. In its original form, a six page report for police by Mr Lynch contained two

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32 (2003) 28 WAR 1 at 21 [87].

pages under the heading "Examination of clothing for immersion in river water". However, at the request of police, a second version of the report was produced omitting those two pages. The missing two pages were never disclosed to the defence. Yet the undisclosed part of the report concluded that "[t]he residual soluble salts detected in the clothing items are not consistent with immersion in river water … unless they were subsequently washed in fresh water". The respondent sought to explain this discrepancy by referring to the fact that it had been raining on the evening of the deceased's murder. However, further experiments by Mr Lynch showed that, even in significant rainfall, the levels of salts in clothing soaked in river water remained clearly detectable.

(3) *The missing cap*: The appellant's "confession" to police had it that he was wearing a cap with a gold border turned backwards. This was said to be consistent with the evidence of the witness Ms Barsden who described a person whom she had momentarily seen in the deceased's shop at about the time of the murder. However, a prosecution witness, Ms Michelle Engelhardt, had made a handwritten statement only a few days after the deceased's murder. This stated that the appellant's familiar cap remained on a hook in her apartment on the afternoon of the murder. Ms Engelhardt said that, when the appellant arrived at her apartment that evening, he was not wearing any headgear at all and his hair was wet, inferentially from the rain. However, all references to the whereabouts of the appellant's cap, his wet hair and lack of headgear were removed by police from Ms Engelhardt's original statement. The police prepared a second, typed, statement which deleted this information. It was agreed before the Court of Criminal Appeal that Ms Engelhardt's original handwritten statement had not been disclosed to the defence at the trial, although it was in the possession of the police and although it contained material casting doubt upon the link that the prosecution had sought to make between the appellant and the presumed assailant seen by Ms Barsden.

(4) *The undisclosed sketches*: The day after the murder, Ms Barsden signed a statement for police. This stated that, at her mother's suggestion, when she had arrived home, she had drawn sketches of the man she had seen in the deceased's shop. Her original statement referred to these sketches. However, that version of the statement was not given to the defence. In the statement that was later produced, the reference to the sketches was deleted by police. There were discrepancies between the undisclosed sketches and the appearance of the appellant at the time of the attack on the deceased. The appellant then had a large and clearly visible moustache. There was no moustache in the sketches. The sketches showed a person with a beard; whereas the appellant had none. Ms Barsden further described the person she saw as having a scarf tied "like a gypsy" on his head with no hair visible. However, a taxi driver, Mr Peverall, who had seen the appellant at the Bel Air apartments minutes

before the murder occurred, mentioned no hat, cap or headgear. He described the appellant's hair as "fairly long" and "untidy". Ms Barsden described the person she saw as of "medium build" whereas Mr Peverall, accurately, described the appellant's build as "slim".

(5) *The locking of eyes*: The appellant denied that he had said that he "locked eyes" with a girl passing by the shop where the deceased was killed. However, in an original police statement this phrase had been attributed to him. The phrase was deleted from the draft witness statement provided to the defence. Evidence, referred to in the joint reasons[33], concerning defects in the appellant's vision, made it extremely unlikely that he would "lock eyes" with anyone sitting in a passing car outside the deceased's shop. Still less was it likely that the appellant would ever say so. The removal of the expression from the statement, as supplied, lends weight to the suggestion that the "verbal confession" attributed to the appellant amounted, in substantial parts at least, to words chosen by police rather than by the appellant. And that the later deletion of the statement was designed to remove an obvious source of discrepancy that could be brought out by cross-examination.

(6) *The man wearing a bandanna*: Two witness statements, which were not disclosed to the defence, described a man seen wearing a bandanna on his head and behaving erratically within three kilometres of the scene of the murder several hours before it happened. At the time described, the appellant was detained in relation to another charge in the East Perth lockup. Accordingly, he could not have been the person described as wearing the bandanna. Yet the person so described more closely fitted Ms Barsden's description of the person she had seen and with whom she had "locked eyes". This was a man described as of five foot eleven inches (180 centimetres) wearing a "gypsy style bandanna". The appellant was much taller than the person so described (six foot six inches or 198 centimetres). He did not use that form of head-dress. The existence in the vicinity of a person more closely fitting the description of the man seen in the deceased's shop at about the time of the murder, would have been a fruitful source of evidence and argument before the jury in the defence case.

57 *Conclusion: material non-disclosures*: A review of the foregoing and other evidence, which was not disclosed to the appellant's counsel at the trial, but which was in the possession of police and, at the least, available to the prosecution, suggests strongly that material evidence was not disclosed that bore upon the guilt of the appellant of the crime charged in the indictment. Whilst the

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33 Joint reasons at [35].

non-disclosure of one or two of these items (eg items (4) and (6)), taken alone or perhaps together, might not have been sufficient to produce an unreasonable or unsupportable verdict, with a miscarriage of justice in the trial, a consideration of the totality of the unrevealed evidence raises a stark question as to the safety of the appellant's conviction.

58 Of particular concern are the items in which evidentiary material, consistent with innocence and presenting difficulties for the prosecutor's hypothesis of guilt, were actually suppressed or removed from the material supplied to the defence. The important issue of legal principle in this appeal is whether such non-disclosures and suppression deprived the appellant of a fair trial.

Approach to prosecution non-disclosures

59 *The WA prosecution guidelines*: Pursuant to the *Director of Public Prosecutions Act* 1991 (WA)[34], the Director of Public Prosecutions of Western Australia issued a statement, operative from 1 November 1992, on "Prosecution Policy and Guidelines" ("the Guidelines"). The statement was published in the *Western Australian Government Gazette*[35]. It applied to the conduct of the prosecution in relation to the appellant's trial.

60 The Guidelines were stated to be "based on, and developed from, the Crown's longstanding prosecution policy in Western Australia". They were said to take account of, and to incorporate, the Guidelines on the Role of Prosecutors adopted by the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders of 1990 ("the United Nations Guidelines")[36]. Indeed, the United Nations Guidelines are annexed to the Western Australian Guidelines.

61 The most important paragraphs of the Guidelines governing the disclosure of the prosecution case and provision of information to the defence are set out in the joint reasons[37]. I would add, however, reference to the following additional paragraphs of the Guidelines:

> "61. If a prosecutor knows of a person who can give evidence which may be exculpatory, but forms the view that the person is not credible, the prosecutor is not obliged to call that witness.

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34 s 24(1).

35 No 155, 3 November 1992 at 5418.

36 See Guidelines, par 5.

37 Guidelines, pars 57-60. See joint reasons at [16].

62. In either case, the Crown, if requested by the defence, should subpoena the person.

63. If the prosecutor possesses such exculpatory information but forms the view that the statement is not credible or that the subject matter of the statement is contentious, the prosecutor is not obliged to disclose the contents of the statement to the defence, but should inform the defence of the existence of the information and its general nature.

64. However, if the prosecutor is of opinion that the statement is credible and not contentious, then a copy of that statement should be made available to the defence in good time."

62 The foregoing paragraphs (at least pars 61 and 63) are designed to relieve the prosecution of obligations to produce to the defence the text of statements made by collaborators, supporters and friends of the accused. In the present case, the unprovided and suppressed materials did not fall into that category. Without exception, they were statements procured in the preparation of the police brief for ultimate tender to the prosecutor. At least some of them were certainly known to the prosecutor. All of them would have been available to the Director of Public Prosecutions.

63 Where a form of statutory instrument is adopted, enjoying authority under an Act of the Parliament, it prevails, to the extent of any inconsistency, over principles of the common law. However, it is clear from the language and purpose of the Guidelines that they were not intended to expel the operation in Western Australia of the general principles of the common law on prosecution disclosures. Instead, they were intended to express, clarify, elaborate and make public the "longstanding prosecution policy" that had developed conformably with the common law. Moreover, as noted above[38], they were intended to give effect to international principles which, in turn, were designed to ensure observance of "human rights and fundamental freedoms recognised by national and international law"[39].

64 *This Court's authority*: The consequence of an omission of the prosecution in a criminal trial to supply to the defence statements of material witnesses was considered by this Court in *Lawless v The Queen*[40]. There, a

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38 These reasons at [60].

39 United Nations Guidelines, par 2(b).

40 (1979) 142 CLR 659. The case came from the Full Court of the Supreme Court of Victoria, sitting as the Court of Criminal Appeal, considering a petition under s 584 of the *Crimes Act* 1958 (Vic).

majority[41] refused special leave to appeal against the dismissal of a petition of mercy on the ground that the "fresh evidence" relied upon would not have been likely to have led to a different result in a new trial. Murphy J, dissenting as to the result[42], observed that the trial judge had directed the prosecution to hand over to the applicant copies of all statements by witnesses. The prosecutor having disobeyed this direction by failing to hand over one such statement which "could have been useful to the applicant … [i]n the way the trial ran", Murphy J considered that the applicant had suffered a miscarriage of justice on the ground of the suppression of the evidence in and of itself.

65 In *R v Apostilides*[43], this Court affirmed the responsibility borne by a prosecutor in the conduct of a criminal trial. However, it acknowledged the jurisdiction of courts of criminal appeal to consider the consequences of the prosecutor's decision where, for example, an election not to call a particular person as a witness, when viewed against the conduct of the trial taken as a whole, could be seen to have given rise to a miscarriage of justice[44]. The Court emphasised that the object of judicial scrutiny in such cases was not to discover whether there had been "misconduct" by the prosecution. It was to consider whether, in all of the circumstances, the verdict was unreasonable or unsupportable in the statutory sense[45].

66 A case involving a more explicit failure of the prosecution, being a failure to reveal that a key prosecution witness had been given a letter of comfort by an investigating police officer despite "widespread and deep involvement" in crimes of the type charged against the accused, was *Grey v The Queen*[46]. The question in that case became whether the non-disclosure in question had occasioned a miscarriage of justice that was not insubstantial and had deprived the accused of a fair chance of acquittal. It was held that it was not reasonably necessary for the accused in that case to "fossick for information" to which he was entitled in the proper conduct of the prosecution against him[47]. The Guidelines considered in

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41 Barwick CJ, Stephen, Mason and Aickin JJ; Murphy J dissenting.

42 (1979) 142 CLR 659 at 683.

43 (1984) 154 CLR 563.

44 (1984) 154 CLR 563 at 575.

45 (1984) 154 CLR 563 at 578. The phrase used was "unsafe or unsatisfactory". See now *Gipp v The Queen* (1998) 194 CLR 106 at 147-150 [120]-[127].

46 (2001) 75 ALJR 1708 at 1712 [16]; 184 ALR 593 at 598.

47 (2001) 75 ALJR 1708 at 1713 [23]; 184 ALR 593 at 599-600.

that case, issued under the *Director of Public Prosecutions Act* 1986 (NSW), were not materially different from the Guidelines applicable to the present appeal[48]. The determining consideration in *Grey* was that the undisclosed material was highly relevant to the credibility of several of the witnesses called by the prosecution against the accused and to the evaluation of the accused's own case. The same can be said of the undisclosed evidence in these proceedings. In *Grey*, the appeal was upheld.

67 The respondent did not contest its failure to provide relevant materials to the appellant. It could scarcely do so, having regard to the agreed facts. Thus, upon this issue, both in the Court of Criminal Appeal and in this Court, the question became one of the significance of such failure. As in *Lawless*, *Apostilides* and *Grey*, that question took the Court to the statutory provisions governing criminal appeals. However, in giving effect to those provisions, it is useful to consider the approaches taken in other countries that follow, as Australia does, the accusatory form of criminal trial, adapted from England. Allowing that it often reflects local constitutional and statutory law, when such authority is examined the considerations given weight by the courts suggest an increasingly insistent demand for the provision of material evidence known to the prosecution which is important for the fair trial of the accused and the proper presentation of the accused's defence. Exceptions exist. However, they are comparatively few and closely defined. Such an approach has been judged essential to the conduct of a fair trial of criminal accusations in many countries.

68 *North American cases*: In the United States of America, suppression by the prosecution of evidence favourable to an accused, where it is material to guilt or punishment, may be judged a violation of the due process requirements of the Fourteenth Amendment to the Constitution[49]. Although Australia has no such constitutional provision, many of the notions that are protected by the Fourteenth Amendment are familiar to us given that, in criminal trials, the primary purpose of that constitutional protection is to ensure against miscarriages of justice that are equally abhorrent to our law[50].

69 In United States cases, as in the Guidelines applicable here, a distinction is drawn between the prosecutor's duty in respect of exculpatory evidence and evidence casting doubt on the truthfulness of other prosecution witnesses[51]. In a recent case, bearing some similarity to *Grey*, the Supreme Court of the United

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48 (2001) 75 ALJR 1708 at 1717 [46] fn 37; 184 ALR 593 at 605.

49 *Brady v Maryland* 373 US 83 at 87 (1963).

50 *United States v Bagley* 473 US 667 at 675 (1985).

51 *United States v Agurs* 427 US 97 (1976); *Bagley* 473 US 667 at 675 (1985).

States allowed an appeal where the State had failed to disclose that one of the witnesses upon whom it had relied was a paid police informant[52]. If the undisclosed or suppressed evidence is judged such as to create a "reasonable probability"[53] that a different result might have ensued had the evidence been disclosed to the defence at an appropriate time, a new trial will generally be ordered.

70 In language that recurs in the decisions of many courts on this issue, the Supreme Court of the United States has declared that the central question is "whether in [the] absence [of the material evidence, the accused] received a fair trial, understood as a trial resulting in a verdict worthy of confidence"[54]. The Supreme Court has explained that it is not the duty of the prosecutor to "deliver his entire file to defence counsel"[55]. Still less is it to conduct the defence case. The ambit of the duty of disclosure, however, is one deriving from the very character of the criminal process. Prudent prosecutors, it is said, will always resolve doubtful questions in favour of disclosure[56]. They will do so in recognition that the role of the prosecutor is as[57]:

> "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."

71 Many of the same considerations have been upheld in the Supreme Court of Canada, including since the adoption of the *Canadian Charter of Rights and Freedoms*. Thus in *R v Stinchcombe*[58], Sopinka J[59] referred to the duties of prosecutors in Canada which render "the fruits of the investigation … not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done".

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52 *Banks v Dretke* 540 US 668 (2004).

53 *Kyles v Whitley* 514 US 419 at 434 (1995).

54 *Kyles* 514 US 419 at 434 (1995). See also *Strickler v Greene* 527 US 263 (1999).

55 *Agurs* 427 US 97 at 111 (1976); *Bagley* 473 US 667 at 675 (1985).

56 *Agurs* 427 US 97 at 108 (1976).

57 *Berger v United States* 295 US 78 at 88 (1935). See also *Strickler* 527 US 263 at 281 (1999).

58 [1991] 3 SCR 326.

59 [1991] 3 SCR 326 at 333.

72 In Canada, as elsewhere, non-disclosure is excused in particular cases, such as where the evidence is beyond the control of the prosecution, is privileged or is clearly irrelevant. However, otherwise, a high duty of disclosure has been affirmed[60]. The criterion usually applied is the entitlement of the accused to a fair trial[61]. In Canada, where undisclosed evidence appears material, it is for the Crown to bring itself within an exception to the general rule mandating disclosure. The rigour of this principle has doubtless been enhanced by the adoption of the *Charter*[62]. But similar principles have been observed, for like reasons, in countries lacking such express constitutional provisions.

73 *British and Irish cases*: In the United Kingdom, the common law test required disclosure of material in the possession of the prosecution as "[a]n incident of a defendant's right to a fair trial"[63]. The prosecutor's duty in Britain is now governed by legislation[64]. Such legislation modifies, to some extent, the accusatorial character of criminal trials[65]. The procedures have been adapted accordingly. This fact makes more recent judicial authority in the United Kingdom of less significance for Australia. However, in *R v Brown*, Lord Hope of Craighead affirmed[66]:

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60 *R v Egger* [1993] 2 SCR 451 at 466 per Sopinka J; *R v Chaplin* [1995] 1 SCR 727 at 739 [21] per Sopinka J; *R v O'Connor* [1995] 4 SCR 411 at 428 [4] per Lamer CJ and Sopinka J; *R v Mills* [1999] 3 SCR 668 at 716-717 [69]-[70] per McLachlin and Iacobucci JJ; *R v Taillefer* [2003] 3 SCR 307 at 313-314 [1] per LeBel J.

61 *R v Lyons* [1987] 2 SCR 309 at 362; *Mills* [1999] 3 SCR 668 at 718 [72].

62 *Stinchcombe* [1991] 3 SCR 326 at 336 per Sopinka J.

63 *R v Ward* [1993] 1 WLR 619 at 674; [1993] 2 All ER 577 at 626. See United Kingdom, Royal Commission on Criminal Justice, *Report*, (1993) Cm 2263 at 95 [51].

64 *Criminal Procedure and Investigations Act* 1996 (UK). The procedures there provided have been amended by the *Criminal Justice Act* 2003 (UK). See Sprack, "The Criminal Procedure and Investigations Act 1996: (1) The Duty of Disclosure", (1997) *Criminal Law Review* 308.

65 The suggested correlative need in Australia to consider immunities of the accused has been discussed: Moen, "Criminal Trial Reform – At What Cost?", (2000) 27(4) *Brief* 17; cf *Ling* (1996) 90 A Crim R 376 at 380 per Doyle CJ.

66 [1998] AC 367 at 377.

> "The prosecution is not obliged to lead evidence which may undermine the Crown case, but fairness requires that material in its possession which may undermine the Crown case is disclosed to the defence. … [T]he prosecution is not obliged to lead the evidence of witnesses who are likely in its opinion to be regarded by the judge or jury as incredible or unreliable. Yet fairness requires that material in its possession which may cast doubt on the credibility or reliability of those witnesses whom it chooses to lead must be disclosed."

74 Subject to any exceptions provided by statute or common law, I would accept this as a statement expressing the common law rule in this country. Its foundation, as Lord Hope explained, lies in "the principle of fairness [which is] at the heart of all the rules of the common law about the disclosure of material by the prosecutor"[67].

75 In Scotland, which follows a different criminal procedure, a like duty of disclosure applies to the Crown in respect of "information in their possession which would tend to exculpate the accused"[68]. Similarly, in the Irish Republic, the courts have followed the general principles expressed by the English cases[69]. Specifically, where the prosecution has a statement by a person in a position to give material evidence, who will not be called as a prosecution witness, it is "in general" under a duty to make available to the defence any statements that the witness may have given[70].

76 The English authorities have been influential throughout Commonwealth countries. A similar rule of prosecution disclosure is observed in New Zealand[71] where Lord Hope's approach in *Brown* has been followed.

77 Demonstrating the generality and strictness of the rule, in Hong Kong, since its separation from the Crown, the courts have continued to observe the principle that, if disputed material is in the possession of the prosecution, which

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67 [1998] AC 367 at 379.

68 *McLeod v HM Advocate (No 2)* 1998 JC 67 at 79 per Lord Rodger.

69 *The People (DPP) v Kelly* [1987] IR 596.

70 *Ward v Special Criminal Court* [1998] 2 ILRM 493 at 500.

71 *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385; *R v Shaqlane* unreported, Court of Appeal of New Zealand, 5 March 2001; *R v Taylor* unreported, Court of Appeal of New Zealand, 17 December 2003.

may help prove a defendant's innocence or avoid a miscarriage of justice, "the balance comes down resoundingly in favour of disclosing it"[72].

78 *International law decisions*: The explicit introduction into the Guidelines in Western Australia of reference to international statements about human rights makes it relevant, in considering what flows from non-disclosure or suppression of material evidence in this case, to notice decisions concerning the requirements of the International Covenant on Civil and Political Rights[73] binding on Australia[74] and of the doctrine established by courts elucidating the similar or analogous provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms[75] ("the European Convention").

79 In *Edwards v United Kingdom*[76], the European Court of Human Rights affirmed that the requirement in Art 6(1) of the European Convention, entitling everyone to a "fair and public hearing … by an independent and impartial tribunal established by law", extended, in a criminal prosecution, to a requirement that "the prosecution authorities disclose to the defence all material evidence for or against the accused"[77]. The Court noted that this was also a requirement recognised under English law. It is one that has been reinforced in more recent times by the European Court's decision in *Fitt v United Kingdom*[78]. There, the Court observed[79]:

> "It is a fundamental aspect of the right to a fair trial that criminal proceedings … should be adversarial and that there should be equality of arms between the prosecution and defence. … [B]oth prosecution and

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72 *R v Keane* [1994] 1 WLR 746 at 751-752; [1994] 2 All ER 478 at 484 applied in *HKSAR v Lau Ngai Chu* [2002] HKEC 291 and *HKSAR v Lee Ming Tee* (2003) 6 HKCFAR 336.

73 [1980] *Australian Treaty Series* No 23.

74 Art 14.3(b) and (c). See *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42.

75 213 *United Nations Treaty Series* 222.

76 (1992) 15 EHRR 417.

77 (1992) 15 EHRR 417 at 432.

78 (2000) 30 EHRR 480.

79 (2000) 30 EHRR 480 at 510 [44] (footnotes omitted). See discussion Hinton, "Unused Material and the Prosecutor's Duty of Disclosure", (2001) 25 *Criminal Law Journal* 121 at 135.

> defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. In addition Article 6(1) requires, as indeed does English law, that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused."

80 The European Court of Human Rights has recognised that the duty of disclosure is not absolute or precisely reciprocal in an accusatorial system. The duty may permit prosecution non-disclosure for reasons of competing interests such as national security; or to protect witnesses at risk of reprisal; or to keep secret police methods of investigating certain crimes; in some cases to preserve the fundamental rights of another individual; or to safeguard an important public interest[80]. However, even where such exceptions exist, the European Court has insisted that it remains the accused's right to receive a fair trial and any difficulties caused by limitations on the right to disclosure must be "sufficiently counterbalanced by the procedures followed by the judicial authorities"[81]. Considerations such as these have led, in accusations of terrorism offences, to the adoption of new procedures involving "special advocates"[82].

Non-disclosure of evidence: conclusions

81 *The applicable principles*: The foregoing review of the approach of courts, in national and international jurisdiction, indicates the growth of the insistence of the law, particularly in countries observing the accusatorial form of criminal trial[83], of the requirement that the prosecution may not suppress evidence in its possession, or available to it, material to the contested issues in the trial. It must ordinarily provide such evidence to the defence. Especially is this so where the material evidence may cast a significant light on the credibility or reliability of material prosecution witnesses or the acceptability and truthfulness of exculpatory evidence by or for the accused.

82 According to the principles expressed (as in *Apostilides*), this Court will not second guess the prosecutor in the decisions that have to be made in presenting the prosecution case. Still less is the prosecutor burdened with an obligation to present the defence case (which, in any event, may not always be known in advance of the trial). The obligation imposed by the law is to ensure a fair trial for the accused, remembering the special requirements that descend

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80 *Fitt* (2000) 30 EHRR 480 at 510-511 [45].

81 *Fitt* (2000) 30 EHRR 480 at 511 [45].

82 *R v H* [2004] 2 AC 134 at 149-150 [21].

83 *RPS v The Queen* (2000) 199 CLR 620 at 630 [22].

upon a prosecutor, who represents not an ordinary party but the organised community committed to the fair trial of criminal accusations and the avoidance of miscarriages of justice.

83 Ultimately, where there has been non-disclosure or suppression of material evidence, which fairness suggests ought to have been provided to the defence, the question is whether the omission has occasioned a miscarriage of justice. This is so both by the common law and by statute[84] (and in some jurisdictions by constitutional mandate). The courts are guardians to ensure that "justice is done" in criminal trials[85]. Where the prosecutor's evidentiary default or suppression "undermines confidence in the outcome of the trial"[86], that outcome cannot stand. A conviction must then be set aside and consequential orders made to protect the accused from a risk of a miscarriage of justice. At least, this will follow unless an affirmative conclusion may be reached that the "proviso" applies – a conclusion less likely in such cases given the premise.

84 In a case of very limited non-disclosure which the appellate court concludes affirmatively to have been unlikely to have altered the outcome of the criminal trial, the proviso may be applied as it was in *Lawless*[87]. However, in a case where the non-disclosure could have seriously undermined the effective presentation of the defence case, a verdict reached in the absence of the material evidence (and the use that the defence might have made of it) cannot stand. Such was the case in *Grey*[88].

85 *Application of the principles*: When the foregoing principles are applied to the present appeal, there can be but one conclusion. There were many curious features of this case at trial. The possibility that the appellant is innocent cannot be excluded. There is exculpating evidence. Some of it was simply not revealed to the defence. Some of it was actually suppressed so as to deprive the defence of material by which to test the accuracy of the evidence of obviously truthful witnesses and to impugn the credibility of others (particularly police) whose credibility was challenged and where the resolution of that challenge was significant for the acceptance or rejection by the jury of the unrecorded and unconfirmed "confessions". These "confessions" had their own peculiarities.

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84 Relevantly because of the terms of the Code, s 689(1).

85 *Stinchcombe* [1991] 3 SCR 326 at 333; cf *Berger* 295 US 78 at 88 (1935).

86 *Kyles* 514 US 419 at 434 (1995).

87 (1979) 142 CLR 659.

88 (2001) 75 ALJR 1708; 184 ALR 593.

Subjecting them to rigorous examination and scrutiny at the trial was essential to the fair trial of the appellant.

86 The very number, variety and significance of the material evidence that was not disclosed to the defence in these proceedings, without more, presents, potentially, an important body of testimony upon which counsel representing the appellant could suggest a failure by the prosecution to afford him a fair trial. In particular, the non-disclosure and suppression of evidence that presented contradictory (or at least highly inconvenient and troubling) testimony from getting before the jury could be viewed, of itself, as casting doubt on the reliability of the "confessions" that were an important foundation of the prosecution case.

87 I have described the requirements governing prosecution disclosure laid down by many courts for a purpose. Despite the distinct legal rules of different jurisdictions, there is a high measure of consistency in the emerging principles. This is hardly surprising given the links of history and the contemporary stimulus of universal notions of fundamental rights both for the expression of the common law and the elucidation of Guidelines founded in statute or other written law. There is nothing inconsistent with these principles in this Court's earlier doctrine. To the contrary, Australian law gives effect to them.

88 A reflection upon the consistency with which the principles are expressed and applied in the foregoing cases in courts of high authority confirms a conclusion that, in the present case, especially when viewed in combination, the many instances of prosecution non-disclosure and of the suppression of material evidence results in a conclusion that the appellant's trial cannot enjoy public confidence[89]. This is another way of saying, in terms of the Code, that the jury's verdict is unreasonable or unsupportable in the light of the "whole case", as it is now known.

89 *Conclusion: a miscarriage of justice*: It follows that there has been a miscarriage of justice in this case. It is impossible to conclude that the errors which occurred in the appellant's trial can be described as insubstantial so as to warrant dismissal of the appeal under the proviso. The appeal must be allowed.

The disposition and orders

90 *Submission for acquittal*: The appellant strongly argued that he was entitled to an order of acquittal. By reference to the defects in the conduct of his

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89 This amounts to the Court's saying, on its own authority, that the trial did not meet the standards set by law: cf *Silbert v Director of Public Prosecutions (WA)* (2004) 217 CLR 181 at 191 [26].

trial, the suggested errors in the suppression of material evidence, the substantial material relevant to his mental infirmity said to explain the peculiarities of his "confessions", the prolonged period he has already served in prison and the burden of a retrial on him, on witnesses and on the community, the appellant asked this Court to bring his incarceration to a close with an order of acquittal.

91 In *Dyers v The Queen*[90], I collected considerations that this Court has viewed in the past as relevant, where a conviction is quashed, to adding the usual order for a new trial and, exceptionally, to omitting that course[91]. As I acknowledged there, retrial is the normal order in such circumstances. This leaves it to the prosecution, within the Executive Government, to take into account all relevant considerations and to ensure consistency in the treatment of like cases in ordering a retrial[92].

92 In *Dyers*, I concluded that no new trial should be ordered in the special circumstances of that case. However, all other members of the Court joined in making the usual order. That is the order that should be made here, but in the terms, and for the reasons, expressed in the joint reasons[93].

93 *A new trial order*: There remain curiosities in the evidence of the appellant in the first trial. There are issues of conflicting evidence that an appellate court cannot satisfactorily resolve. Whether, in all the circumstances, a retrial should be had, is a question properly left to the Director of Public Prosecutions. The matters disclosed in this appeal will doubtless be of assistance to him in making his decision.

94 I agree in the orders proposed in the joint reasons.

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90 (2002) 210 CLR 285.

91 (2002) 210 CLR 285 at 314-316 [82]-[85].

92 (2002) 210 CLR 285 at 316 [85].

93 Joint reasons at [43].