HIGH COURT OF AUSTRALIA

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

BOHDAN WEISS APPELLANT

AND

THE QUEEN RESPONDENT

Weiss v The Queen
[2005] HCA 81
15 December 2005
M50/2005

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Court of Appeal of the Supreme Court of Victoria made on 5 May 2004.*

3. *Remit the matter to the Court of Appeal of the Supreme Court of Victoria for its further consideration.*

On appeal from the Supreme Court of Victoria

Representation:

P F Tehan QC with S T Russell and L C Carter for the appellant (instructed by Falcone and Adams)

J D McArdle QC with C B Boyce for the respondent (instructed by Director of Public Prosecutions (Victoria))

CATCHWORDS

Weiss v The Queen

Criminal Law – Appeal – Application of "proviso" that no substantial miscarriage of justice has actually occurred – Appellant convicted of murder – Evidence led at trial that should not have been adduced – Appellant appealed against conviction – Appeal court to review the whole case – Utility of reference to what a jury, the actual trial jury or a hypothetical reasonable jury, would have done.

Words and phrases – "proviso", "substantial miscarriage of justice", "substantial miscarriage of justice has actually occurred".

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

1 GLEESON CJ, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ. The important issue in this appeal concerns the operation of the proviso to s 568(1) of the *Crimes Act* 1958 (Vic) ("the Crimes Act") and how that provision is to be applied in criminal appeals conformably with the language and purpose of the statute which appears in common form throughout Australia.

The facts and disposition in the Court of Appeal

2 On 24 November 1994, Ms Helen Elizabeth Grey was murdered. She was beaten to death. In November 2000, the appellant was charged with Ms Grey's murder.

3 At the appellant's trial in the Supreme Court of Victoria, Ms Jean Horstead, with whom the appellant was living in 1994, was an important witness against the appellant. She swore that, on the night of the murder, the appellant had confessed to her that he had killed Ms Grey. Ms Horstead gave evidence that, although she had at first provided the appellant with a false alibi, some years after the murder, and after she had left the relationship with the appellant and moved to America, she had decided to tell the truth. Evidence was led that, some time after Ms Grey was murdered, the appellant formed and thereafter maintained a sexual relationship with a woman other than Ms Horstead. Over the objection of the appellant's counsel, the prosecution was permitted to adduce evidence in cross-examination of the appellant that at the time the appellant began his relationship with the other woman (whom it is convenient to refer to as Renée) she was not yet 15 years old. It is not now disputed that evidence of Renée's age should not have been adduced.

4 To have intercourse with a girl under 16 years of age and to maintain a sexual relationship with her were serious crimes[1]. None of the criminal consequences of the appellant's conduct with Renée was mentioned to the jury. All that they were told was that she was not yet 15 and a suggestion was made in the course of the prosecutor cross-examining the appellant, but not adopted, that Renée's age had been given as part of the reasons for Ms Horstead terminating her relationship with the appellant. The prosecution did not later suggest that maintaining a sexual relationship with an under-age girl was a matter that went to the appellant's credit.

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1 *Crimes Act* 1958 (Vic), Pt I, Div 1(8C), ss 45-49A.

5 The appellant was convicted. On his appeal to the Court of Appeal of Victoria, the Court (Callaway and Batt JJA, Harper AJA) held unanimously[2] that the evidence of Renée's age had been wrongly admitted. Callaway JA (with whose reasons the other members of the Court agreed) rightly held[3] that the evidence of Renée's age was not relevant, that it could not be led to bolster the credit of Ms Horstead and that, if it did have any significant probative value, it was outweighed by its prejudicial quality because "[t]he jury became aware, in effect, that the [appellant] had had carnal knowledge of a girl of 14".

6 The Court of Appeal nonetheless dismissed the appellant's appeal, holding that the proviso to s 568(1) of the Crimes Act applied.

7 Having discussed the state of the authorities about the proviso and its application, Callaway JA concluded[4] that a distinction should be drawn between an appellate court asking whether, without the wrongly admitted evidence, the jury at the appellant's trial would inevitably have convicted him, and asking whether, without that evidence, any reasonable jury, properly instructed, would inevitably have convicted him. On the former test (the "this jury" test) Callaway JA concluded[5] that the appellant's conviction was inevitable; on the latter test (the "any reasonable jury" test) his Honour was of the opinion that it could not be said that the appellant's conviction was inevitable. That was so because[6]:

> "Another jury might have taken a different view of Ms Horstead's evidence or the reliability of the [appellant's] confession, for this was a case that largely turned on the credibility of the two principal witnesses."

Having regard to some earlier Victorian decisions[7], Callaway JA concluded that the relevant test was the "this jury" test and that the appeal should be dismissed.

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2 *R v Weiss* (2004) 8 VR 388.

3 (2004) 8 VR 388 at 397 [60].

4 (2004) 8 VR 388 at 400-401 [70].

5 (2004) 8 VR 388 at 400-401 [70].

6 (2004) 8 VR 388 at 401 [70] footnote 69.

7 *R v Konstandopoulos* [1998] 4 VR 381; *R v McLachlan* [1999] 2 VR 553.

8 By special leave, the appellant now appeals to this Court on grounds confined to the application of the proviso. Issues debated in the Court of Appeal, but for which special leave to appeal to this Court was refused, about the effect that trial counsel's behaviour at trial may have had on the fairness of the trial, were said to be indirectly relevant to the application of the proviso. They do not arise directly and, for reasons that will become apparent, the possible effect of trial counsel's conduct need not be considered in deciding this appeal.

Some fundamental propositions

9 The questions that are to be decided in the appeal must be considered against some fundamental, if obvious, propositions. First and foremost, the root question is one of statutory construction[8]. It is the words of the statute that ultimately govern, not the many subsequent judicial expositions of that meaning which have sought to express the operation of the proviso to the common form criminal appeal provision by using other words. Section 568(1) of the Crimes Act provides:

> "The Court of Appeal on any such appeal against conviction shall allow the appeal if it thinks 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 which 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 of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

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8 cf *Gipp v The Queen* (1998) 194 CLR 106 at 147-150 [120]-[127] per Kirby J; *Farrell v The Queen* (1998) 194 CLR 286 at 295 [18] per Kirby J; *Fleming v The Queen* (1998) 197 CLR 250 at 255-256 [11]-[12] per Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ.

10 The task of construing this section is not accomplished by simply taking the text of the statute in one hand and a dictionary in the other[9]. Especially is that so when note is taken of some particular features of this provision. What is to be made of the contrast between the provisions in the body of the section that the court "*shall* allow the appeal" if certain conditions are met and the proviso that the Court "*may* … dismiss the appeal" if another condition is met? What is to be made of expressions like "if it [the Court] *thinks* that the verdict of the jury *should* be set aside …"? What is to be made of the reference in the body of the section to "a miscarriage of justice" compared with the reference in the proviso to "no *substantial* miscarriage of justice"? How is the proviso to operate when it is cast in terms that the Court "*may* … notwithstanding that [the Court] is of opinion that the point … *might* be decided in favour of the appellant … dismiss the appeal if it *considers* that no substantial miscarriage of justice has *actually* occurred"? What is the intensity to be given to the words "may", "might", "considers"? What, if anything, turns on referring, in the first kind of ground of appeal specified in the body of the section, to the verdict of the jury but referring, in the second kind of ground, to the judgment of the Court?

11 Not all of these particular questions must be considered in this appeal. But none of them, and none of the more general questions of construction presented by the statute, can be answered without understanding the context in which what is now the common form of Australian criminal appeal statute was drafted and enacted.

The history of the adoption of the proviso

12 Examination of the history of the common form of criminal appeal statute often begins by noticing its origin in the *Criminal Appeal Act* 1907 (UK) ("the 1907 English Act"). It is, of course, correct to note that the language of s 568(1) of the Crimes Act, and its equivalents in other States, was taken directly from s 4(1) of the 1907 English Act. It is necessary, however, to look beyond that fact in order to understand why s 4(1) of the 1907 English Act took the form it did. In particular, it is essential to put both s 4(1) of the 1907 English Act, and its Australian equivalents, in their proper contexts, both historically and otherwise.

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9 *Cunard SS Co v Mellon* 284 F 890 (1922) at 894 per Judge Learned Hand.

13 The 1907 English Act replaced the old procedure for Crown Cases Reserved[10]. It was enacted more than 30 years after the *Judicature Act* reforms, but against a background where the understanding of when a new trial would be ordered was that the "Exchequer rule" prevailed. Before 1835 an erroneous admission or rejection of evidence was not a sufficient ground to set aside a jury's verdict and order a new trial unless upon *all* the evidence it appeared to the judges that the truth had not been reached[11]. In 1835, however, *Crease v Barrett*[12], a decision of the Court of Exchequer, was taken as establishing a new rule: the Exchequer rule. The language actually used by Parke B in *Crease v Barrett*[13] may not suggest the adoption of a new rule but in other cases decided in and after 1835 the rule was taken to be[14] that the courts generally had renounced any discretion and, "where evidence formally objected to at Nisi Prius is received by the Judge, and is afterwards thought by the Court to be inadmissible, the losing party has *a right* to a new trial" (emphasis added).

14 On the civil side, this rule was done away with in the rules of court enacted by the *Supreme Court of Judicature Act* 1873 (UK). Rule 48 of those rules provided:

> "A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial of the action; and if it

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10 See *Conway v The Queen* (2002) 209 CLR 203 at 210-211 [10]-[12].

11 *Margaret Tinkler's Case* (1781) R & R 133 note [168 ER 721]; *R v Ball* (1807) R & R 132 [168 ER 721]; *R v Teal* (1809) 11 East 307 at 311 [103 ER 1022 at 1024]; *R v Treble* (1810) R & R 164 [168 ER 740]; cf, on the civil side, *Tyrwhitt v Wynne* (1819) 2 B & Ald 554 at 559 [106 ER 468 at 470]; Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 3rd ed (1940), vol 1 at 365-367.

12 (1835) 1 Cr M & R 919 [149 ER 1353].

13 (1835) 1 Cr M & R 919 at 933 [149 ER 1353 at 1359].

14 *Wright v Doe dem Tatham* (1837) 7 A & E 313 at 330 per Lord Denman CJ [112 ER 488 at 495]; cf *de Rutzen v Farr* (1835) 4 A & E 53 at 56-57 [111 ER 707 at 708].

> appear to such Court that such wrong or miscarriage affects part only of the matter in controversy, the Court may give final judgment as to part thereof, and direct a new trial as to the other part only."

And the subsequent 1883 rules made like provision in O 39 r 6. In *Bray v Ford*[15], Lord Herschell contrasted the requirement of "substantial wrong or miscarriage" with the entitlement before the *Judicature Act* to a new trial as of right where there had been any misdirection which could not be said to be upon a wholly immaterial point.

15 There is an evident similarity between the language used in those rules ("unless in the opinion of the Court … some substantial wrong or miscarriage has been thereby occasioned in the trial of the action") and the language later to be adopted in the proviso to s 4(1) of the 1907 English Act ("if they [the Court] consider that no substantial miscarriage of justice has actually occurred"). But the language is not identical. The *Judicature Act* rule and the 1883 rules provided a qualification to an otherwise generally expressed prohibition against orders for new trial: "a new trial shall not be granted … unless"; the proviso to s 4(1) of the 1907 English Act was a qualification to an otherwise generally expressed command to allow an appeal and, in consequence, quash the conviction and direct entry of a verdict and judgment of acquittal.

16 Be this as it may, after the *Judicature Act* reforms, the Exchequer rule was understood as still governing the jurisdiction of the Queen's Bench Division, in Crown Cases Reserved, to order a new trial in a criminal matter. In *R v Gibson*[16], Lord Coleridge CJ, speaking in 1887, stated the rule as being that "if any bit of evidence not legally admissible, which might have affected the verdict, had gone to the jury, the party against whom it was given was entitled to a new trial".

17 The better view may be that what was said in *Gibson* was "much misunderstood"[17] and that it established no absolute rule. As Griffith CJ pointed out in *R v Grills*[18]:

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15 [1896] AC 44 at 52.

16 (1887) 18 QBD 537 at 540-541.

17 *R v Grills* (1910) 11 CLR 400 at 409 per Griffith CJ; *Balenzuela v De Gail* (1959) 101 CLR 226 at 234-235; *Conway* (2002) 209 CLR 203 at 212-217 [15]-[29].

18 (1910) 11 CLR 400 at 410.

> "It happens … in innumerable cases that, by inadvertence, irrelevant evidence (which, strictly speaking, is not admissible) is admitted, and passes without notice and without mischief. But there is no case which decides that a conviction is necessarily bad on the ground that the jury had not been expressly directed to disregard such evidence."

It is, nonetheless, important to recognise that the Exchequer rule was often expressed in absolute terms. And as later will be observed, judicial reasons considering the meaning and application of the proviso to the common form criminal appeal statute have often exhibited the same tendency to state rules in absolute terms.

18 The matters of history that are recorded above readily show that the proviso to s 4(1) of the 1907 English Act was intended to do away with the Exchequer rule. But they also cast light upon what appears to be a conundrum[19] presented by reference in the grounds on which the Court of Appeal *shall* allow the appeal to a "miscarriage of justice", and reference in the proviso to dismissing the appeal if the Court "considers that no substantial miscarriage of justice has actually occurred". What the history reveals is that a "miscarriage of justice", under the old Exchequer rule, was *any* departure from trial according to law, regardless of the nature or importance of that departure. By using the words "substantial" and "actually occurred" in the proviso, the legislature evidently intended to require consideration of matters beyond the bare question of whether there had been any departure from applicable rules of evidence or procedure. On that understanding of the section as a whole, the word "substantial", in the phrase "substantial miscarriage of justice", was more than mere ornamentation. If the 1965 *Report of the Interdepartmental Committee on the Court of Criminal Appeal* ("the Donovan Committee")[20] was right to conclude, as it did[21], that the construction which had been placed on the proviso by the English courts rendered the word "'substantial' … devoid of practical significance", the construction and application of the proviso had moved a very long way from its historical roots.

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19 *R v Gallagher* [1998] 2 VR 671.

20 Cmnd 2755.

21 at 37, par 164.

19 Noting that the proviso was evidently intended to require consideration of matters beyond the question of whether there had been a departure from applicable rules of evidence or procedure presents the further question of what matters are to be addressed in deciding whether a substantial miscarriage of justice has actually occurred. And that was seen as the determinative question in this case in the Court of Appeal. Before turning to consider that question, however, it is necessary to notice some other contextual and historical matters.

20 The 1907 English Act made no provision for the Court of Appeal to order a new trial. Section 4(2) of the 1907 English Act provided:

> "Subject to the special provisions of this Act, the Court of Criminal Appeal shall, if they allow an appeal against conviction, quash the conviction and *direct a judgment and verdict of acquittal to be entered*." (emphasis added)

This is to be contrasted with s 4(2) of the *Crimes Act* 1914 (Vic) ("the 1914 Victorian Act"). That provision required the Full Court of the Supreme Court of Victoria "if they allow an appeal against conviction [to] quash the conviction and either direct a judgment and verdict of acquittal to be entered or *direct a new trial to be had*" (emphasis added).

21 All of the Australian States (and eventually the mainland Territories[22]) copied the template appearing in the 1907 English Act. As in Victoria, the legislation in the other Australian jurisdictions went further than the 1907 English Act empowering courts of criminal appeal either to direct a judgment and verdict of acquittal to be entered or to direct a new trial to be had. The Australian legislation, by adopting common form legislation based substantially on the English precedent, replaced the disparate and, to some extent, uncertain position that had existed in the Australian colonies concerning the powers of the local Supreme Courts to order new trials after convictions were quashed following the determination of points reserved in the trial for consideration by the Supreme Court[23]. Whereas such a power had been doubted in New South

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22 The proviso does not appear, in terms, in the *Federal Court of Australia Act* 1976 (Cth). See *Conway v The Queen* (2002) 209 CLR 203 at 218-219 [35]-[36] per Gaudron ACJ, McHugh, Hayne and Callinan JJ, 230-231 [76]-[77] per Kirby J.

23 O'Connor, "Criminal Appeals in Australia Before 1912", (1983) 7 *Criminal Law Journal* 262 at 267.

Wales[24], it had been exercised in Victoria pursuant to a local statute that had become law in 1852[25]. This empowered the colonial Supreme Court of Victoria on a point of law reserved in the trial "to hear and determine the question of law so reserved, and to affirm, amend, or reverse the judgment which shall have passed on such person, or to direct a venire de novo or new trial to be had, or to make such other order as the justice of the case may require …".

22 Even before the 1907 English Act was copied in Australia, the Victorian court was ordering new trials pursuant to this statutory provision. An apparent object of copying most of the provisions of the 1907 English Act throughout Australia was to secure the advantages thereby procured whilst, at the same time, settling disputes that had vexed the administration of criminal justice in several of the Australian colonies before Federation.

23 Like the 1907 English Act, the 1914 Victorian Act made elaborate and detailed provision[26] for supplemental powers of the Full Court in criminal appeals. The Full Court was given power[27], in addition to the powers it would have in an appeal or application in a civil case, to order production of documents, exhibits or other things connected with the proceedings, "the production of which appears to them necessary for the determination of the case", power[28] to order "any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court *whether they were or were not called at the trial*" (emphasis added), power[29] to receive evidence of any witness, power[30]

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24 *Attorney-General of New South Wales v Bertrand* (1867) 4 Moo PC NS 460 [16 ER 391]; *R v Murphy* (1868) 5 Moo PC NS 47 [16 ER 432].

25 *An Act for Improving the Administration of Criminal Justice*, 16 Vict No 7 s 28, noted (1983) 7 *Criminal Law Journal* 262 at 273-274 citing also *R v Whelan* (1868) 5 WW & A'B (L) 7 at 21.

26 s 9.

27 s 9(a).

28 s 9(b).

29 s 9(c).

30 s 9(d).

"where any question arising on the appeal involve[d] prolonged examination of documents or accounts or any scientific or local investigation" which could not conveniently be conducted before the Full Court to refer the question for inquiry and report to a special commissioner, and power[31] to "appoint any person with special expert knowledge to act as assessor … in any case where it appear[ed] to the Court that such special knowledge is required for the proper determination of the case". These procedural provisions were necessary only if the Full Court (and the Court of Appeal in England) was to make its own inquiry about whether the accused was in fact guilty as the jury had found and had moved beyond functions apt solely to a court of error.

24 Neither the 1907 English Act nor each States' enactment of appellate provisions drawn from the 1907 English Act[32] was the first time that legislation was enacted that was intended to abolish the application of the Exchequer rule in criminal appeals. In India, provision was made first by Sir James Fitzjames Stephen's *Indian Evidence Act* 1872 (s 167) and then by the *Code of Criminal Procedure* of 1898 (ss 423, 537). The Privy Council later remarked that these provisions showed "the wide disparity between the law of India and the law of England in their respective attitudes to the verdict of a jury in criminal cases"[33].

25 In New South Wales, s 423 of the *Criminal Law (Amendment) Act* 1883 (NSW) (46 Vict No 17) ("the 1883 NSW Act") had empowered the court considering a question reserved under the Crown Cases Reserved procedure (among other things) to affirm, amend or reverse the judgment given at trial. But that power was qualified by the proviso that:

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31 s 9(e).

32 *Criminal Appeal Act* 1912 (NSW), s 6(1); *Criminal Appeals Act* 1924 (SA), s 6(1) (see now *Criminal Law Consolidation Act* 1935 (SA), s 353(1)); *Criminal Code Amendment Act* 1913 (Q) (see now *Criminal Code* (Q), s 668E(1) and (1A)); *Criminal Code* (WA), s 689(1) (see now *Criminal Appeals Act* 2004 (WA), s 14(2)); *Criminal Code Act* 1924 (Tas), s 402(1) and (2); *Criminal Code Act* (NT), s 411(1) and (2).

33 *Abdul Rahim v King-Emperor* (1946) LR 73 IA 77 at 90.

> "[N]o conviction or judgment thereon shall be reversed arrested or avoided on any case so stated unless for some substantial wrong or other miscarriage of justice."

How were provisions like these, culminating as they did in the proviso to s 4(1) of the 1907 English Act, to be construed? What was the task they set for the court hearing the appeal? The answer to these questions is best approached by considering what underpinned the Exchequer rule.

The Exchequer rule and the accused's rights

26 Writing in 1940, Wigmore identified[34] two theories that could support the Exchequer rule. The first was that a party has a legal right to observance of the rules of evidence (and, we would add, to observance of all other aspects of law and procedure, the contravention of which could constitute "a wrong decision of any question of law" or "on any ground … a miscarriage of justice"). The second was that judicial consideration of the weight of all the evidence, as a motive for refusing a new trial, would be the usurpation of the jury's function.

27 These two "rights" (to a trial according to law and to the verdict of a jury) can be seen to have informed the subsequent interpretations of statutes intended to do away with the Exchequer rule. Thus, in *Mraz v The Queen*, Fullagar J said[35] that the proviso should be read, and in fact always had been read, "in the light of the long tradition of the English criminal law that every accused person is *entitled* to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed" (emphasis added). But to speak of either a *right* to a trial according to law or a *right* to have guilt determined by verdict of a jury is useful only if there can be *no* circumstances in which an appellate court may conclude that an error made at trial does not warrant setting aside the verdict of the jury or the judgment entered in consequence of that verdict. If an appellate court finding error at trial may decline to set aside the verdict and judgment, the relevant inquiry, about when that is to be done, cannot be answered by asserting the existence of an unqualified right to it not being done.

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34 *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 3rd ed (1940), vol 1 at 368.

35 (1955) 93 CLR 493 at 514.

28 Notions of usurpation of the jury's function may perhaps be seen in the Privy Council's consideration of the proviso to the 1883 NSW Act in the famous baby-farming case of *Makin v Attorney-General for New South Wales*[36], now chiefly remembered as the origin of much of the doctrine about admission and rejection of similar fact evidence. In *Makin*, the Judicial Committee concluded[37] that "substantial wrong would be done to the accused if he were deprived of the verdict of a jury on the facts proved by legal evidence, and there were substituted for it the verdict of the Court founded merely upon a perusal of the evidence". This was said to follow[38] from the fact that:

> "The evidence improperly admitted might have chiefly influenced the jury to return a verdict of guilty, and the rest of the evidence which might appear to the Court sufficient to support the conviction might have been reasonably disbelieved by the jury in view of the demeanour of the witnesses."

That a jury might properly have proceeded in this way may readily be acknowledged. But it by no means follows that it is useful to speak of the accused having a "right" to the verdict of a jury rather than a verdict of an appellate court.

29 And the Privy Council in *Makin* did not go so far as to hold that the accused had such a right. Rather, as Isaacs J pointed out in *Grills*[39], the Privy Council concluded only that where inadmissible evidence was introduced at trial "then notwithstanding there is *sufficient* evidence to sustain the verdict and show the accused was guilty, there is a substantial wrong or miscarriage of justice except where it is *impossible* to suppose the evidence improperly admitted could have any influence on the verdict" (emphasis added). One case of the latter kind (although not given as an example by Isaacs J) must be the case where, taken as a whole, the record of the trial reveals that the accused was shown, beyond reasonable doubt, to be guilty of the offence in respect of which the jury returned its guilty verdict.

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36 [1894] AC 57.

37 [1894] AC 57 at 70.

38 [1894] AC 57 at 70.

39 (1910) 11 CLR 400 at 431.

30 As Wigmore pointed out[40], the conduct of jury trials has always been subject to the direction, control and correction both of the trial judge and the appellate courts. Once it is acknowledged that an appellate court may set aside a jury's verdict "on the ground that it is unreasonable or cannot be supported having regard to the evidence", it follows inevitably that the so-called "right" to the verdict of a jury rather than an appellate court is qualified by the possibility of appellate intervention. The question becomes, when is that intervention justified? And that, in turn, requires examination of when a court should conclude that "no substantial miscarriage of justice has actually occurred".

Applying the proviso

31 This Court has repeatedly emphasised the need, when applying a statutory provision, to look to the language of the statute rather than secondary sources or materials[41]. In *Fleming v The Queen*[42], the Court said that "[t]he fundamental point is that close attention must be paid to the language" of the relevant criminal appeal statute because "[t]here is no substitute for giving attention to the precise terms" in which the relevant provision is expressed.

32 Many statements are to be found in the decided cases that describe the task presented by the proviso as being to decide whether conviction was

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40 *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 3rd ed (1940), vol 1 at 369-370.

41 See, for example, *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vict)* (2001) 207 CLR 72 at 77 [9] per Gaudron, Gummow, Hayne and Callinan JJ, 89 [46] per Kirby J; *Victorian Workcover Authority v Esso Australia Ltd* (2001) 207 CLR 520 at 526 [11] per Gleeson CJ, Gummow, Hayne and Callinan JJ, 545 [63] per Kirby J; *Commonwealth v Yarmirr* (2001) 208 CLR 1 at 37-39 [11]-[15] per Gleeson CJ, Gaudron, Gummow and Hayne JJ, 111-112 [249] per Kirby J; *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 1 at 6-7 [7]-[9] per Gleeson CJ, McHugh, Gummow and Hayne JJ; *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 79 ALJR 1850 at 1856 [30] per Gleeson CJ, Gummow, Hayne and Heydon JJ, 1877 [167]-[168] per Kirby J.

42 (1998) 197 CLR 250 at 256 [12].

"inevitable"[43]. Other cases[44] ask whether the accused was deprived of a "chance which was fairly open … of being acquitted" or a "real chance" of acquittal.

33 These expressions attempt to describe the operation of the statutory language in other words. They must not be taken as substitutes for that language. They are expressions which may mask the nature of the appellate court's task in considering the application of the proviso.

34 Examination of the cases reveals that this danger of masking the nature of the appellate court's task is acute when the test to be applied is expressed by reference to what a jury would have done. Frequent reference is to be found in the cases to what "the jury"[45], "a reasonable, and not a perverse, jury"[46], "a jury of reasonable men, properly instructed and on such of the material as should properly be before them"[47], would have done. Like the Court of Appeal in the present matter, the Donovan Committee concluded that it was important to distinguish between a test which refers to the trial jury and a test which refers to any reasonable jury. The Donovan Committee identified two conflicting views in the English cases about the way in which the proviso should be operated. The report of the Committee said[48]:

> "The one [way in which the proviso might be operated] is that the Court should try to assess the effect upon the mind of the trial jury if the fault had not occurred. In other words, suppose that the evidence wrongfully admitted had been excluded, or that the mistaken direction had not been

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43 See, for example, *Festa v The Queen* (2001) 208 CLR 593 at 631 [121] per McHugh J.

44 See, for example, *Mraz v The Queen* (1955) 93 CLR 493 at 514 per Fullagar J; *R v Storey* (1978) 140 CLR 364 at 376 per Barwick CJ.

45 *Woolmington v Director of Public Prosecutions* [1935] AC 462 at 482-483 per Viscount Sankey LC.

46 *Mraz* (1955) 93 CLR 493 at 515 per Fullagar J.

47 *Storey* (1978) 140 CLR 364 at 376 per Barwick CJ.

48 *Report of the Interdepartmental Committee on the Court of Criminal Appeal*, Cmnd 2755 at 35, par 152.

> given by the judge, must the jury who tried the appellant nevertheless have convicted him? The other is that the Court should itself decide the problem which the proviso sets; and should resolve it by reference to the test whether any reasonable jury properly instructed could upon the whole of the admissible evidence have done otherwise than convict."

The Committee concluded[49] that the debate between these views had been resolved, in England, by the decision of the House of Lords in *Stirland v Director of Public Prosecutions*[50] and had been resolved in favour of the "reasonable jury" test. The Committee said[51]:

> "The Court does not try to assess what the particular jury which heard the case might or might not have done; nor whether that jury *must* have convicted even if the irregularity had not occurred. It assumes a reasonable jury and asks the question 'Could a reasonable jury, properly directed, have failed to convict?'"

But as argument in the present appeal reveals, confining the debate about the meaning and operation of the proviso between a test referring to "this jury" and a test referring to "a reasonable jury properly instructed and on only the material that would properly be available" invites error.

35 The fundamental task committed to the appellate court by the common form of criminal appeal statute is to decide the appeal. In so far as that task requires considering the proviso, it is not to be undertaken by attempting to predict what a jury (whether the jury at trial or some hypothetical future jury) would or might do. Rather, in applying the proviso, the task is to decide whether a "substantial miscarriage of justice has actually occurred".

36 By hypothesis, when the proviso falls for consideration, the appellate court has decided that there was some irregularity at trial. If there was not, there is no occasion to consider the proviso. In cases, like the present, where evidence that should not have been adduced has been placed before the jury, it will seldom be possible, and rarely if ever profitable, to attempt to work out what the

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49 Cmnd 2755 at 36-37, pars 159-161.

50 [1944] AC 315 at 321.

51 Cmnd 2755 at 37, par 161.

members of the trial jury actually did with that evidence. In cases, like the present, where the evidence that has been wrongly admitted is evidence that is discreditable to the accused, it will almost always be possible to say that that evidence *might* have affected the jury's view of the accused, or the accused's evidence. And unless we are to return to the Exchequer rule (where any and every departure from trial according to law required a new trial) recognition of the possibility that the trial jury *might* have used wrongfully received evidence against the accused cannot be treated as conclusive of the question presented by the proviso.

37 This may suggest that reference may be made to what a reasonable jury, properly instructed, would or might have done. That would at least make the inquiry objective and take away what might be said to be the element of speculation implicit in the "this jury" test.

38 In some cases, no doubt, invocation of the jury, and what they would inevitably have done, may amount to nothing more than the appellate judges reminding themselves of the ordinary entitlement of an accused person to have serious criminal charges decided in the first instance by a jury – sometimes described as "the constitutional judge of fact"[52]. In some cases, the jury may have been mentioned because appellate judges wished to remind themselves of the need to apply the criminal standard of proof, a task commonly reserved in serious criminal trials to a jury. In still other cases, the reference may have been made by the appellate judges to remind themselves of the special features that attend the trial of serious criminal accusations before a jury whose verdicts are inscrutable but final, and sometimes reflect consideration of practical wisdom in deciding multiple issues presented by complex evidence. Occasionally, reference to the jury might have been invoked in an endeavour to clothe the conclusion of the appellate judges in the apparel of a jury verdict, so as to attract to the appellate judgment the respect and finality conventionally accorded to jury verdicts. However this may be, as the present case illustrates, difficulties can arise in applying such tests, at least in cases where conflicting evidence has been given at trial. Is it enough to notice, as was noticed in the present case[53], that another jury *might* take a different view of the credibility of witnesses from that

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52 *Hocking v Bell* (1945) 71 CLR 430 at 440 per Latham CJ quoting Lord Wright in *Mechanical and General Inventions Co Ltd v Austin* [1935] AC 346 at 373.

53 *R v Weiss* (2004) 8 VR 388 at 401, footnote 69.

apparently taken at trial, in order to conclude that the proviso does not apply? Taken to its logical conclusion such an approach would again tend to readopting the Exchequer rule, for it would preclude applying the proviso in any case in which there was a substantial factual controversy at trial. Yet as the history of the criminal appeal provisions reveals, the legislative objective in enacting the proviso was to do away with the Exchequer rule and the language of the proviso is apt to achieve that objective.

39 Three fundamental propositions must not be obscured. First, the appellate court must itself decide whether a substantial miscarriage of justice has actually occurred. Secondly, the task of the appellate court is an objective task not materially different from other appellate tasks. It is to be performed with whatever are the advantages and disadvantages of deciding an appeal on the record of the trial; it is not an exercise in speculation or prediction. Thirdly, the standard of proof of criminal guilt is beyond reasonable doubt.

40 Reference to inevitability of result (or the converse references to "fair" or "real chance of acquittal") are useful as emphasising the high standard of proof of criminal guilt. They are also useful if they are taken as pointing to "the 'natural limitations' that exist in the case of any appellate court proceeding wholly or substantially on the record"[54]. But reference to a jury (whether the trial jury or a hypothetical reasonable jury) is liable to distract attention from the statutory task as expressed by criminal appeal statutes, in this case, s 568(1) of the Crimes Act. It suggests that the appeal court is to do other than decide for itself whether a substantial miscarriage of justice has actually occurred[55].

The statutory task and the proviso

41 That task is to be undertaken in the same way an appellate court decides whether 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. The

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54 *Fox v Percy* (2003) 214 CLR 118 at 125-126 [23] per Gleeson CJ, Gummow and Kirby JJ.

55 cf *Favell v Queensland Newspapers Pty Ltd* (2005) 79 ALJR 1716 at 1720 [11] per Gleeson CJ, McHugh, Gummow and Heydon JJ, 1722-1723 [23]-[24] per Kirby J.

appellate court must make its own independent assessment of the evidence[56] and determine whether, making due allowance for the "natural limitations" that exist in the case of an appellate court proceeding wholly or substantially on the record[57], the accused was proved beyond reasonable doubt to be guilty of the offence on which the jury returned its verdict of guilty. There will be cases, perhaps many cases, where those natural limitations require the appellate court to conclude that it cannot reach the necessary degree of satisfaction. In such a case the proviso would not apply, and apart from some exceptional cases, where a verdict of acquittal might be entered, it would be necessary to order a new trial. But recognising that there will be cases where the proviso does not apply does not exonerate the appellate court from examining the record for itself.

42 It is neither right nor useful to attempt to lay down absolute rules or singular tests that are to be applied by an appellate court where it examines the record for itself, beyond the three fundamental propositions mentioned earlier. (The appellate court must itself decide whether a substantial miscarriage of justice has actually occurred; the task is an objective task not materially different from other appellate tasks; the standard of proof is the criminal standard.) It is not right to attempt to formulate other rules or tests in so far as they distract attention from the statutory test. It is not useful to attempt that task because to do so would likely fail to take proper account of the very wide diversity of circumstances in which the proviso falls for consideration.

43 There are, however, some matters to which particular attention should be drawn. First, the appellate court's task must be undertaken on the *whole* of the record of the trial including the fact that the jury returned a guilty verdict. The court is not "to speculate upon probable reconviction and decide according to how the speculation comes out"[58]. But there are cases in which it would be possible to conclude that the error made at trial would, or at least should, have

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56 *Driscoll v The Queen* (1977) 137 CLR 517 at 524-525 per Barwick CJ; *Storey* (1978) 140 CLR 364 at 376 per Barwick CJ; *Morris v The Queen* (1987) 163 CLR 454; *M v The Queen* (1994) 181 CLR 487; *Festa* (2001) 208 CLR 593 at 631-633 [121]-[123] per McHugh J.

57 *Fox v Percy* (2003) 214 CLR 118 at 125-126 [23] per Gleeson CJ, Gummow and Kirby JJ.

58 *Kotteakos v United States* 328 US 750 at 763 (1946).

had no significance in determining the verdict that was returned by the trial jury. The fact that the jury did return a guilty verdict cannot be discarded from the appellate court's assessment of the whole record of trial. Secondly, it is necessary always to keep two matters at the forefront of consideration: the accusatorial character of criminal trials such as the present[59] and that the standard of proof is beyond reasonable doubt.

44 Next, the permissive language of the proviso ("the Court … *may*, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal …") is important. So, too, is the way in which the condition for the exercise of that power is expressed ("if it considers that no *substantial* miscarriage of justice has *actually* occurred"). No single universally applicable description of what constitutes "no *substantial* miscarriage of justice" can be given. But one negative proposition may safely be offered. It cannot be said that no substantial miscarriage of justice has actually occurred unless the appellate court is persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict of guilty.

45 Likewise, no single universally applicable criterion can be formulated which identifies cases in which it would be proper for an appellate court not to dismiss the appeal, even though persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt. What can be said, however, is that there may be cases where it would be proper to allow the appeal and order a new trial, even though the appellate court was persuaded to the requisite degree of the appellant's guilt. Cases where there has been a significant denial of procedural fairness at trial may provide examples of cases of that kind.

46 It is unnecessary in this appeal to examine that issue further, or to consider the related question whether some errors or miscarriages of justice occurring in the course of a criminal trial may amount to such a serious breach of the presuppositions of the trial as to deny the application of the common form criminal appeal provision with its proviso[60]. It is also unnecessary to decide in

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59 *RPS v The Queen* (2000) 199 CLR 620 at 630 [22] per Gaudron ACJ, Gummow, Kirby and Hayne JJ.

60 See, for example, *Wilde v The Queen* (1988) 164 CLR 365 at 373; cf *Conway v The Queen* (2002) 209 CLR 203 at 241 [103] per Kirby J referring to *R v Hildebrandt*

(Footnote continues on next page)

this case whether, and if so how, the provisions of s 80 of the Constitution, obliging trial by jury in the trial on indictment of an offence against any law of the Commonwealth, imports minimum requirements into the elements of such a trial which, in particular circumstances, could not be saved by the provision of State or Territory law expressed in terms of the common form of criminal appeal provision considered in this case. The appellant's trial was conducted wholly within State jurisdiction and so was the disposition of the appeal by the Court of Appeal. No federal question therefore arises, still less any question presented by s 80 of the Constitution.

47 That an appellate court must review the whole record of trial when it is required to consider the application of the proviso may be said to tend to prolong appellate hearings and increase the burden on already overburdened intermediate appellate courts. The immediate answer to that proposition must be that it is what the common form criminal appeal provision requires. But no less importantly, the proviso, properly applied, will, in cases to which it is applicable, avoid the needless retrial of criminal proceedings[61].

The present case

48 The Court of Appeal approached its task in the present case by asking what the trial jury would have done had the wrongly admitted evidence not been before it. Approaching the task in that way was to divert attention from the question presented by the proviso and may (we do not say must) have led the Court of Appeal to a wrong conclusion about the application of the proviso in this case.

49 Counsel for the respondent submitted on the hearing of the appeal in this Court that the appropriate start to the chain of reasoning that should have been followed by the Court of Appeal was that the trial jury must have accepted certain evidence given at trial in preference to that given by the appellant. If that was the premise from which the Court of Appeal began its consideration of

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(1963) 81 WN (Pt 1) (NSW) 143 at 148 per Herron CJ; *R v Henderson* [1966] VR 41 at 43 per Winneke CJ; *Couper* (1985) 18 A Crim R 1 at 7-8 per Street CJ.

61 cf Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice", (1937) 20 *Journal of the American Judicature Society* 178 at 185-186.

whether the proviso applied, it was a premise whose validity was the very question presented by the proviso.

50 It may readily be accepted that the trial jury did accept the evidence given against the appellant and rejected his contrary evidence. But for the reasons given earlier, the possibility that the jury took account of the wrongly admitted evidence in deciding what evidence to accept or reject cannot be excluded. If the wrongly admitted evidence *was* taken into account in reaching a conclusion about what other evidence to accept, the conclusion actually reached by the trial jury would not provide a sound basis for reaching a conclusion about whether guilt had been proved beyond reasonable doubt. It is wrong to begin an examination of whether a substantial miscarriage of justice has actually occurred by accepting, as necessarily correct, the preference by the jury for some controverted evidence when that preference may have been affected by the error that was made at trial.

51 Rather, it is necessary to look beyond what the jury may be assumed to have accepted and for the Court, so far as it properly can, to judge the evidence for itself. That is best done in this case by focusing first upon the chief evidence against the appellant – his alleged admissions – rather than exclusively or mainly upon the two questions and answers that mentioned Renée's age which must necessarily be considered in the context of the whole trial. The appellant was alleged to have made two confessions that he had killed Ms Grey. Evidence of one of those alleged confessions was given by Ms Horstead.

52 Ms Horstead's evidence in this regard was hotly contested. The appellant denied that he had made the statements she alleged he had made. He sought to establish that she was a disappointed and bitter woman who, once the appellant had taken up with Renée, and Ms Horstead's relationship with the appellant had ended, had set out, in her own words, to achieve the conviction of the appellant. But there was a further set of confessional material which was much more difficult for the appellant to deal with.

53 When first interviewed by police in November 2000 (after Ms Horstead had given police what she was later to swear was the true account of what had happened four years earlier, when Ms Grey was killed) the appellant made no admission and denied any involvement in Ms Grey's death. About 45 minutes after that interview finished he was interviewed again. In this second interview he admitted that he had visited Ms Grey on the night she was killed, that they had quarrelled and that he had struck her with a cricket bat. He admitted that he may have hit her more than once. (He said he thought that he had hit her once or

twice but that it may have been more often.) He admitted that, at the scene, he had stripped the rubber grip from the handle of the bat he had used to hit Ms Grey, and had thrown the grip away on his way home from Ms Grey's house. While he denied that he had intended to hit Ms Grey, the statements he made in this interview, if accepted as true, taken with the evidence of the pathologist about the number and ferocity of the blows struck, could have supported his conviction for murder. Both interviews with police were videotaped and admitted in evidence at the appellant's trial.

54 The appellant's case at trial was that the confessions he made in the second interview were false. He sought to explain his saying what he did in the second interview by asserting that a police officer, Detective Sergeant Dean Thomas (with whom he had had earlier dealings when charged with theft), had told him, or at least suggested to him, that, if he confessed to the killing, an otherwise inevitable conviction for murder could be avoided and a plea of guilty of manslaughter accepted by the authorities.

55 Detective Thomas did not take any part in the first interview with the appellant. He gave an altogether different account of the conversation he had with the appellant after the first interview had ended. He said that the appellant, having asked to see him, told him that he wanted to confess. And on the face of the transcript of the interview there is much that would not be inconsistent with such an account of what went on in the interval between the two interviews. But, of course, the interview having been videotaped, it was available to the Court of Appeal, and that Court could make its own judgment about what, if anything, the second interview, judged against the transcript of all else that was said at trial, revealed about the appellant's guilt.

56 In undertaking that task, the Court of Appeal would know that the jury at trial had concluded, beyond reasonable doubt, that the appellant had made confessional statements that were true. There was no doubt that he had made confessional statements to the police. The jury, and the Court of Appeal, had the video recording of those statements. The jury may also have concluded that the statements he was alleged to have made to Ms Horstead were in fact made and were true. The Court of Appeal would also know that the jury at trial would most likely have rejected the appellant's account of his conversation with Detective Thomas.

57 Neither counsel nor the trial judge had invited the jury to conclude that the appellant's evidence at trial could more easily be rejected by the jury because he was a man of poor character. There was a deal of evidence that revealed the

appellant had done discreditable things with Renée, when under-age. On the appellant's own account of his dealings with Detective Thomas, he had asked to see him because he was a police officer who had dealt fairly with him when he was investigated for, and ultimately charged with, theft. There was frequent reference at trial to the appellant and others using drugs. And there was, of course, the evidence of his forming and maintaining a relationship with Renée. The possibility that any or all of these matters had been considered by the jury and taken into account against the appellant cannot be excluded. But one question for the Court of Appeal was whether, considering all of the evidence at trial, these matters of character could be put aside as unimportant side issues when viewed in the context of the whole trial, particularly as the evidence in the trial included the powerful testimony of confessions to police which the appellant did not contest making, although he sought to explain how they came about. If they could, attention could focus upon whether the videotaped confession (which the appellant had undoubtedly made) established, beyond reasonable doubt, his guilt of murder. Or was there a reasonable possibility that he had made a false confession?

58 These questions were not addressed in argument of the present appeal. Argument was confined to the point of principle revealed by the Court of Appeal's reasons. This Court does not have the whole record of the trial. Even if it did, it would be far preferable that the record first be considered by the Court of Appeal than examined for the first time in this Court. It may be that on examining the whole of the record of the trial, the Court of Appeal will not be persuaded to the requisite standard that, allowing for the natural limitations on an appellate court, what the appellant said in his second interview with police can be accepted as proving, beyond reasonable doubt, his guilt of murder. But that is a question that the Court of Appeal has not yet addressed. The matter should be remitted for that Court's further consideration. That reconsideration must take place because, in applying the proviso to s 568(1) of the Crimes Act, the Court of Appeal erred when the reasons that it gave are considered by reference to language of the Crimes Act expressing that Court's appellate duty.

Conclusion and orders

59 For these reasons, the appeal should be allowed, the orders of the Court of Appeal of the Supreme Court of Victoria made on 5 May 2004 should be set aside and the matter remitted to the Court of Appeal for its further consideration.