HIGH COURT OF AUSTRALIA

GLEESON CJ
GUMMOW, KIRBY, HEYDON AND CRENNAN JJ

Matter No S215/2006

RICHARD BRUCE CORNWELL — APPLICANT

AND

THE QUEEN — RESPONDENT

Matters No S281/2006 & S282/2006

THE QUEEN — APPELLANT

AND

RICHARD BRUCE CORNWELL — RESPONDENT

Cornwell v The Queen
[2007] HCA 12
22 March 2007
S215/2006, S281/2006 & S282/2006

ORDER

In Appeal No S281 of 2006 and Application No S215 of 2006:

1. *Appeal allowed.*

2. *Application for special leave to cross-appeal granted and cross-appeal allowed.*

3. *Matter remitted to the Court of Criminal Appeal for consideration of grounds 2, 3, 4 and 6, and reconsideration of ground 5, in the appellant's notice of appeal to that Court.*

In Appeal No S282 of 2006:

1. *Appeal dismissed.*

On appeal from the Supreme Court of New South Wales

Representation

P Roberts SC for the respondent in Matter No S215/206 and for the appellant in S281/2006 and S282/2006 (instructed by Commonwealth Director of Public Prosecutions)

T A Game SC with S J Buchen for the applicant in matter No S215/2006 and for the respondent in S281/2006 and S282/2006 (instructed by Ford Criminal Lawyers)

CATCHWORDS

Cornwell v The Queen

Evidence – Competence and compellability of accused persons – Accused convicted following retrial of conspiracy to import cocaine – Accused gave evidence after indications that a certificate under s 128(6) would be granted – At retrial, Crown sought to tender cross-examination evidence from first trial – Evidence held to be admissible at retrial – Construction of s 128(8) – Whether s 128(8) precluded accused from relying on the certificate – Privilege against self-incrimination – Meaning of "fact in issue" under s 128(8) – Distinction between "facts in issue" and "facts relevant to facts in issue" – Whether evidence went to a "fact in issue" at the retrial – Whether retrial was a "proceeding" to which s 128(7) applied.

Evidence – Criminal Procedure – Competency of Crown challenge to grant and issue of certificate – Significance of certificate granted under s 128 – Whether trial judge conducting retrial bound by evidentiary rulings in the first trial.

Evidence – Criminal Procedure – Whether evidence should have been excluded on discretionary grounds – Whether retrial was unfair – Whether accused prejudiced by evidence tendered at retrial.

Evidence – Criminal Procedure – Whether accused objected to giving evidence – Meaning of "objects" in s 128(1) – Whether s 128 applies where witness sets out to adduce evidence revealing offences other than the one charged.

Criminal Law and Procedure – Appeal – Appeal against conviction – Verdict of acquittal – Appeal ground alleges that conviction unreasonable and contrary to evidence – Obligation of Court of Criminal Appeal to consider and decide ground of appeal – Necessity of independent assessment – Whether reasons sufficiently demonstrate such assessment.

Words and phrases – "proceeding", "fact in issue", "fact relevant to a fact in issue" "objects", "interests of justice".

Criminal Appeal Act 1912 (NSW), s 5F.
Evidence Act 1995 (NSW), s 128(1), (6), (7), (8).

1 GLEESON CJ, GUMMOW, HEYDON AND CRENNAN JJ. This case involves two appeals and an application for special leave. They arise out of two trials of Richard Bruce Cornwell ("the accused") on a drug conspiracy charge. The charge was laid under federal law and prosecuted in the name of the Crown by the Commonwealth Director of Public Prosecutions ("the DPP")[1]. The first trial was conducted in the Supreme Court of New South Wales before Howie J and a jury. At that trial the jury failed to agree on the charge against the accused. The second trial was conducted in the District Court of New South Wales before Blackmore DCJ and a jury. At the second trial the accused was convicted.

2 The first appeal is brought by the Crown against orders of the Court of Criminal Appeal of New South Wales (McClellan CJ at CL, Hulme and Adams JJ) upholding an appeal by the accused against his conviction at the second trial and ordering a new trial.

3 The second appeal is also brought by the Crown. It is an appeal against the Court of Criminal Appeal's failure to allow a Crown appeal against Howie J's grant of a certificate under s 128 of the *Evidence Act* 1995 (NSW) ("the NSW Act").

4 The application for special leave is an application by the accused for special leave to cross-appeal against the orders of the Court of Criminal Appeal. As presented, it criticises that Court's handling of a ground of appeal rejected by that Court, ground 5. Its ultimate goal is to obtain the entry of a verdict of acquittal, in place of the order for a new trial.

5 The background to these matters is complex and unusual. It led to considerable division of opinion in the courts below.

Background

6 *The charge.* On 17 February 2003 the DPP charged the accused on an indictment that he conspired (with eight other defendants, three other named persons "and divers others") to "import into Australia prohibited imports to which section 233B of the Customs Act 1901 [(Cth)] applied, namely, narcotic goods consisting of a quantity of cocaine being not less than the commercial quantity applicable to cocaine". The period alleged was the period between about 1 January 2001 and about 6 August 2001. The provision allegedly

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1 See *Director of Public Prosecutions Act* 1983 (Cth), s 9(1).

contravened was s 233B(1)(cb)[2]. The quantity of cocaine allegedly involved was approximately 120 kilograms. The commercial quantity applicable to cocaine was two kilograms. The maximum sentence was a fine not exceeding $825,000 and/or imprisonment for life. The accused was sentenced to 24 years imprisonment, with a non-parole period of 14 years and six months.

7 *Howie J admits recorded conversations.* The first trial began on 4 February 2003. On 20 February 2003, Howie J decided to admit into evidence certain listening device recordings of conversations between the accused and one of the defendants, Mr Diez, and between the accused and another of the defendants, Mr Lawrence ("the Diez-Lawrence conversations"). Howie J did so on the basis that the Diez-Lawrence conversations revealed that the three persons were involved in the business of supplying drugs to buyers in Australia, and that this was "highly probative evidence" of their participation in the alleged conspiracy to import drugs into Australia[3]. Howie J said[4]:

> "A person involved in the drug trade has to obtain his supplies from somewhere. When that trade is as substantial as appears to be that in which the accused was involved, it is well open to the jury to find that the accused would be a participant in a conspiracy to obtain a substantial amount of drug for the purpose of carrying out the trade in which he was involved."

Howie J rejected various contentions advanced on behalf of the accused which are not now pressed, for example, that the evidence was tendency evidence which was not admissible under s 97 of the NSW Act, that the evidence was so unfairly prejudicial that the Court should exercise its discretion under s 137 of the NSW

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2 Section 233B(1)(cb) provided:

> "(1) Any person who:
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> ...
>
> (cb) conspires with another person or other persons to import ... into Australia any prohibited imports to which this section applies ...
>
> shall be guilty of an offence."

3 *R v Cornwell* (2003) 57 NSWLR 82 at 94 [40].

4 *R v Cornwell* (2003) 57 NSWLR 82 at 95 [46].

Act to exclude it, and that it was inadmissible because it did not comply with s 138 of the NSW Act.

8 *The accused foreshadows an application for a s 128 certificate.* On 30 April 2003 counsel for the accused[5] said that he expected his client would give evidence, but that he would wish to object to testifying about the Diez-Lawrence conversations. Counsel said that he would be seeking a certificate under s 128 of the NSW Act in relation to the accused's testimony on that subject. He said that Howie J would need to consider what procedure should be adopted.

9 *Section 128.* Section 128 of the NSW Act provides:

"(1) This section applies if a witness objects to giving particular evidence on the ground that the evidence may tend to prove that the witness:

(a) has committed an offence against or arising under an Australian law or a law of a foreign country, or

(b) is liable to a civil penalty.

(2) Subject to subsection (5), if the court finds that there are reasonable grounds for the objection, the court is not to require the witness to give that particular evidence, and is to inform the witness:

(a) that he or she need not give the evidence, and

(b) that, if he or she gives the evidence, the court will give a certificate under this section, and

(c) of the effect of such a certificate.

(3) If the witness gives the evidence, the court is to cause the witness to be given a certificate under this section in respect of the evidence.

(4) The court is also to cause a witness to be given a certificate under this section if:

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5 Who appeared at both trials, but not at the hearing of the appeals to the Court of Criminal Appeal or in this Court.

(a) the objection has been overruled, and

(b) after the evidence has been given, the court finds that there were reasonable grounds for the objection.

(5) If the court is satisfied that:

(a) the evidence concerned may tend to prove that the witness has committed an offence against or arising under, or is liable to a civil penalty under, an Australian law, and

(b) the evidence does not tend to prove that the witness has committed an offence against or arising under, or is liable to a civil penalty under, a law of a foreign country, and

(c) the interests of justice require that the witness give the evidence,

the court may require the witness to give the evidence.

(6) If the court so requires, it is to cause the witness to be given a certificate under this section in respect of the evidence.

(7) In any proceeding in a NSW court:

(a) evidence given by a person in respect of which a certificate under this section has been given, and

(b) evidence of any information, document or thing obtained as a direct or indirect consequence of the person having given evidence,

cannot be used against the person. However, this does not apply to a criminal proceeding in respect of the falsity of the evidence.

(8) In a criminal proceeding, this section does not apply in relation to the giving of evidence by a defendant, being evidence that the defendant:

(a) did an act the doing of which is a fact in issue, or

(b) had a state of mind the existence of which is a fact in issue.

(9) A reference in this section to doing an act includes a reference to failing to act."

10 *Submissions of the parties.* On 30 April 2003, on 1 May 2003, and on the next sitting day, 5 May 2003, some argument took place about the meaning of

s 128(8). The DPP argued that the expression "fact in issue" included the supply of drugs within Australia revealed by the Diez-Lawrence conversations. His position was in effect that "fact in issue" meant a fact relevant to the proceedings which was in contest between the parties. Howie J advanced the contrary view. He suggested that "fact in issue" referred only to elements of the offence charged (here, importation into Australia); and that the supply of drugs within Australia was only a fact relevant to a fact in issue, rather than a fact in issue strictly so called. Counsel for the accused supported and sought to reinforce that construction. Below this will be referred to as "the accused's construction" of s 128(8). The competing view, which is to be preferred for reasons given below[6], is that even if "fact in issue" does not include the supply of drugs within Australia, the giving of evidence by the accused about that supply was "evidence that the [accused] ... did an act [conspiring to import drugs] the doing of which is a fact in issue".

11 Counsel for the accused pressed his request for guidance about the procedure to be adopted. He said that it could affect the terms of his opening address. He said that if the grant of a certificate were unlikely, that might lead to a reconsideration of whether or not the accused should give evidence. However, Howie J made it plain several times that he would not give any guidance about the relevant procedure, and would not decide whether or not he would grant a certificate, until the accused was asked a specific question and took an objection to it.

12 After counsel for the accused conferred with his client during a short adjournment, he said:

> "Just so that your Honour understands where things are likely to proceed from here on [in]: I will open to the jury. I will call [the accused]. In the very early stages of his evidence-in-chief I will ask him a question. He will decline to answer that on the grounds it might tend to incriminate him. Then I expect that your Honour would wish to hear either argument or perhaps further evidence in the absence of the jury before determining whether or not to issue a certificate under s 128."

Howie J indicated agreement to this course and said: "Let's proceed and see what happens."

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6 Below at [30]-[85].

13 *The accused's "objection".* What happened was that after the accused entered the witness box a little later he answered 33 questions put by his counsel. He was then asked two questions which he answered as follows:

> "Q. ... Some time after you re-established contact with Mr Diez, did he raise with you the possibility of involvement in some form of illegal activity?
>
> A. In February.
>
> Q. You may wish to preserve your legal rights here in answer to this question, Mr Cornwell. What did he say to you about the possibility of your involvement in some illegal activity?
>
> A. Well, I don't want to answer that on the grounds of it may incriminate me."

14 *Howie J's judgment of 5 May 2003.* After Howie J heard submissions from counsel (including counsel appearing for other defendants) he delivered a detailed judgment. First, he rejected the DPP's argument that testimony about what the Diez-Lawrence conversations revealed of the accused's involvement in selling drugs in Australia was evidence of a "fact in issue" within the meaning of s 128(8), that hence s 128 did not apply and that no certificate could be granted[7]. Secondly, Howie J indicated that he would require the accused, under s 128(5), to answer questions about selling drugs in Australia, and would grant him a certificate under s 128(6)[8]. He required the legal representatives of the accused to present a draft certificate within three weeks[9], but this was not done. He did not give, or cause to be given, any certificate to the accused in the course of the first trial.

15 *The outcome of the first trial.* On 23 June 2003 the jury convicted some of the defendants and acquitted others. However, the jury members were unable to agree on the charge against the accused and the charges against some of the other defendants.

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7 *R v Cornwell* [2003] NSWSC 660 at [5]-[17].

8 *R v Cornwell* [2003] NSWSC 660 at [18]-[27].

9 *R v Cornwell* [2004] NSWSC 45 at [4].

16 *The start of the second trial.* On 27 January 2004 a second trial began; the jury was empanelled on 16 February 2004. The charge against the accused was similar to the charge against him in the first trial in the sense that it related to the same part of s 233B and the same drugs. Apart from the accused, there were four other defendants. Additional unindicted co-conspirators were named.

17 In that trial the DPP contended that statements made by the accused in evidence at the first trial were admissible in the second despite Howie J's judgment of 5 May 2003. On 6 February 2004 Blackmore DCJ ruled that any s 128 certificate issued by the Supreme Court would apply to the proceedings before him, on the basis that the trial before him was a "proceeding" within the meaning of s 128(7) which was different from the proceeding involved in the first trial before Howie J.

18 *Howie J grants the s 128 certificate.* The difficulty that no certificate had actually been issued by the Supreme Court was then met by counsel for the accused making an application to Howie J for a certificate. On 11 February 2004 it was granted. Howie J did indicate a strong view about s 128(7) to the contrary of that expressed by Blackmore DCJ, but did not see that as a reason for refusing the certificate[10].

19 The certificate provided:

> "This Court certifies under section 128 of the *Evidence Act 1995* of New South Wales that evidence in these proceedings by Richard Bruce Cornwell
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> on 5 May 2003, 6 May 2003, 7 May 2003, 8 May 2003, 9 May 2003 and 12 May 2003 in relation to Richard Bruce Cornwell's involvement with Juan Guillermo Diez-Orozco, John Lawrence, and any other person in the supply or trafficking in narcotic goods between the 1st January and 10th August 2001
>
> is evidence to which section 128 (7) of that Act applies."

The Evidence Regulation 2000 (NSW), cl 7(1), provided that a certificate under s 128 might be in accordance with Form 1, and Form 1 provided for a transcript, or other record of the evidence, to be attached to the certificate. None was. However, counsel for the accused marked a copy of the transcript to indicate which portions were in his contention covered by the certificate.

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10 *R v Cornwell* [2004] NSWSC 45 at [11]-[13].

20 *Blackmore DCJ receives the accused's testimony about the Diez-Lawrence conversations.* The DPP had previously indicated to Blackmore DCJ that he wished to tender the whole of the accused's evidence in cross-examination from the first trial. On 12 February 2004 Blackmore DCJ made the crucial ruling of which the accused complains. He ruled that the Diez-Lawrence conversations "went to a fact in issue" in the trial before him and that s 128(8) precluded the accused from relying on the certificate to prevent the tender of evidence about those conversations. That is, he apparently declined to accept Howie J's ruling that s 128(8) did not apply to the accused's oral evidence about the Diez-Lawrence conversations and appeared to reach the conclusion that since s 128(8) was satisfied, s 128 as a whole did not apply[11]. If that were his reasoning, it would follow that the inhibition which Blackmore DCJ considered was otherwise created by s 128(7) on the use of the evidence against the accused did not exist. Blackmore DCJ rejected an argument that there was sufficient unfairness in the tender to outweigh the significant probative value of the evidence. The accused then requested that the Crown tender the whole of the accused's evidence at the first trial and not just the cross-examination. The Crown agreed to this course, and it was adopted. The accused did not give evidence at the second trial. On 8 June 2004 he was convicted. On 18 November 2004 he was sentenced.

21 *The appeals to the Court of Criminal Appeal.* In the meantime, on 24 February 2004 the DPP appealed to the Court of Criminal Appeal against Howie J's grant of the certificate. That appeal was eventually heard on 2 and 3 February 2006 at the same time as the accused's appeal against conviction.

22 The grounds of appeal relied on by the accused were:

> "1. The learned trial judge erred by admitting against the [accused] evidence which was the subject of a certificate issued pursuant to section 128 of the *Evidence Act*.
>
> 2. The learned trial judge erred by referring to the [accused's] former evidence as (a) an admission tendered against the interests of the accused and (b) 'a possible version of the facts'.
>
> 3. The learned trial judge erred by directing the jury that conversations involving the [accused] could be used against him if

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11 That was the Court of Criminal Appeal's view of what Blackmore DCJ did: *Cornwell v The Queen* (2006) 160 A Crim R 243 at 260 [84] and 261 [91].

the jury was satisfied on the balance of probabilities that the conversations related to the conspiracy.

4. The learned trial judge failed to adequately sum up the defence case.

5. The verdict is unreasonable and cannot be supported by the evidence.

6. The learned trial judge erred in refusing to grant the [accused] access to the information on oath deposed by Federal Agent ... on 27 February 2001."[12]

23 The Court of Criminal Appeal upheld ground 1, briefly rejected ground 5, discussed ground 4 but did not decide it, and did not decide grounds 2, 3 and 6. The Court declined to apply the proviso to s 6(1) of the *Criminal Appeal Act* 1912 (NSW). The Court ordered a new trial. The Court dismissed the Crown appeal in relation to the issue of the certificate.

The issues

24 Five issues emerged in the argument.

25 The first and fundamental issue is whether the accused's construction of s 128(8) of the NSW Act was correct.

26 The second issue is whether Blackmore DCJ was correct to treat the second trial as falling within s 128(7).

27 The third issue is whether it is competent for the DPP now to challenge the certificate granted by Howie J on 11 February 2004 and the ruling underlying that grant made on 5 May 2003.

28 The fourth issue is whether Blackmore DCJ erred in failing to exclude the evidence given by the accused before Howie J in his discretion on grounds of unfairness.

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12 A list of revised grounds stated by the Court of Criminal Appeal comprised only the first five grounds: *Cornwell v The Queen* (2006) 160 A Crim R 243 at 245 [1]. But on this appeal the DPP said without contradiction by counsel for the accused that ground 6 was a ground of appeal as well.

29 The fifth issue is whether the accused's application for special leave to cross-appeal should be granted and the cross-appeal allowed. This issue turns on the Court of Criminal Appeal's treatment of ground 5.

First issue: did s 128(8) apply to the accused's testimony at the first trial?

30 Before s 128 could operate, a key question posed by s 128(8) had to be answered. Was the accused's testimony at the first trial about the drug dealing in Australia "evidence" that he "did an act the doing of which is a fact in issue" or that he "had a state of mind the existence of which is a fact in issue"? On the accused's construction of s 128(8), the answer is "No" and the balance of s 128 was capable of applying. If the answer is "Yes", s 128 could not have applied, there would have been no power to "require" the accused to give the evidence pursuant to s 128(5), and there would have been no justification for causing the accused to be given a certificate under s 128(6). It would have been a matter for the accused and his counsel what questions were asked in chief, and the accused would have been obliged to answer any otherwise permissible questions in cross-examination.

31 The right answer to the question just posed is "Yes", because the accused's construction of s 128(8) is not correct. Section 128(8), in New South Wales and other jurisdictions in which it or identical provisions apply[13], is the successor to s 1(e) of the *Criminal Evidence Act* 1898 (UK) ("the 1898 Act") and its Australian equivalents. The affirmative answer to the question flows from the language of s 128(8) considered in the light of that earlier legislation and the Australian Law Reform Commission Reports which led to the enactment of s 128(8).

32 *Section 1(e) of the 1898 Act and its Australian equivalents.* At common law parties to legal proceedings were generally not competent witnesses: they could not testify, on their own behalf or otherwise, even if they wanted to. The nineteenth century justification for this rule was that the credibility of their evidence was tainted by their interest in the outcome, although other explanations for its earlier development have been suggested[14]. The legislature rejected this justification in relation to non-party witnesses in 1843, when s 1 of the *Law of*

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13 *Evidence Act* 1995 (Cth), s 128(8) (Federal Courts and Australian Capital Territory); *Evidence Act* 2001 (Tas), s 128(8); *Evidence Act* 2004 (Norfolk Island), s 128(8).

14 Allen, *The Law of Evidence in Victorian England*, (1997) at 96-97.

Evidence Act (UK) (*Lord Denman's Act*) abolished their incompetence on the grounds of interest. When the county courts were established in 1846, the parties were rendered competent: *County Courts Act* 1846 (UK), s 83. For civil cases generally the *Law of Evidence Amendment Act* 1851 (UK) abolished the common law rule of party incompetency and non-compellability (except as between husband and wife). That exception was greatly narrowed by the *Evidence Amendment Act* 1853 (UK), rendering spouses competent and compellable except in proceedings instituted in consequence of adultery. The last exception in turn was abolished by the *Evidence Further Amendment Act* 1869 (UK).

33 So much for party-witnesses in civil proceedings. What of the accused in criminal proceedings? It is well-known that in *Rationale of Judicial Evidence*, first published in 1827, Bentham opposed the rule rendering accused persons incompetent in their own defence. His preferred position – administration of compulsory questioning, coupled with a power in the court to infer guilt from failure to respond – has not prevailed in Australia. But his criticism of the common law rule of incompetence had some influence during the debate which led to its abolition. Speaking of the late nineteenth century, Windeyer J said[15]:

> "Proposals that accused persons should be permitted to give evidence on oath, and considerations of the qualifications that should be entailed upon the conferring of such a right, had been the subject of vigorous controversy in England ...".

That controversy had been going on from at least the mid-nineteenth century[16].

34 It was a debate in which the participants included leading statesmen with a legal background (for example, Robert Lowe and Sir William Harcourt); prominent former or future judges (for example, Lord Brougham, Lord Chief Baron Kelly, Sir James Fitzjames Stephen and Sir Richard Webster); lawyers of all kinds; and influential lay writers (for example, Charles Dickens). A key institutional participant was the Law Amendment Society: it was created by Lord Brougham in 1844, it produced a quarterly journal called *The Law Review*,

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15 *Bridge v The Queen* (1964) 118 CLR 600 at 613.

16 See Allen, *The Law of Evidence in Victorian England*, (1997) at 10-11 and 123-180. See also Bodansky, "The Abolition of the Party-Witness Disqualification: An Historical Survey", (1982) 70 *Kentucky Law Journal* 91 at 105-129; Parker, "The Prisoner in the Box – The Making of the Criminal Evidence Act, 1898" in Guy and Beale (eds), *Law and Social Change in British History*, (1984) at 156-175.

and it engaged in activities like conducting a survey of the County Court judges to obtain their views on the effects of the *County Courts Act* 1846 (UK) and conducting a survey of judges and Attorneys-General in the American States and Canadian provinces about the rendering of the accused competent[17]. Another leading participant in the debate was Pitt Taylor, who in 1848 published the first of the eight editions of his *Treatise on the Law of Evidence* to appear in his lifetime, who had drawn up a Bill, introduced unsuccessfully in 1845 by Lord Brougham, to enable parties and their spouses to give evidence in civil cases, who had drawn up the Report of the Common Law Committee of the Law Amendment Society which recommended the reform embodied in the *Law of Evidence Amendment Act* 1851 (UK), and who had prepared the first draft of that Act. Another influence on the debate came from John Appleton, a Justice of the Supreme Court of Maine from 1852 to 1862, and the Chief Justice from 1862 to 1883. From 1829 he wrote articles strongly affected by Bentham, not only in thought[18]. He advocated the grant of competency to parties in civil suits (which was achieved in Maine in 1856). From 1835, he also advocated the grant to defendants in criminal trials of the right to testify on their own behalf[19], and this campaign led to Maine becoming the first common law jurisdiction to enact permanent[20] legislation to this effect, first in relation to certain lesser offences in 1859 and then generally in 1864[21]. Other States and Territories followed suit[22].

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17 Goodeve, "The Examination of Accused Persons", (1876) 1 *Law Magazine and Review* (4th Series) 630. See also Cairns, *Advocacy and the Making of the Adversarial Criminal Trial 1800-1865*, (1998) at 166-167.

18 They were collected in *The Rules of Evidence Stated and Discussed*, (1860), a work in the style of Bentham.

19 *The Rules of Evidence Stated and Discussed*, (1860), ch vii, first published as "Rules of Evidence. No. 6. Of the Admission of Parties as Witnesses in Criminal Procedure", (1835) 13 *American Jurist and Law Magazine* 46.

20 Connecticut had preceded Maine in 1848, but the common law position was restored in 1849. Opinions differ on whether the provision in 1848 was enacted inadvertently (Gold, *The Shaping of Nineteenth-Century Law: John Appleton and Responsible Individualism*, (1990) at 61 and 187 n 15), or whether it was enacted deliberately but was then thought to work badly (Fisher, "The Jury's Rise as Lie Detector", (1997) 107 *Yale Law Journal* 575 at 665 n 425.

21 Gold, *The Shaping of Nineteenth-Century Law: John Appleton and Responsible Individualism*, (1990) at 61.

A letter from Appleton CJ to the Massachusetts Committee on the Judiciary advocating that the accused be made competent was published in England in 1866[23].

35 Those in the United Kingdom who were opposed to the accused's testimonial incompetence faced considerable difficulties. Those difficulties are illustrated by the fact that although in the four decades preceding its general abolition by the 1898 Act there were numerous Private Member's Bills seeking to achieve that result, and that in the two decades before 1898 both Liberal and Conservative administrations introduced numerous Bills seeking to achieve it, these Bills persistently failed. And they failed even though in many self-governing Colonies in the Empire equivalent Bills were enacted without fuss.

36 The difficulties did not lie merely in the task of persuading adherents to the status quo to change their minds. They also arose from the fact that any legislative decision to make accused persons competent but not compellable raised other questions. Should the accused's evidence be given on oath or not? What could be said to the jury about, or inferred from, the accused's decision not to testify? To what extent could the accused be cross-examined on matters of credit? And, most relevantly for present purposes, to what extent could the accused be cross-examined on matters relevant to the charge apart from credit?[24]

37 Once the 1898 Act was enacted, Australian legislation was introduced to adopt, or altered to conform to, the model of that enactment. The model stood in the United Kingdom for over 100 years and in four Australian jurisdictions for nearly 100 years. Indeed in five of them it still stands. The accused's construction of s 128(8) rests on the conclusion that that model, particularly in relation to cross-examination of the accused on issues bearing on guilt other than credit and character, has been abandoned. That is not a conclusion lightly to be reached.

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22 By the end of the nineteenth century every State but Georgia had done so: see *Ferguson v Georgia* 365 US 570 at 577 n 6 (1961).

23 Anon, "Testimony of Parties in Criminal Cases", (1866) 21 *Law Magazine and Law Review* 339 at 342-347.

24 This is the issue underlying s 128(8) and its precursors. The terms of s 1(e) of the 1898 Act are set out at [54]. Some of the provisions of Bills unsuccessfully introduced before 1898 which correspond with s 1(e) are set out below at fn 40 and 41.

38 Developments in the United Kingdom may be surveyed chronologically as follows. A partial breach in the common law rule rendering accused persons incompetent in criminal cases was effected by the *Summary Jurisdiction Act* 1848 (UK): s 14 permitted the defendant to give evidence on the hearing of an information or complaint under that Act. With a view to achieving the general abolition of the common law rule, Lord Brougham introduced Bills into the House of Lords in 1858, 1859 and 1860, but without success. In 1861, Pitt Taylor read a paper to the Law Amendment Society advocating abandonment of the common law incapacity of the accused to testify, which was thereafter published[25]. In 1865, Vincent Scully[26] introduced a Bill for abolition, as did Sir Fitzroy Kelly[27], both again without success.

39 Although these and later attempts at general abolition did not succeed in England until 1898, more piecemeal changes began to be made from 1867. The legislature frequently followed the practice, when it created a new criminal offence, of also providing that persons charged with that offence were competent witnesses in relation to it[28]. This approach solved particular difficulties, but also

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25 "On the Expediency of passing an Act to permit Defendants in Criminal Courts, and their Wives or Husbands, to testify on Oath", (1861) 5 *The Solicitors' Journal and Reporter* 363 at 363-364, 383-385.

26 A Queen's Counsel who was the Liberal Member for Cork.

27 The former Attorney-General and Solicitor-General, a Conservative, shortly to be appointed Lord Chief Baron.

28 The following are examples. The *Master and Servant Act* 1867 (UK), s 16, rendered parties to a contract of service and their spouses competent witnesses on the hearing of an information or complaint brought under it. Section 51(4) of the *Licensing Act* 1872 (UK) provided that in summary proceedings for offences under the Act the defendant and his wife were competent to give evidence. Section 11 of the *Conspiracy, and Protection of Property Act* 1875 (UK) provided that on the hearing of any indictment or information for the offences relating to breaches of contract created by ss 4-6 the parties to the contract and their spouses were competent to give evidence. The *Explosives Act* 1875 (UK), s 87, in certain circumstances made defendants to charges brought under the Act competent witnesses. The *Merchant Shipping Act* 1876 (UK), s 4, made a defendant charged with knowingly taking, sending, or attempting to send an unseaworthy ship to sea a competent witness. The *Evidence Act* 1877 (UK), s 1, made defendants to indictments relating to certain public nuisances and related crimes competent where

(Footnote continues on next page)

necessarily "created numberless anomalies"[29], as the Earl of Halsbury LC, moving the second reading of the Criminal Evidence Bill 1898 in the House of Lords, was able to point out with considerable effect[30].

40 In 1876, 1877 and 1878, Evelyn Ashley[31] introduced Bills seeking general abolition of incompetence. During the debate on the second reading of the 1878 Bill, Sir John Holker, Conservative Attorney-General, announced that the Law Officers intended to introduce draft legislation including a code of criminal

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the proceedings were instituted for the purpose of trying a civil right. The *Corrupt and Illegal Practices Prevention Act* 1883 (UK) made the accused competent in any prosecution for any offence under the Act. The *Criminal Law Amendment Act* 1885 (UK), s 20, made defendants and their spouses competent witnesses in relation to offences under the Act and other sexual offences. The *Merchandise Marks Act* 1887 (UK), s 10, made defendants and their spouses competent in relation to any offence under the Act. The *Coal Mines Regulation Act* 1887 (UK), s 62(ii), provided that any person charged with an offence under the Act was competent. The *Prevention of Cruelty to, and Protection of, Children Act* 1889 (UK), s 7, rendered defendants and their spouses competent witnesses. The *Betting and Loans (Infants) Act* 1892 (UK), s 6, made defendants charged with any offence under the Act and their spouses competent. Similar legislation existed in relation to various summary offences: see Stephen, *A Digest of the Law of Evidence*, (1893) at 125. Sir Richard Webster, when as Attorney-General he moved the second reading of the Criminal Evidence Bill in the House of Commons, estimated that 26 of those Acts had been passed since 1873: United Kingdom, House of Commons, *Parliamentary Debates*, 4th series, vol 56 at 978 (25 April 1898).

29 Glanville Williams, *The Proof of Guilt: A Study of the English Criminal Trial*, 3rd ed (1963) at 46.

30 United Kingdom, House of Lords, *Parliamentary Debates*, 4th series, vol 54 at 1171-1172 (10 March 1898). See also Lord Herschell at 1176-1178 and the Attorney-General, Sir Richard Webster, moving the second reading of the Bill in the House of Commons: United Kingdom, House of Commons, *Parliamentary Debates*, 4th series, vol 56 at 977 (25 April 1898).

31 A barrister and Liberal; a son of the great Shaftesbury; private secretary to and biographer of Palmerston. By a curious coincidence the political career of this prominent Parliamentary advocate of competence for the accused was terminated in 1885 by his defeat in the Isle of Wight at the hands of his main successor in that role, Sir Richard Webster, particularly as Attorney-General in Salisbury's first three administrations.

procedure for indictable offences which would have a similar effect to Ashley's proposals.

41 What Sir John Holker had in mind was cl 368 of a code drafted by Sir James Fitzjames Stephen. That provided for the accused to make an unsworn statement at the end of a prosecution case or to be examined in chief without being sworn. Cross-examination was to be confined to "the matter in issue *and matters relevant thereto*, and shall not be directed to matters affecting the defendant's credit or character"[32]. A Royal Commission (of which the members were, apart from Stephen, Lord Blackburn, Lord Justice Lush and Mr Justice Barry) revised Stephen's code, and cl 523 of the draft code annexed to their Report corresponded with cl 368[33]. Clause 523 provided:

> "Every one accused of any indictable offence shall be a competent witness for himself or herself upon his or her trial for such offence, and the wife or husband as the case may be of every such accused person shall be a competent witness for him or her upon such trial: *Provided that no such person shall be liable to be called as a witness by the prosecutor, but every such witness called and giving evidence on behalf of the accused shall be liable to be cross-examined like any other witness on any matter though not arising out of his examination-in-chief*: Provided that so far as the cross-examination relates to the credit of the accused, the court may limit such cross-examination to such extent as it thinks proper, although the proposed cross-examination might be permissible in the case of any other witness." (emphasis added)

The Report[34] said of cl 523:

> "As regards the policy of a change in the law so important, we are divided in opinion. The considerations in favour of and against the change have been frequently discussed and are well known. On the whole we are of opinion that, if the accused is to be admitted to give evidence on his own

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32 See Criminal Code (Indictable Offences) Bill 1878 (Bill 178) in *House of Commons Parliamentary Papers*, (1878), vol 2 at 5 (emphasis added).

33 United Kingdom, *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences*, (1879) [C 2345].

34 United Kingdom, *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences*, (1879) [C 2345] at 37.

behalf, he should do so on the same conditions as other witnesses, subject to some special protection in regard to cross-examination."

42 The Bill proposed by the Commission was discussed in the House of Commons in 1879, but the government decided it was not possible to proceed with it in that session. Another Bill[35], containing in cl 471 a provision equivalent to cl 523, was read a second time in 1880, but was not proceeded with[36].

43 In the same year, 1880, a Private Member's Bill for a criminal code – the Criminal Code (No 2) Bill – was introduced into the House of Commons. If that Bill had been enacted, accused persons would have become competent (cl 337) to give unsworn evidence (cl 341) and be questioned about it in the same way as ordinary witnesses, save that accused persons were not to be asked "any question with a view to impeaching [their] credit generally", and the questions which were asked were to be "such only as are reasonably calculated to elicit the whole knowledge of the accused in relation to the particular offence then being tried" (cl 341)[37].

44 In 1882 a further Private Member's Bill – the Criminal Law Amendment Bill – contained cl 106, which was identical with cl 523 of the 1879 Bill[38]. The Liberal Attorney-General, Sir Henry James, while favouring the Bill, argued that the responsibility for so great a change in the law had to rest with the government. The Bill was dropped. But, faithful to what Sir Henry had said, in 1883 the government introduced the Criminal Code (Indictable Offences Procedure) Bill, cl 100 of which corresponded with cl 106 of the 1882 Bill[39]. Eventually the 1883 Bill was dropped in committee: this was apparently the result of its size, complexity and importance, and the employment of delaying tactics by Irish Nationalist members. Indeed the 1898 Act itself might never have been enacted if it had not been limited to the narrow issues of rendering accused and their spouses competent and if it had not contained s 7(1), which provided that it did not extend to Ireland.

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35 Criminal Code Bill (Bill 2) in *House of Commons Parliamentary Papers*, (1880), vol 2 at 1.

36 For the reasons, see *Darkan v The Queen* (2006) 80 ALJR 1250 at 1259 [36] per Gleeson CJ, Gummow, Heydon and Crennan JJ; 228 ALR 334 at 343.

37 Bill 47 in *House of Commons Parliamentary Papers*, (1880), vol 2 at 223.

38 Bill 15 in *House of Commons Parliamentary Papers*, (1882), vol 2 at 1.

39 Bill 8 in *House of Commons Parliamentary Papers*, (1883), vol 2 at 249.

45 In 1884 Lord Bramwell presented a very short Bill to render the accused competent[40]. It passed the House of Lords, but not the House of Commons. In 1885 a very short government Bill of the same kind was introduced into the House of Commons without success[41]. Further Bills were introduced in 1886 and 1887. In 1888 the government introduced another Bill which was similar in some respects to Lord Bramwell's in 1884[42]. It failed by reason of delays caused by the opposition of Irish members. Yet further Bills were introduced without success in 1889 and 1891.

46 In 1892, 1893 and 1894 more Bills passed the House of Lords but the session ended before they could be considered by the House of Commons. In the next three years yet more Bills were introduced without success. Then, against an immediate background of public controversy on the issue in the newspapers, in other journals and in pamphlets, the 1898 Act was enacted. In the House of Lords debate on the motion that the Bill be read a second time, aggressively moved by the Earl of Halsbury LC, his political opponent, Lord Herschell, delivered a passionate speech supporting the Lord Chancellor's remarks. The tone of these two speeches can be understood in the light of a remark by the First Lord of the Treasury, A J Balfour, in his most weary style, after more than eight hours' debate in the House of Commons on the motion of the Attorney-General, Sir Richard Webster, that the Bill be read a second time[43]:

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40 Bill 9 in *House of Lords Sessional Papers*, (1884), vol 4 at 39. Section 4 provided that an accused who testified had no right "to refuse to answer any question on the ground that it would tend to criminate him or her as to the offence charged, unless the court ... shall think fit."

41 Bill 65 in *House of Commons Parliamentary Papers*, (1884-1885), vol 2 at 363. Proviso (c) to cl 2 was in these terms:

> "A person called as a witness in pursuance of this Act shall not be asked, and, if asked, shall not be required to answer, any questions tending to show that any defendant has committed or been convicted of any offence other than that wherewith he is then charged, unless the proof that the defendant has committed such other offence is admissible evidence to show, that such defendant is guilty of the offence wherewith he is then charged, or unless such defendant has given evidence of good character."

42 Bill 132 in *House of Commons Parliamentary Papers*, (1888), (132), vol 2 at 407.

43 United Kingdom, House of Commons, *Parliamentary Debates*, 4th series, vol 56 (25 April 1898) at 1075-1076.

> "I beg to make an appeal to the House to bring this interesting and important Debate to a conclusion. I would remind the House that the principle of the Bill, which, after all, is the one thing we are discussing tonight, has been decided eight times in the House of Lords, in which even those most opposed to that House will admit that legal talent is very strongly represented, and four times in the House of Commons. A Bill which has passed a Second Reading four times in the House of Commons in different Houses, with different majorities predominating, and under varying circumstances, is surely one which we may to-night pass after the full and important discussion which has taken place."

Although there was no substantial opposition in the House of Lords and no division, there was much opposition in the House of Commons; however, 233 members voted for a second reading and only 80 against. Many leading lawyers apart from the Attorney-General were present. A future Lord Chancellor (Sir Robert Reid) spoke, as did Sir Edward Clarke, Edward Carson, the future Mr Justice Bucknill and the future Mr Justice Evans. Among those who did not speak but voted were the future Lord Atkinson, a future Master of the Rolls (H H Cozens-Hardy), two future Lord Chancellors (Sir Robert Finlay and R B Haldane), and one who was offered the Lord Chancellorship but declined it (H H Asquith).

47 For present purposes, the principal interest of the House of Commons speeches lies in three aspects.

48 The first is the demonstration by opponents of the Bill that there were distinguished lawyers who preferred other solutions to the problems with which it dealt.

49 The second is the references made to the success which the grant of testimonial competence to accused persons had enjoyed in "practically all the States of America ... all our self-governing Colonies, and ... a great many of our Crown Colonies ..."[44]. The American States were dealt with above[45]. Among the

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44 United Kingdom, House of Commons, *Parliamentary Debates*, 4th series, vol 56 at 978 (25 April 1898) (Sir Richard Webster) and 1006 (Sir Robert Reid). See also United Kingdom, House of Commons, *Parliamentary Debates*, 4th series, vol 54 at 1176 (10 March 1898) (Earl of Halsbury LC). Cf United Kingdom, House of Commons, *Parliamentary Debates*, 4th series, vol 56 at 1016-1017 (25 April 1898) (A Lyttelton) and 1017 (T M Healy).

Australian Colonies, competence was granted in South Australia in 1882[46], New South Wales in 1891[47], Victoria in 1891[48] and Queensland in 1892[49]. In Tasmania competence was conferred in summary proceedings in 1888[50]. In New Zealand the accused was made competent in 1889[51]. In the Cape Colony testimonial competence was granted in 1886[52]. In Canada it was granted in 1893[53].

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45 Above at [34].

46 *Accused Persons Evidence Act* 1882 (SA), ss 1 and 5. "[N]o presumption of guilt" was to "be made from" the accused's election not to give evidence (s 1). Section 5 provided: "Any person so giving evidence shall be liable to be cross-examined as in the case of any other witness, and shall not be excused from answering any question on the ground that the answer may tend to criminate himself ...".

47 *Criminal Law Evidence Amendment Act* 1891 (NSW) (in relation to indictable offences). Section 6 provided that an accused person giving evidence was not "to be questioned on cross-examination without the leave of the Judge as to his or her previous character or antecedents". It was replaced by s 7 of the *Evidence Act* 1898 (NSW).

48 *Crimes Act* 1891 (Vic). Section 34(3) provided: "A person called as a witness in pursuance of this section shall not be asked, and if asked shall not be required to answer, either on examination cross-examination or re-examination any question not relevant to the particular offence with which he is charged unless such person has given evidence of good character."

49 *Criminal Law Amendment Act* 1892 (Qld). Section 3 provided in part: " ... Nothing in this section shall render any person compellable to answer any question tending to criminate himself or herself with respect to any matter other than the offence for which he or she is being tried, and on the trial of which he or she tenders himself or herself as a witness."

50 *An Act to further amend the Law of Evidence* 1888 (Tas), s 1.

51 *Criminal Evidence Act* 1889 (NZ).

52 *Administration of Justice Act* 1886: see Hoffmann, *The South African Law of Evidence*, 2nd ed (1970) at 58.

53 *Canada Evidence Act* 1893: see Noble, "The Struggle to Make the Accused Competent in England and in Canada", (1970) 8 *Osgoode Hall Law Journal* 249.

50 The third point of interest in the Second Reading speeches lies in their rehearsal of the many arguments put against the grant of competence to the accused in the course of the previous half century. These arguments divided the legal profession, they divided each major political party, and individual lawyers changed their minds on the issues from time to time as particular arguments were pressed. They will now briefly be noted – not with a view to debating their force, but merely to underline the seriousness and significance of the resolution arrived at in the 1898 Act.

51 The principal arguments for conferring general competence on accused persons were as follows. First, it would reduce the risk of a miscarriage of justice by creating a new avenue by which innocent accused persons could negate guilt, particularly if they were unrepresented. Secondly, the goal of the trial was to discover the truth, and to grant competence removed one obstacle to the achievement of that goal: it increased the chance not only of acquitting the innocent but of convicting the guilty. Thirdly, the creation of limited grants of competence for particular offences in the last third of the nineteenth century had resulted in many anomalies. It was also anomalous in principle that the legislative decision to render admissible the evidence of the parties in civil cases, despite their interest in the outcome, had not been matched by the same change in criminal cases. Hence it was argued that to render accused persons competent was merely to extend a natural and existing trend in the law. Finally, the grant of competence in the United States and many parts of the Empire had not caused any difficulty; nor had the grant of competence in relation to particular newly created statutory offences.

52 The principal arguments against conferring general competence on accused persons were as follows. First, the difficulties in which many accused persons found themselves meant that they would be presented with an irresistible temptation to commit perjury. The grant of competence would enable oppression by skilful counsel of ignorant accused persons. Since it would be difficult to prevent the jury from drawing adverse inferences from silence, the change would have the effect of compelling accused persons to testify and would create, in practice, an alteration in the standard and burden of proof. It would generate the conviction of the innocent. It would assimilate English legal procedure to French, which was thought to operate unfairly to the accused, and would lead to unseemly wrangling between judge and accused. It would prejudice the impartiality both of prosecution counsel and the judge. The Bill's attempt to control the introduction of the accused's record was inadequate.

53 These were arguments about what were seen as fundamentally important issues. The competing arguments were put with varying degrees of emphasis and

detail in different combinations. Equally complex attempts were made to refute or qualify them. The point is that the legislature reacted to these arguments, after many years in which numerous possibilities had been put forward in Bills presented but not enacted, by enacting a particular compromise or accommodation which was thought correct. Few legislative changes have been more closely examined, or by more experienced observers.

54 Apart from its conferral of testimonial competence on accused persons and their spouses, the key relevant parts of the 1898 Act, s 1, for present purposes are as follows:

> "(e) A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged:
>
> (f) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless –
>
> (i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or
>
> (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or
>
> (iii) he has given evidence against any other person charged with the same offence ...".

55 After the 1898 Act had been enacted, the Australian position came to assume very similar form in legislation rendering accused persons competent to testify in their own defence. First, through provisions similar to s 1(e) of the 1898 Act, accused persons could be asked any question in cross-examination notwithstanding that it would tend to criminate them of the offence charged[54].

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54 For Victoria, see *Crimes Act* 1891, s 34(3); *Crimes Act* 1915, s 432(3); *Crimes Act* 1928, s 432(d); *Crimes Act* 1957, s 399(d); *Crimes Act* 1958, s 399(4). For

(Footnote continues on next page)

Secondly, in jurisdictions other than New South Wales (and, before 1971, the Australian Capital Territory) a regime generally similar to s 1(f) of the 1898 Act was expressly adopted[55]. Only in New South Wales before 1974 (and the Australian Capital Territory before 1971) was the position less clear. Section 407 of the *Crimes Act* 1900 (NSW) (also in force in the Australian Capital

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Queensland, see *Criminal Law Amendment Act* 1892, s 3, replaced in 1961 by s 618A of the *Criminal Code*, (inserted by the *Criminal Code and Other Acts Amendment Act* 1961, s 31), and continued by s 15(1) of the *Evidence Act* 1977. For South Australia, see *Accused Persons Evidence Act* 1882, s 5, replaced by *Evidence Amendment Act* 1925, s 12(d) and *Evidence Act* 1929, s 18(v). For Tasmania, see *Evidence Act* 1910, s 85(1)(iv). For Western Australia, see *Criminal Evidence Act* 1899, s 3(e), and *Evidence Act* 1906, s 8(1)(d). For the Australian Capital Territory, between 1971 and the enactment of the *Evidence Act* 1995 (Cth), see *Evidence Ordinance* 1971, s 69; *Evidence Act* 1971, s 69. In New South Wales, the same position held by implication until enactment of the NSW Act in 1995: *Crimes Act* 1900 (NSW), s 407(1)(b). Thus Gobbo (ed), *Cross on Evidence*, 1st Aust ed (1970) at 291 n 38 said that the loss of the privilege against self-incrimination was "implicit" in s 407(1)(b). It has held in the Northern Territory since 1939: *Evidence Ordinances* 1939, s 9(7); *Evidence Act*, s 9(7). While the legislation in New South Wales, Queensland, the Australian Capital Territory and the Northern Territory did not use the actual word "cross-examination", the Queensland and Australian Capital Territory legislation is to be construed as if it did, and the same outcome must be "implicit" in the New South Wales and Northern Territory legislation.

55 Adoption took place in the following order. In Western Australia it took place in 1899 by the *Criminal Evidence Act*, s 3(f), and continued in the *Evidence Act* 1906, s 8(1)(e). In Tasmania adoption took place by the *Evidence Act* 1910, s 85(1)(v): see now *Evidence Act* 2001, s 104. For Victoria, see *Crimes Act* 1915 (No 2), introducing s 432(5) of the *Crimes Act* 1915, and continued as *Crimes Act* 1928, s 432(e), *Crimes Act* 1957, s 399(e) and *Crimes Act* 1958, s 399(5). In South Australia adoption took place in 1925 in s 12 of the *Evidence Amendment Act*, and has continued under the *Evidence Act* 1929, s 18. In the Northern Territory adoption took place in the *Evidence Ordinances* 1939, s 9(7), and continued in the *Evidence Act*, s 9(7). In Queensland adoption took place in 1961 with the insertion of s 618A into the *Criminal Code* by the *Criminal Code and Other Acts Amendment Act* 1961, s 31, and continued in substance in s 15(2) of the *Evidence Act* 1977. Adoption existed in the Australian Capital Territory between 1971 and 1995: *Evidence Ordinance* 1971, s 70; *Evidence Act* 1971, s 70.

Territory until 1971)[56] provided that although accused persons were rendered competent, no person charged with an indictable offence was liable "to be questioned on cross-examination as to his previous character or antecedents, without the leave of the Judge". Before the enactment of ss 413A and 413B of the *Crimes Act* in 1974, which introduced a modification of the 1898 Act model, the New South Wales Court of Criminal Appeal held that the same principles were to be applied in New South Wales as had been enacted in the United Kingdom and Victorian legislation[57].

56 Thus the Australian jurisdictions which had conferred competence on the accused before 1898 tended to alter their legislation so as substantially to mirror the 1898 Act. The Australian jurisdictions which had not conferred competence on the accused by 1898 thereafter adopted the approach of the 1898 Act when they did so.

57 The language of the equivalents to s 1(e) of the 1898 Act did not support the view that their application turned on any distinction between "facts in issue" and "facts relevant to facts in issue". Nor did any decision on that language. In discussing the general law of evidence that distinction is sometimes drawn. It is the distinction between the facts in issue, which are to be identified by reference to the substantive law and anything which defines the issues, like pleadings or a plea of "not guilty", and matters of fact from which inferences going to the existence or non-existence of facts in issue may be drawn. Facts relevant to facts in issue are often called "circumstantial evidence". The distinction between facts in issue and facts relevant to facts in issue is not material to any specific rule of the law of evidence at common law, save for such exceptional instances as the standard of proof of circumstantial evidence in criminal cases[58], and, in some cases, jury directions on circumstantial evidence.

58 It can be seen, then, that the problems raised by granting to the defendant the right to testify in criminal cases were serious and controversial; that the grant

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56 Section 407 of the *Crimes Act* 1900 (NSW) was one of the laws in force in the Australian Capital Territory immediately before 1 January 1911, and therefore continued in force pursuant to the *Seat of Government Acceptance Act* 1909 (Cth), s 6. Section 407 ceased to apply in the Territory from 1971: Crimes Ordinance, 1971 (ACT), s 8.

57 *R v Woods* (1955) 56 SR (NSW) 142 at 145.

58 *Shepherd v The Queen* (1990) 170 CLR 573.

had been opposed for a long time on many grounds; and that even experienced lawyers who favoured the grant of competence came up with radically different solutions to the problems which conferral created. Notwithstanding these disagreements, the Australian legislatures achieved unanimity on the proposition that the defendant's privilege against self-incrimination was abolished so far as matters of fact tending to criminate the accused as to the crime charged were concerned. In these circumstances it is highly unlikely that the enactment of s 128(8) of the NSW Act in 1995, and the corresponding Commonwealth legislation, the *Evidence Act* 1995 (Cth) ("the Commonwealth Act"), would have had the effect of changing the law by the introduction of a distinction, not specifically referred to in the statutory language, between self-incrimination as to facts in issue and self-incrimination as to facts relevant to facts in issue, unless clear language were employed. There is no suggestion in reports prepared by the Australian Law Reform Commission or the New South Wales Law Reform Commission that any such change was intended. There is no such suggestion in the Second Reading Speeches. And the indications in the legislation itself relied on by Howie J and by the accused's submissions are insufficient to suggest that it effected so radical a change in the law as that which is involved in the accused's construction of s 128(8).

59 *The Australian Law Reform Commission.* The Australian Law Reform Commission published two reports on evidence – an Interim Report ("ALRC 26") in 1985 and a Report ("ALRC 38") in 1987. The latter took account of comments made by the public on the former. Both were tabled in the Parliament of the Commonwealth – the former on 21 August 1985 and the latter on 5 June 1987. In consequence, by reason of s 3(3) of the NSW Act, they may be used in the interpretation of s 128(8).

60 In ALRC 26 the Commission perceived difficulties in what is known as the second limb of s 1(f)(ii) of the Australian equivalents to the 1898 Act – the rule permitting the character of an accused person to be attacked in cross-examination where that accused person has attacked prosecution witnesses[59]. Its proposal for changes in the law in relation to this particular rule has resulted in s 104(4)(b) of the NSW Act. The equivalent in the NSW Act to the first limb of s 1(f)(ii) is s 104(4)(a). Corresponding to s 1(f)(i) are ss 97, 98 and 112. The equivalent to s 1(f)(iii) is s 104(6).

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59 Australian Law Reform Commission, *Evidence*, Interim Report No 26, (1985), vol 1 at [411].

61 In oral argument counsel for the accused correctly conceded that the only provision in the NSW Act corresponding to the equivalents to s 1(e) of the 1898 Act is s 128(8). ALRC 26 did not discuss any difficulties arising out of the equivalents to s 1(e) of the 1898 Act. The origins of s 128(8) lay in the Commission's treatment of the privilege against self-incrimination. The Commission thought that anachronistic aspects of the privilege should be removed, such as the common law rule that the privilege could be claimed where there is a risk of forfeiture[60]. The result of that approach is seen in s 128(1) of the NSW Act. The Commission also considered that although the privilege against self-incrimination served useful purposes, it was capable of injuring the interests of the State in that it was capable of restricting unduly the body of evidence available to the trier of fact[61]. It found an alternative solution in what it called "a modified version of the ACT certification approach"[62]. That was a reference to s 57 of the Evidence Ordinance 1971 (ACT), now repealed, which provided in part:

> "(2) Where, in a proceeding, a person called as a witness or required to answer an interrogatory declines to answer a question or interrogatory under the last preceding sub-section, the court may, if it is satisfied that, in the interests of justice, the person should be compelled to answer the question or interrogatory, inform the person –
>
> (a) that, if he answers the question or interrogatory and all other questions or interrogatories that may be put to him, the court will give him a certificate under this section; and
>
> (b) of the effect of such a certificate.
>
> (3) Where, in relation to a proceeding, a person has been informed by the court of the matters referred to in paragraphs (a) and (b) of the last preceding sub-section, that person is not thereafter entitled to refuse to answer a question or interrogatory put to him in that proceeding.

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60 Australian Law Reform Commission, *Evidence*, Interim Report No 26, (1985), vol 1 at [464], [852]-[862].

61 Australian Law Reform Commission, *Evidence*, Interim Report No 26, (1985), vol 1 at [853]-[854].

62 Australian Law Reform Commission, *Evidence*, Interim Report No 26, (1985), vol 1 at [861].

> (4) Where, after being informed by the court of the matters referred to in paragraphs (a) and (b) of sub-section (2) of this section, a person answers all questions and interrogatories put to him in the proceeding, the court shall give to the person a certificate that his evidence in the proceeding was given under this section.
>
> (5) Where a person is given a certificate under this section, a statement made by the person in answer to a question or interrogatory put to him in the proceeding in which that certificate was given to him is not admissible in evidence against the person in criminal proceedings other than proceedings for an offence arising out of falsity of the statement."

Similar but not identical provisions were introduced in Western Australia in 1906[63], Tasmania in 1910[64] and Queensland in 1997[65].

62 The element of "modification" to which the Commission referred was a conferral on the witness of an option whether or not to accept the certificate. It was thought that that would increase the amount of evidence admitted without destroying the advantages conferred on witnesses by the privilege against self-incrimination. That view was adopted in cl 104 of the draft Bill annexed to ALRC 26 and cl 110 of the draft Bill annexed to ALRC 38. The present form of s 128, under which the witness has an option not to give the evidence under s 128(2) but a duty to give it under s 128(5), developed after 1987.

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63 *Evidence Act* 1906 (WA), ss 11-13 and 24.

64 *Evidence Act* 1910 (Tas), ss 87-89.

65 *Criminal Code* (Qld), s 644A, inserted by the *Criminal Law Amendment Act* 1997 (Qld), s 117. In a rather different field, namely, the compelling of witnesses before commissions or boards of examiners not deciding adversarial litigation, a similar idea was introduced into the *Royal Commissions Act* 1902 (Cth) when in 1912 it was amended by inserting s 6DD:

> "A statement or disclosure made by any witness in answer to any question put to him by a Royal Commission or any of the Commissioners shall not (except in proceedings for an offence against this Act) be admissible in evidence against him in any civil or criminal proceedings in any Commonwealth or State Court or any Court of any Territory of the Commonwealth".

63 In neither ALRC 26 nor ALRC 38 does the discussion by the Commission give any support to the accused's construction of s 128(8)[66]. The only two references to the equivalents to s 1(e) of the 1898 Act in ALRC 26 expressed no dissatisfaction with them. The only aspect which is discussed in the first reference[67] is the relationship of each of them with the corresponding equivalent to s 1(f). The other reference[68] merely summarises what the equivalents say, using the words "would tend to incriminate him as to the crime charged". There is no reference in ALRC 38 to the equivalents to s 1(e).

64 Counsel for the accused, however, submitted that the accused's construction was supported by one part of ALRC 38 (although Howie J did not rely on it). The part in question was the last four sentences of a passage directed to cl 104(5) of the draft Bill annexed to ALRC 26, which was in the following terms[69]:

> "The preceding provisions of this section do not apply in relation to evidence given by a party that tends to prove that the party did an act the doing of which is a fact in issue in the proceeding."

The passage containing the sentences on which counsel for the accused relied is as follows[70]:

Like techniques are common: *Evidence Act* 1958 (Vic), s 30; *Trade Practices Act* 1974 (Cth), ss 155(7) and 159; *Corporations Act* 2001 (Cth), s 597(12) and (12A).

66 Australian Law Reform Commission, *Evidence*, Interim Report No 26, (1985), vol 1 at [852]-[862]; Australian Law Reform Commission, *Evidence*, Interim Report No 26, (1985), vol 2 at App C, [207]-[229]; Australian Law Reform Commission, *Evidence*, Report No 38, (1987), at [214]-[217].

67 Australian Law Reform Commission, *Evidence*, Interim Report No 26, (1985), vol 2 at App C, [187].

68 Australian Law Reform Commission, *Evidence*, Interim Report No 26, (1985), vol 2 at App C, [209].

69 Australian Law Reform Commission, *Evidence*, Interim Report No 26, (1985), vol 2 at App A, 52.

70 Australian Law Reform Commission, *Evidence*, Report No 38, (1987) at [217(a)]; (two footnotes are omitted and two added).

> "*Privilege claimed by a party.* The interim proposals [ie cl 104(5)] provided that the privilege was not available in relation to evidence given by a party that tended to prove that the party did an act the doing of which is a fact in issue in the proceedings. This reflects the law for criminal trials in most jurisdictions where a provision applies to the effect that a person charged and being a witness may be asked any question in cross-examination notwithstanding that it would tend to incriminate that person as to the offence charged.[71] The proposal, in its application to civil trials, went further than existing law. In civil trials, it appears that a party who gives evidence as a witness can claim the privilege in relation to questions directed to the facts in issue. The interim proposal treated all party witnesses in the same way, whether the accused in a criminal trial or a plaintiff/defendant in a civil trial, on the basis that, where a party chooses to give evidence, he or she should have to give complete evidence about matters directly in issue. The accused and civil parties are not, however, in the same position. If the accused has to answer questions about facts relevant to the charges, the answers will not generally expose the accused to the risk of further criminal proceedings. The contrary applies to parties giving evidence in civil proceedings – their answers could be used in subsequent criminal proceedings. The clause[72] should be limited to the accused."

65 The submission of counsel for the accused in relation to the last four sentences of that passage, which he put orally but not in writing, was:

> "[I]f you take the converse of that, what it means is that the rationale is that you do not need to protect the accused in relation to facts in issue because they are protected by the charge, but if there are uncharged acts, they are not protected by the charge. That is an explanation for the

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71 This refers to the Australian equivalents to s 1(e) of the 1898 Act.

72 That is, cl 104(5) of the Bill annexed to ALRC 26. This proposal was reflected in cl 110(5) of the Bill annexed to ALRC 38, which provided:

> "In a criminal proceeding, the preceding provisions of this section do not apply in relation to evidence that a defendant –
>
> (a) did an act the doing of which is a fact in issue; or
>
> (b) had a state of mind the existence of which is a fact in issue."

narrowness of the provision and that is the only passage I can find that really speaks in any way to that subject."

66 The submission suffers the following vices.

67 First, it seeks to advocate a particular answer to the question: "What is the meaning of the words 'evidence that a defendant ... did an act the doing of which is a fact in issue'?" It seeks to derive that answer from a passage which did not pose the question and did not seek to answer it. The passage was directed to a different question – "Whatever the legal regime which flows from the words 'evidence that a defendant ... did an act the doing of which is a fact in issue' on their true construction, should that legal regime apply only to defendants in criminal cases, or to the parties in civil cases as well?"

68 Secondly, the passage quoted suggests that the Commission was trying to bring its proposal into conformity with the equivalents to s 1(e) of the 1898 Act, rather than to depart from them. The second sentence, after saying that cl 104(5) "reflects the law for criminal trials", accurately summarised that law as established in the equivalents to s 1(e). The balance of the passage argues against extending that law to civil cases. It does not seek to alter the law in criminal cases. It does not offer any explanation for why the Commission would seek to alter the law in criminal cases. Unlike some parts of s 1(f) and its equivalents, s 1(e) and its equivalents generated very little reported authority, appear to have caused no problems, were not the subject of any criticism by the Commission in ALRC 26 or ALRC 38, and were not the subject of any recorded complaint to the Commission.

69 Thirdly, not only is it impossible to extract from the language employed in ALRC 26 and ALRC 38 any desire to alter the regime established for criminal cases by the equivalents to s 1(e), but that language points against the existence of any such desire in the following ways.

(a) The expression employed in cl 104(5) of the Bill annexed to ALRC 26[73], "tends to prove", and the first sentence of the long passage quoted above which summarised cl 104(5), is close to the expression "tend to criminate him as to the offence charged" that is used in s 1(e) and its equivalents. The Commission in ALRC 26 had earlier employed a similar expression

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73 Quoted above at [64].

in summarising, accurately, the effect of the equivalents to s 1(e) of the 1898 Act[74].

(b) The Commission evidently regarded "tends to prove" as meaning the same as "tends to show". Clause 104(1) of the Bill annexed to ALRC 26 commenced: "Where a witness objects to giving evidence on the ground that the evidence may tend to prove that the witness ...". The Commission's summary of cl 104(1) in ALRC 38 was[75]:

> "It was proposed that a witness should be able to object to answering a question on the ground that the answer may tend to show that the witness has committed an offence or is liable to a civil penalty."

(c) The draft Bill annexed to ALRC 26 used the expression "may tend to prove" in cl 104(1) (corresponding with s 128(1)) and "tends to prove" in cl 104(5) (corresponding with s 128(8)). The draft Bill annexed to ALRC 38 used the expression "may tend to prove" in cl 110(1) (corresponding with s 128(1)), but used the expression "evidence that a defendant ... did an act the doing of which is a fact in issue" in cl 110(5)[76] (corresponding with s 128(8)). However, the Commission did not appear to intend any change by its use of different words in cl 110(5) from those used in cl 104(5). That is because in its notes on the clauses of the draft Bill annexed to ALRC 38, the Commission said of cl 110(5)[77]:

> "Subclause (5) provides that the privilege against self-incrimination is not available in a criminal trial for questions that tend to show that the accused committed the offence for which he or she is being prosecuted."

70 Of course, it is not the questions which tend to show anything, only the answers. But it is clear that what the Commission meant was that the expression

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74 Australian Law Reform Commission, *Evidence*, Interim Report No 26, (1985), vol 2 at App C [209].

75 Australian Law Reform Commission, *Evidence*, Report No 38, (1987) at [214].

76 Set out above at fn 72.

77 Australian Law Reform Commission, *Evidence*, Report No 38, (1987) at App A [295].

"evidence that a defendant ... did an act the doing of which is a fact in issue" in cl 110(5) means evidence that "[tends] to show that the accused committed the offence" charged. These passages confirm that the Commission did not intend cl 110(5) to have a different meaning from the equivalents to s 1(e) of the 1898 Act.

71 Counsel for the accused conceded that evidence of conversations about retailing cocaine in New South Wales "tends to prove" that the speakers were conspiring to import it into New South Wales. If so, the evidence obviously "tends to show" a conspiracy to import as well. Counsel for the accused also accepted that if the accused's construction of s 128(8) were sound, a revolutionary change in the law contained in the equivalents to s 1(e) of the 1898 Act had been effected by s 128(8), and that the Commission had given no explanation for this change. Counsel for the accused simply submitted that, in fact, the Commission, in the Bill annexed to ALRC 38, and the legislature had been "very explicit in using different words".

72 One problem is that the Commission did not see the different words as having a different meaning. Another problem is that the Commission was normally careful to indicate when it thought that its proposals would change the law significantly and, when it did so, it habitually strove to give very full justifications for making changes of that kind. The likelihood of this practice being followed would have been extremely high in relation to any intention to change the long established and widespread statutory regime to be found in the equivalents to s 1(e) of the 1898 Act, which itself had a long and controversial background of which the Commission is likely to have been aware. If the accused's construction of s 128(8) were sound, its substitution for any provision equivalent to s 1(e) would have changed the law significantly. The absence of any justificatory material of this kind in the ALRC Reports – or in the Report of the New South Wales Law Reform Commission in 1988[78], or in the Second Reading Speeches – tells powerfully against the accused's construction.

73 *Howie J's reasoning.* Howie J gave three reasons[79] for adopting the construction he did. They were supported by the accused in this Court.

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78 New South Wales Law Reform Commission, *Evidence*, Report No 56, (1988) at [2.38] ("NSWLRC 56"). It concurred with cl 110 of the draft Bill annexed to ALRC 38, but for an addition which is immaterial for present purposes.

79 Apart from his plain opinion that the outcome of his construction was just: "The accused *should be able* to put forward his defence to that [importation conspiracy]

(Footnote continues on next page)

74 The first was that ALRC 26 said[80]:

> "The expression 'fact in issue' should be interpreted as referring to the issues in the proceedings defined by substantive law and pleadings and thus would extend to facts to be proved in undefended or ex parte proceedings."[81]

75 Howie J's second reason was related to s 94 of the NSW Act. Section 94 is the first section in Pt 3.6, which deals with tendency and coincidence evidence. In particular, s 94(3) provides:

> "This Part does not apply to evidence of:
>
> (a) the character, reputation or conduct of a person, or
>
> (b) a tendency that a person has or had,
>
> if that character, reputation, conduct or tendency is a fact in issue."

It is a precondition to the admission of both tendency evidence (s 97(1)(a)) and coincidence evidence (s 98(1)(a)) that the parties intending to adduce the evidence have given reasonable notice in writing to the other parties of that intention. Howie J said[82]:

> "In order to determine whether Part 3.6 applies, and whether the tendency rule and the coincidence rule have any application, it is necessary to know whether the character, reputation, conduct or tendency of a person is a fact in issue in the proceedings. Because it is necessary for the party wishing to tender evidence falling within the tendency or coincidence rules to give reasonable notice of its intention to do so, there must be some understanding of what will be a fact in issue in advance of the

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charge without putting himself at risk of being prosecuted for other serious criminal activity" (*R v Cornwell* [2003] NSWSC 660 at [17] (emphasis added)).

80 Australian Law Reform Commission, *Evidence*, Interim Report No 26, (1985), vol 1 at [641], n 3.

81 *R v Cornwell* [2003] NSWSC 660 at [7].

82 *R v Cornwell* [2003] NSWSC 660 at [11].

proceedings. The question whether the Part applies and, therefore, the rules operate to exclude otherwise relevant evidence cannot depend upon the manner in which the proceedings are conducted by the parties."

76 The third reason given by Howie J centred on a passage in *Smith v The Queen* in the following terms[83]:

> "In determining relevance, it is fundamentally important to identify what are the issues at the trial. On a criminal trial the ultimate issues will be expressed in terms of the elements of the offence with which the accused stands charged. They will, therefore, be issues about the facts which constitute those elements. Behind those ultimate issues there will often be many issues about facts relevant to facts in issue. In proceedings in which [the NSW Act] applies, as it did here, the question of relevance must be answered by applying Pt 3.1 of the Act and s 55 in particular. Thus, the question is whether the evidence, if it were accepted, could rationally affect (directly or indirectly) the assessment by the tribunal of fact, here the jury, of the probability of the existence of a fact in issue in the proceeding."

Howie J then said that the reference to the "ultimate issues" was a "reference to the facts in issue for the purposes of" the NSW Act[84].

77 These three reasons are directed to the meaning of "fact in issue" in s 128(8). Neither the Commission in the passage in ALRC 26, nor this Court in *Smith v The Queen*, was dealing with the meaning of "fact in issue" in s 128(8), and what was said in those passages was said in a context very remote from s 128(8). The field of operation of s 94(3) is also remote from that of s 128(8). Subject to those difficulties, even if Howie J's reasons are thought to support the proposition that "fact in issue" in s 128(8) does not mean "fact relevant to a fact in issue", they do not support his construction of s 128(8) as a whole. In particular, none of them negate the proposition that the expression "giving of evidence by a defendant, being evidence that the defendant ... did an act the doing of which is a fact in issue" includes giving evidence of facts (including facts relevant to facts in issue) which tend to prove that the defendant did an act the doing of which is a fact in issue.

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83 (2001) 206 CLR 650 at 654 [7] per Gleeson CJ, Gaudron, Gummow and Hayne JJ (footnote omitted).

84 *R v Cornwell* [2003] NSWSC 660 at [13].

78 The accused's construction appears to read "evidence" in s 128(8) as meaning "direct evidence" and excluding circumstantial evidence. When, on 20 February 2003, Howie J gave reasons for his decision to admit the Diez-Lawrence conversations, he stated that they were "of such probative value as circumstantial evidence tending to prove ... participation in the conspiracy, that [they] ought to be admitted notwithstanding [their] prejudicial effect"[85]. However, on 5 May 2003, he concluded that those conversations were not evidence of a "fact in issue". In consequence the accused's construction compelled Howie J to conclude that the conversations about drug supply in Australia, which he had held on 20 February 2003 to be "highly probative evidence" of the conspiracy to import into Australia, fell outside s 128(8). This outcome raises a serious question about the reasoning which led to it.

79 Assume that a man's body is found in a locked room. The cause of death is a single bullet fired into his head. One "fact in issue" on a defendant's trial for murder is whether the defendant shot the deceased. Evidence that the defendant was outside the room just before the time of death in possession of a fully loaded revolver is, on the accused's construction, not evidence of a "fact in issue". Nor is evidence that the defendant was outside the room just after the time of death in possession of a revolver fully loaded save that one shot had been fired. Nor is evidence that the defendant was the only person possessing a key to the room. Nor is evidence that the defendant had a motive for killing the deceased. All of these matters of fact other than the actual shooting are matters of fact relevant to the material "fact in issue", being the shooting by the defendant, but are not themselves "facts in issue". They are items of circumstantial evidence tending to establish that the defendant had the opportunity, the means and the motive to shoot the deceased. Counsel for the accused conceded that on the accused's construction, if the defendant entered the witness box, he could not claim any privilege against answering questions about the shooting inside the room, but he could claim privilege against answering questions about where he was just before and just after the shooting, about possessing the revolver or the key, and about his motive. If s 128(2) was satisfied, the accused would not be required to answer the questions, and if he did so, he would be entitled to a s 128(3) certificate; if s 128(5) was satisfied, he would be required to answer the questions and he would be entitled to a s 128(6) certificate. This would give the defendant a much greater potential immunity from questioning, and from later use of the answers to any questions which were asked, than existed – and in Victoria, Queensland, South Australia, Western Australia and the Northern Territory still

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85 *R v Cornwell* (2003) 57 NSWLR 82 at 95 [44].

exists – under the equivalents to s 1(e) of the 1898 Act. That outcome would be extremely unlikely.

80 There are two bases on which that outcome could be avoided. One, advanced by the DPP to Howie J, is that the expression "fact in issue" in s 128(8) includes "facts relevant to facts in issue". It is not necessary now to decide whether or not that approach is sound. The second basis assumes that "fact in issue" does not include "facts relevant to facts in issue", but directs attention to the statutory expression of which "fact in issue" forms part. That was the submission of the DPP in this Court. That approach is sound.

81 Even if the expression "fact in issue" in s 128(8) is limited to the shooting by the defendant of the deceased, no doubt evidence by the defendant that he shot the deceased is "evidence that the defendant ... did an act the doing of which is a fact in issue". But evidence by the defendant that he had the opportunity, the means and the motive to shoot the deceased is also "evidence that the defendant ... did an act the doing of which is a fact in issue". That is because from the circumstantial evidence of opportunity, means and motive can be inferred the doing of the act which is the fact in issue.

82 That construction is supported by a consideration of s 128(8)(b) in its application to the example being discussed. One fact in issue might be whether the defendant intended to kill the deceased. What is the meaning of "evidence that the defendant ... had a state of mind the existence of which is a fact in issue"? A defendant's state of mind can be proved by the defendant's testimony in the witness box; or by proof of an out-of-court admission by the defendant; or by proof of circumstances from which the existence of that state of mind can be inferred. An out-of-court admission by the defendant as to his state of mind can be established by the defendant's own testimony. And circumstances from which the existence of a defendant's state of mind can be inferred can be proved by that defendant's testimony. If the accused's construction were correct, the defendant could not object to answering questions about whether, as he pulled the trigger, he intended to kill the deceased; but he could object to answering questions, and seek to obtain the advantages of s 128(2) and s 128(5), about having later admitted an intention to kill, or about motives and other circumstances – including circumstances also relevant to whether the defendant shot the deceased – such as buying the revolver and the bullets, loading the revolver and procuring the key, from which an intention to kill could be inferred. That outcome too is extremely unlikely. Evidence of admissions of having had an intention to kill or of circumstances from which that intention can be inferred are as much "evidence that the defendant ... had a state of mind the existence of which is a fact in issue" as the accused's direct testimony about it.

83 There is a further consideration. In its most common application, and in the application to which the attention of the Commission was principally directed, s 128(8) arises in the context of cross-examination. A defendant in a criminal proceeding, having elected to give evidence, will have denied guilt. The evidence in chief may take the form of a blanket denial of any knowledge of or participation in the relevant events, or it may take the form of detailed refutation, or explanation, of particular aspects of the prosecution case. Counsel for the prosecution, by cross-examination, may seek to test and challenge that evidence and may open up other matters that have not been addressed in chief. A cross-examiner is unlikely to confine questioning so as to distinguish between questions about the elements of the offence and questions about facts relevant to the elements of the offence. As the language of s 128(1) reveals, the section is concerned with the probative *tendency* of evidence. A line of cross-examination, aimed at advancing the prosecution case or cutting down the defence case, might lead directly or indirectly to a point that, in one way or another, tends to prove guilt, but cross-examination will rarely conform to the neat separation required by the argument for the accused in this case. That is another factor pointing to the extreme unlikelihood of the accused's construction.

84 In short, on the correct construction of s 128(8) the words:

> "... the giving of evidence by a defendant, being evidence that the defendant:
>
> (a) did an act the doing of which is an act in issue, or
>
> (b) had a state of mind the existence of which is a fact in issue"

are not limited to direct evidence that the defendant did the act or had the state of mind; they extend also to the giving of evidence by the defendant of facts from which the doing of the act or the having of the state of mind can be inferred.

85 *Conclusion on s 128(8).* In these circumstances, where the accused's construction leads to results which would be both revolutionary and extremely unlikely, where it is not supported by the ALRC Reports (and indeed is, to a degree, contradicted by them) and where it is not justified by the reasons he advanced, it should not be accepted.

Second issue: was the second trial a "proceeding" to which s 128(7) applied?

86 Blackmore DCJ and the Court of Criminal Appeal[86] considered that the second trial was a "proceeding" to which s 128(7) applied so as to prevent the reception of the accused's evidence at the first trial about the Diez-Lawrence conversations. Even if that view were correct, the evidence was still rightly admitted. That is because it was concluded above that the accused's construction of s 128(8) was erroneous. It follows that s 128 could not apply to the accused's testimony about the Diez-Lawrence conversations. Since s 128 could not apply, the prohibition contained in s 128(7) on use of the evidence against the accused could not apply.

87 But even apart from that point, the second trial was not a "proceeding" to which s 128(7) applied. The reason given by Blackmore DCJ for his opinion was:

> "[T]he natural meaning of the words 'any proceeding' would include the circumstances of this trial even though it is a retrial. The trial is taking place in a different court, in a different jurisdiction, before a different tribunal of fact and the only similarities are the fact that the accused is charged with the same offence."

On the other hand, Howie J disagreed with Blackmore DCJ on the following grounds[87]:

> "I find it difficult to see any justifiable policy which would permit an accused to give evidence in a trial on the basis that some or all of it could not be used against him in any subsequent proceeding for the same offence. There are many situations in which a retrial can occur other than because of a jury disagreement. It is, to my mind at least and generally speaking, an affront to the administration of criminal justice that the evidence given by an accused at a trial of a serious criminal offence could not be used by the Crown at a subsequent trial of the same offence either as evidence in the Crown case or by way of cross-examination of the accused if he or she gave evidence on that occasion. Yet that would be the result of the issuing of the certificate issued by me if the further trial is

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86 *Cornwell v The Queen* (2006) 160 A Crim R 243 at 261 [89].

87 *R v Cornwell* [2004] NSWSC 45 at [11].

caught by s 128(7). I do not believe that could have been the intention of the Law Reform Commission or the legislature in giving effect to the Commission's recommendations."

88 Howie J's opinion is correct for the following reasons. The first and second trials were each part of one "proceeding" – the prosecution of the accused on the charge of conspiring to important 120 kilograms of cocaine. As Blackmore DCJ accepted, at both trials the accused was "charged with the same offence" arising out of the same facts, even though the jurors were different, the trial judges were different, the courts were different, and the form of the indictments differed in relation to the parties. That prosecution was not brought to an end by reason of the jury at the first trial failing to agree on whether the accused should be acquitted or convicted. Rather, that failure simply left the prosecution uncompleted. As Howie J said, a retrial may occur for many reasons other than a jury disagreement. The jury may be discharged, for example, because of illness among the jurors, because of what is said in the addresses of counsel, because the jury hears inadmissible information in a manner not capable of being cured by direction, or because of judicial self-disqualification on grounds of actual or apprehended bias. The first trial may proceed to a conviction, but a second trial may be necessary because an appeal is allowed on some ground not resulting in a verdict of acquittal. The construction on which Blackmore DCJ's conclusion depends produces results so unlikely as to compel its rejection. Among other difficulties, it would mean that an accused person who had obtained a ruling under s 128(2) or s 128(5) but who considered that the evidence given to which the ruling related had turned out unsatisfactorily could, by misconduct sufficient to cause the first trial to miscarry, obtain a second trial free of the risk of that evidence being used. To conduct a retrial is to conduct the trial which ought to have taken place in the first place. A retrial returns the parties to the position they were in at the start of the first trial. The parties are at liberty to re-tender the evidence already tendered. They are also at liberty to tender other evidence. Among that other evidence which traditionally the parties have been at liberty to tender is evidence of admissions made at the first trial. To construe a statutory provision as negating that traditional possibility would require the identification of clear words to that effect. There are no clear words to that effect in s 128(7). There is nothing in ALRC 26, ALRC 38 or NSWLRC 56 which would support Blackmore DCJ's construction of s 128(7). In short, the function of s 128 is to ensure that evidence given at a trial in relation to one charge is not used later in relation to another. Section 128 does not ensure that

the evidence received at a trial in relation to the first charge cannot be used at a retrial on that charge[88].

Third issue: competency of Crown challenge to certificate

89 This issue raises the question: even if Howie J erred in granting the certificate, and even if s 128(7) did not prevent the tender of the evidence at the second trial, can the prosecution succeed in this appeal unless the certificate is set aside? The accused submitted that the grant of the certificate was an act of a Supreme Court judge which should not have been ignored by Blackmore DCJ and could not be negated by collateral attack.

90 The Court of Criminal Appeal held that it could not accede to the Crown's request made in the Crown appeal to that Court to set aside the certificate. It gave three reasons. The first was that the provision relied on, s 5F of the *Criminal Appeal Act* 1912 (NSW), granted only a Crown right of appeal against interlocutory orders up to the time when the first trial concluded. The appeal was filed much later. The second was that although s 5A of the *Criminal Appeal Act* entitled the Crown to submit a question of law to the Court of Criminal Appeal for determination, that entitlement was confined to circumstances where there had been an acquittal. There had been no acquittal. The third was that even if the Crown amended the proceeding so as to seek an order to quash the certificate, and even if the Court had power to grant that order, there were "overwhelming discretionary reasons" for not making the order. McClellan CJ at CL said[89]:

> "The [accused] only gave evidence after Howie J had determined that a certificate would be granted. If that certificate could now be quashed, not only could the evidence be tendered at a retrial of the original charge but also would be available to the Crown to tender against him at a separate trial on the 'domestic' charges. This could result in significant injustice."

91 It is unnecessary to decide whether the Court of Criminal Appeal erred in not granting any relief in relation to the certificate. The arguments on that

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88 In *Uniform Evidence Law* (ALRC Report 102, NSWLRC Report 112, VLRC Final Report) (2005) at 534, the Australian, New South Wales and Victorian Law Reform Commissions recommended that s 128(7) be "amended to clarify that a 'proceeding' under that section does not include a retrial for the same offence or an offence arising out of the same circumstances".

89 *Cornwell v The Queen* (2006) 160 A Crim R 243 at 262 [100].

subject in this Court attributed excessive significance to the certificate granted on 11 February 2004, as distinct from the reasoning which had led to the ruling – the "requirement" – on 5 May 2003 that the accused give the evidence. The certificate had no intrinsic importance. It was not a document constitutive of rights. It was not like a title deed or a certificate of title or a bearer security. The role of a properly drafted certificate granted under s 128(6) (or s 128(3)) is simply to record a factual matter – what particular evidence was required to be given under s 128(5) (or was given after the accused chose to give it under s 128(2)). A s 128 certificate is only a convenient mechanism for use by a witness who later claims the protection given by s 128 and for aiding a court having the duty of determining that claim. It would be absurd if a witness were to fail to obtain the protection conferred by s 128(7) merely because a court which had decided that the conditions stipulated in s 128(1) and (5) (or s 128(1) and (2)) had been satisfied had failed to cause the witness to be given a certificate, whether because it had overlooked s 128(6) (or s 128(4)), or because, as here, a legal representative of the witness had failed to carry out a direction in relation to the certificate, or because of some lapse within the registry of the court. It would be equally absurd if a witness were to fail to obtain the protection conferred by s 128(7) merely because the witness and the court registry lost all copies of the certificate. If the certificate had had any intrinsic importance beyond being a convenient mechanical record, it is hard to see how Howie J could have issued it when he did: the first trial had ended months earlier, and he was *functus officio*.

92 Accordingly, the vital question is not whether the Court of Criminal Appeal erred in failing to set aside or quash the certificate, but rather whether Howie J's ruling of 5 May 2003 was a barrier to Blackmore DCJ's reception of the evidence at the second trial. The Court of Criminal Appeal, which construed Blackmore DCJ's reasons as amounting to a ruling that the certificate had been issued contrary to the section, held that it was not open to him to have done this[90]. In this regard, with respect, it erred.

93 Counsel for the accused supported the Court of Criminal Appeal's view by contending that s 128(8) did not relate to the giving of evidence before Blackmore DCJ. Rather, it restricted the tender of evidence from the first trial. Counsel submitted that all Blackmore DCJ had to do was construe the s 128(6) certificate and apply it. He had erred in going behind it.

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90 *Cornwell v The Queen* (2006) 160 A Crim R 243 at 261 [91]-[93].

94 This criticism is incorrect. It would only be valid if there were some legislative provision compelling Blackmore DCJ to follow Howie J's ruling. The only legislative provision to which the accused could point was s 128(7), and it was concluded above that it did not apply[91]. In the absence of any legislative provision to the contrary, Blackmore DCJ was not bound either by Howie J's ruling under s 128(5), or by the certificate, any more than he was bound by any other evidential ruling made by Howie J. Blackmore DCJ took a far wider view than Howie J of the relevance of the Diez-Lawrence conversations, for example: no complaint was made about this, and it could not be said that this course was not open to him. If trial judges conducting second trials are not in general[92] able to approach the task of making evidential rulings afresh for themselves, free of any constraints created by the rulings in the first trial, the prosecution would be placed in an impossible position. Those responsible for the conduct of a prosecution at one trial would have to seek protection against the risk of an order for a new trial later being made. But by what means? To launch interlocutory appeals under s 5F of the *Criminal Appeal Act* against all rulings which they were dissatisfied with would run foul of the strong repugnance appellate courts have towards interrupting trials by interlocutory appeals. To apply to quash those rulings after the jury disagreed would mean having to face the difficulty that the Court of Criminal Appeal seemed to express considerable doubt, in the passage quoted above, as to whether there exists any method by which to actually do so. Blackmore DCJ was not bound by the accused's construction of s 128(8), and was entitled to depart from it. If the accused's construction were wrong, as it has been held to be[93], Blackmore DCJ was therefore entitled to depart from Howie J's s 128(5) ruling since no part of s 128 applied. Whether or not Blackmore DCJ actually relied on this reasoning, it is sound, and it supports his conclusion that the accused's testimony at the first trial was admissible at the second. That conclusion stands whether or not the certificate is set aside.

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91 Above at [86]-[88].

92 In an exceptional case far removed from the present context, *Rogers v The Queen* (1994) 181 CLR 251, this Court held that where admissions had been rejected as involuntary at a trial on four counts of armed robbery, on two of which the accused was acquitted and on two of which he was convicted, it was an abuse of process for the Crown to tender some of the admissions on further and distinct charges of armed robbery. The question whether that principle applies to a case like the present, where the jury failed to agree at the first trial of a particular charge, so as to prevent the Crown from re-tendering at a second trial on that charge an admission rejected as involuntary at the first, does not arise.

93 Above at [85].

Fourth issue: should Blackmore DCJ have excluded the evidence on discretionary grounds?

95 Counsel for the accused submitted that once Howie J had given a ruling pursuant to s 128(5) requiring the accused to give evidence, and the accused had acted on the faith of it by giving evidence about the Diez-Lawrence conversations on the assumption that he would have the protection given by s 128(7), Blackmore DCJ was wrong to admit that evidence where the consequence of his having done so was to prevent the accused from testifying in the second trial.

96 Blackmore DCJ appears to have considered whether the evidence should be excluded under s 137 of the NSW Act[94], but declined to do so because he considered that the evidence had significant probative value which "easily" outweighed the danger of unfair prejudice. Counsel for the accused did not before this Court in terms rely on s 137. Instead it was submitted that the accused had not had a fair trial according to law.

97 In developing that submission, to some degree counsel for the accused criticised the conduct of the DPP, but in essential respects it is difficult to see how the DPP could have behaved differently. Before Howie J made his s 128(5) ruling, the DPP contended that s 128(8) prevented s 128 from applying. Howie J was against that contention, but the DPP has succeeded in this Court on that point. An attempt to seek leave to appeal against Howie J's s 128(5) ruling would almost certainly have met with failure in view of the months the trial had been running and the undesirability of disrupting it. It would have been a highly unusual course, even if it were legally possible, to have challenged Howie J's ruling after the jury at the first trial disagreed and before the second trial started.

98 One factual element of the accused's submission must be refined. It is not necessarily the case that the accused would not have given evidence if his counsel had not sought and obtained the s 128(5) ruling. The Diez-Lawrence conversations were already in evidence before the accused's case opened; unless explained by testimony from the accused, they would have been very damaging to the accused's position. The s 128(5) ruling was obtained only after the accused entered the witness box. Howie J steadfastly refused to make a ruling before

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94 Section 137 provides: "In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant."

then. It is true that perhaps even before the accused entered the witness box the ruling eventually made could have been predicted because the accused's construction of s 128(8) was advanced in argument and embraced by counsel for the accused. But it was not certain that the ruling would have been made. Once the accused had entered the box, he was running the risk that the ruling might not be made. It follows that it is an exaggeration to say that the accused acted on the faith of the s 128(5) ruling in giving evidence about the Diez-Lawrence conversations. Once Howie J had decided to admit evidence of those conversations, there would have been strong pressure on the accused to enter the box to explain them. Once he entered the box it was virtually inevitable that he would be questioned about them: the only issue was whether he would be questioned first in chief (and, if so, with s 128(5) protection) or in cross-examination.

99 Another factual element in the accused's argument must be questioned. It has not been demonstrated how it is that Blackmore DCJ's reception of the evidence prevented the accused from testifying at the second trial. Indeed he gained one potential advantage from the course adopted. His case, as explained over the several days in which he gave evidence in chief and was cross-examined at the first trial, was put before the jury without the risk of damage from further cross-examination.

100 There is a third factual aspect raised by the accused's argument to be clarified. While evidence given by the accused after Howie J "required" him to do so under s 128(5) was no doubt given with s 128(7) in mind, there is nothing to suggest either that it was given with a second trial on the same charge in mind, or that it was given in the belief that s 128(7) would provide protection against the use of the evidence at a second trial on the same charge.

101 It is hard to see how the accused suffered "prejudice", or how the second trial could be called unfair, by reason of the tender of evidence at the second trial which was given at the first trial in the belief that s 128(7) would apply to it, in circumstances where s 128 did not in truth apply. The accused claimed privilege under s 128(1), obtained a ruling under s 128(5), and was issued with a certificate under s 128(6). In law he had in truth no privilege, he should not have obtained the ruling, and he should not have been issued with the certificate. Nor was he entitled to any s 128(7) protection at the second trial. To have excluded the evidence would have conferred by an indirect route benefits to which he was not entitled directly[95].

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95 The position in which the accused finds himself is the result of a difference of opinion between Howie J and this Court as to the correct construction of s 128(8).

(Footnote continues on next page)

Fifth issue: the application for special leave to cross-appeal

102 The draft notice of cross-appeal (composed and filed by the accused, not his counsel) sought an order that a verdict of acquittal be entered. The only submission specifically directed to this outcome was a submission made very briefly, and only in writing, that it was not reasonably open to a properly instructed jury to have been satisfied beyond reasonable doubt of the accused's guilt. This Court would ordinarily not undertake the task of assessing such a submission unless that task had first been undertaken by the Court of Criminal Appeal. Counsel for the accused advanced with much more vigour an argument that although the Court of Criminal Appeal had rejected the relevant ground of appeal, ground 5, directed to the unreasonableness of the verdict, it had done so only very briefly, without properly addressing the question, and the matter should be remitted to it to be addressed properly.

103 Counsel for the accused advanced two groups of arguments to the Court of Criminal Appeal. According to the first, the evidence revealed that the accused was "frozen out" of the conspiracy in the sense that even if he engaged in acts preparatory to it, he fell out with the conspirators before he became party to the conspiracy. According to the second, the enterprise discussed in the Diez-Lawrence conversations was not the conspiracy charged, but another conspiracy, a "parallel importation". These submissions were supported by copious references to the evidence. Counsel for the accused submitted that while the Court of Criminal Appeal's discussion of ground 4 (which in the end it did not decide) referred to the parallel importation issue, its very brief discussion of ground 5 did not deal adequately with either group of arguments[96].

104 The application for special leave to cross-appeal is sufficiently dealt with by saying that the criticisms made by counsel for the accused of the Court of Criminal Appeal's reasoning in relation to ground 5 are sound. The Court's conclusion may be correct, but its reasoning – or at least the Court's statement of

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It is the result of a failure by his counsel correctly to predict what the true construction of s 128, considered as a matter of first impression, would ultimately be held to be, and in that sense it was the result of what was essentially an innocent "mistake" by his counsel. Whether in these particular circumstances the evidence which the accused gave could or should be excluded at a trial on domestic drug dealing charges is an entirely separate question which need not be discussed here.

96 See *Cornwell v The Queen* (2006) 160 A Crim R 243 at 262-263 [102]-[107].

it – did not come to grips with the points of detail which an assessment of the arguments advanced by counsel for the accused called for. Ground 5 should be remitted to the Court of Criminal Appeal for reconsideration.

105 Intermediate appellate courts in criminal appeals must deal with grounds of appeal which, if made out, could result in a verdict of acquittal notwithstanding that a ground justifying an order for a new trial has been made out[97]. That principle does not apply here, for apart from ground 5, none of the grounds of appeal, if made out, were likely to result in a verdict of acquittal as distinct from an order for a new trial. This case presents a different and more difficult problem. Intermediate courts of appeal in this country are very busy, and it is understandable that they should not wish to deal with matters which it is not necessary for them to deal with. However, while no universal rule can be enunciated, intermediate courts of appeal should bear in mind the factors making it desirable for them to deal with all grounds of appeal, rather than to deal with what is seen as a decisive ground in a way which apparently renders it unnecessary to deal with other grounds[98]. That is because of the trouble caused if this Court, as here, disagrees with the intermediate court of appeal on one ground it did deal with fully, considers that its treatment of the other ground it dealt with was incomplete, and has returned the matter to the intermediate court for the four grounds not dealt with and the one ground not completely dealt with to be considered again. The trouble comes in the form of cost, delay and the need for reargument. This is particularly so in criminal appeals, where adding to delays can result in accused persons who are ultimately acquitted at a second trial having to remain imprisoned for longer than necessary, and longer than in justice they should be.

Did the accused "object" to giving particular evidence?

106 Finally, one other aspect of s 128 may be referred to. The opening words of s 128(1) provide that s 128 only applies if "a witness objects to giving particular evidence". A fair characterisation of the exchanges between counsel

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97 *Jones v The Queen* (1989) 166 CLR 409 at 411 per Mason CJ, Brennan, Dawson and Toohey JJ.

98 The issue has been discussed in this Court in other contexts: *Kimberly-Clark Australia Pty Ltd v Arico Trading International Pty Ltd* (2001) 207 CLR 1 at 19-20 [34]-[35]; *Lockwood Security Products Pty Ltd v Doric Products Pty Ltd* (2004) 217 CLR 274 at 312 [105].

for the accused and Howie J set out earlier[99] is that while in one sense the accused "objected" to the 35th question he was asked in chief when he claimed privilege, in another sense he did not object at all. He evidently wanted to give some evidence about the Diez-Lawrence conversations. He could only be sure of giving it in the way he would have liked if he gave it in chief; if he took the risk of leaving its reception to the chance of particular questions in cross-examination, he ran the risk of not being able to give it, or not in the way perceived to be most favourable to his interests. Hence his claim of privilege was arguably not a means by which he "objected", but was an attempt to ensure that s 128 protected him from some potentially adverse consequences of evidence which he did not "object" to giving, but strongly wanted to give.

107 The accuracy of that characterisation is supported by the following factors.

108 First, counsel for the accused carefully spent time in the days preceding 5 May 2003 seeking to prepare the ground for a favourable ruling on the evidence. He had hopes of a favourable ruling before the accused's case opened. While Howie J was resistant to blandishments seeking a favourable ruling, the course being charted for the accused was plainly driven by the desire of the accused to give evidence in chief about the Diez-Lawrence conversations.

109 Secondly, the 34th question was leading and the 35th question explicitly triggered the claim to privilege which the accused made: what was happening was no surprise to the accused.

110 Thirdly, if the accused had objected to counsel's question in the sense of not wanting to answer it, or not wanting it to be asked, the issue probably would have been sorted out before the accused entered the witness box, or the accused could have reacted in such a way as to cause counsel to withdraw the question. The fact that the thirty-fifth question, and all the later questions in chief about the Diez-Lawrence conversations, were asked supports the conclusion that the accused wanted to give evidence about them and instructed counsel to structure events so that he could do so with a measure of impunity.

111 This characterisation raises a question whether s 128(1), and hence s 128 as a whole, applies where a witness sets out to adduce in chief evidence revealing the commission of criminal offences other than the one charged. A criminal defendant might wish to present an alibi, the full details of which would reveal

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99 Above at [11]-[12].

the commission of another crime. A civil defendant might wish to prove the extent of past earnings, being earnings derived from criminal conduct. This raises a question whether witnesses who are eager to reveal some criminal conduct in chief, because it is thought the sting will be removed under sympathetic handling from their own counsel or for some other reason, are to be treated in the same way as witnesses who, after objection based on genuine reluctance, give evidence in cross-examination about some crime connected with the facts about which evidence is given in chief.

112 The view that the accused's claim of privilege in all the circumstances answered the requirements of s 128(1) has difficulties. It strains the word "objects" in s 128(1). It also strains the word "require" in s 128(5) – for how can it be said that a defendant-witness is being "required" to give some evidence when his counsel has laid the ground for manoeuvres to ensure that the defendant-witness's desire to give the evidence is fulfilled? And it does not fit well with the history of s 128(8). For one thing, s 1(e) of the 1898 Act and its Australian equivalents provided that an accused person called pursuant to the legislation could be "asked any question in *cross-examination* notwithstanding that it would tend to criminate him as to the offence charged"[100], which implies that the protection of the accused's position in chief or in re-examination was a matter between the witness's counsel and the witness. For another thing, the Australian Law Reform Commission, in summarising the pre-s 128(8) law, assumed that s 1(e) and its Australian equivalents were to be construed as applying to questions in cross-examination only[101].

113 The present point was not raised by the DPP either in the courts below or in this Court. It was raised by this Court in the course of oral argument, but was not embraced by counsel for the DPP. "Sometimes this Court will decide a question which has not been referred to or discussed by an intermediate court of appeal but that is not the course which should ordinarily be followed."[102] The

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100 Emphasis added. The actual word "cross-examination" was used in five of the nine relevant statutes, two others are to be construed similarly, and the same construction is implicit in the remaining two: note [46] above.

101 Australian Law Reform Commission, *Evidence*, Interim Report No 26, (1985), vol 2 at App C [181] and [209]; Australian Law Reform Commission, *Evidence*, Report No 38, (1987), at [217(a)].

102 *Jones v The Queen* (1989) 166 CLR 409 at 414 per Mason CJ, Brennan, Dawson and Toohey JJ.

present question could be of considerable importance in the day-to-day conduct of trials, since counsel for the accused submitted that in practice s 128 was often employed by prosecutors to elicit evidence in chief. It is not necessary finally to decide this issue, since the appeal is to be allowed on other grounds. And it is not desirable to do so in view of the absence of dispute between the parties on the question and the importance of the question.

Orders

114 The consequence is that the first Crown appeal (No S281 of 2006) should be allowed in relation to s 128(8), and, as counsel for the DPP agreed, there is therefore no need to deal with the second Crown appeal (No S282 of 2006) other than by dismissing it. If the s 128(8) issue had been the only controversy, it would have been appropriate to reinstate the accused's conviction. But four of the accused's grounds of appeal to the Court of Criminal Appeal (2, 3, 4 and 6) have not been dealt with, and ground 5 must be remitted for reconsideration by that Court.

115 The following orders should be made.

In Appeal S281 of 2006 and Application No S215 of 2006

1. Appeal allowed.

2. Application for special leave to cross-appeal granted and cross-appeal allowed.

3. Matter remitted to the Court of Criminal Appeal for consideration of grounds 2, 3, 4 and 6, and reconsideration of ground 5, in the appellant's notice of appeal to that Court.

In Appeal No S282 of 2006

Appeal dismissed.

116 KIRBY J. These proceedings arise out of orders of the Court of Criminal Appeal of New South Wales[103]. By those orders, that Court upheld an appeal by Mr Richard Cornwell ("the accused"). It set aside his conviction of an offence against the *Customs Act* 1901 (Cth) ("Customs Act") of conspiring to import into Australia a commercial quantity of cocaine, a prohibited import[104]. It ordered his retrial on that charge. The first prosecution appeal to this Court concerns those orders. The second prosecution appeal relates to orders of the Court of Criminal Appeal dismissing a prosecution appeal against a decision by the trial judge at the accused's first trial in the Supreme Court of New South Wales (Howie J) to grant the accused a certificate under s 128 of the *Evidence Act* 1995 (NSW) ("the NSW Act").

117 Also before this Court is an application by the accused for special leave to cross-appeal against part of the Court of Criminal Appeal's disposition. The accused comes before this Court substantially supporting the reasoning of the Court of Criminal Appeal in relation to the meaning of the contested provisions of the NSW Act. However, he complains that that Court omitted to address properly grounds in his appeal before it, most notably a ground challenging the safety of the jury's verdict of guilty of the offence charged. That verdict was returned at the accused's second trial in the District Court of New South Wales (before Blackmore DCJ and a jury). The first trial before Howie J and a jury had ended with the jury being unable to agree on a verdict in relation to the accused. That is why a new trial was ordered[105].

118 Before this Court, the accused sought to support his fifth ground of appeal to the court below, namely that the verdict at the second trial was "unreasonable and cannot be supported by the evidence". The Court of Criminal Appeal dealt with that ground in a very brief way. It dismissed it on the basis that the evidentiary submissions made by the accused were "matters for the jury and it could not be said that there was no evidence to support the conviction"[106]. If he had been successful on that ground of appeal, the accused would have been entitled to the entry of a verdict of acquittal by the Court of Criminal Appeal and hence to discharge from imprisonment and further liability[107].

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103 *Cornwell v The Queen* (2006) 160 A Crim R 243.

104 Customs Act, s 233B(1)(cb). This sub-section was repealed by the *Law and Justice Legislation Amendment (Application of Criminal Code) Act* 2001 (Cth), Sched 21, s 108. That repeal has no consequence for this appeal.

105 (2006) 160 A Crim R 243 at 245 [3].

106 (2006) 160 A Crim R 243 at 263 [107].

107 Under the *Criminal Appeal Act* 1912 (NSW), s 6(1), (2).

119 Nevertheless, the Court of Criminal Appeal upheld only the first ground of appeal relied on by the accused. It accepted the accused's complaint that the trial judge at the second trial had erred in admitting against him evidence that was the subject of the certificate granted in the first trial by Howie J. That error, in the opinion of McClellan CJ at CL (with whom Hulme and Adams JJ concurred), involved both legal error and injustice to the accused. In the opinion of McClellan CJ, it resulted in[108]:

> "… very significant portions of the transcript [being] tendered at the second trial contrary to the certificate. Containing as it did admissions that the appellant was engaged in domestic drug trafficking on a significant scale it could have significantly influenced the jury's approach to the guilt or innocence of the appellant in respect of the matter charged. The Crown tendered the evidence 'to use' it against the appellant at the retrial and in my opinion it was admitted contrary to s 128(7) [of the NSW Act]."

120 The Court of Criminal Appeal dismissed the belated prosecution attempt to challenge the validity of the certificate granted to the accused by Howie J in his first trial. It rejected an attempt to bring a cross-appeal against the grant of that certificate[109]. It did so for a mixture of procedural and substantive reasons[110]. Most importantly, it concluded that there were "overwhelming discretionary reasons" why such relief would be denied[111]:

> "The appellant only gave evidence after Howie J had determined that a certificate would be granted. If that certificate could now be quashed, not only could the evidence be tendered at a retrial of the original charge but also would be available to the Crown to tender against him at a separate trial on the 'domestic' charges [of conspiring to be, or being involved in, illegal drug activities *within* Australia]. This could result in significant injustice."

121 Having dismissed the prosecution's cross-appeal and upheld the accused's complaint about the conduct of his second trial, in the light of the certificate given under the NSW Act in the first trial, the Court of Criminal Appeal declined

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108 (2006) 160 A Crim R 243 at 261-262 [94].

109 Purportedly pursuant to the *Criminal Appeal Act* 1912 (NSW), s 5F(2) and in light of the powers granted to the Court of Criminal Appeal under s 5F(5).

110 (2006) 160 A Crim R 243 at 262 [95]-[101].

111 (2006) 160 A Crim R 243 at 262 [100].

to apply "the proviso"[112]. In so doing, it applied the principles explained by this Court in *Weiss v The Queen*[113].

122 Contrary to the conclusion reached by the majority of this Court, it is my view that (save in one respect) the approach adopted by the Court of Criminal Appeal was substantially correct. That Court did not err in its construction and application of the NSW Act. Its explanation of the meaning of that Act, and its evaluation of the requirements of justice in the circumstances, were sound. Both appeals brought by the prosecution to the orders below should be rejected.

123 However, the accused should have leave to cross-appeal. His cross-appeal should be allowed and the proceedings remitted to the Court of Criminal Appeal to permit that Court to consider in appropriate detail, and according to the operative principles[114], whether the accused was entitled, in the circumstances, to an acquittal on the basis that his conviction at the second trial was "unsafe and unsatisfactory"[115] in the legal sense.

124 Mine is a minority view. However, to a large extent, I am able to explain it by reference to the reasons of the Court of Criminal Appeal and the facts, issues and applicable law set out in the reasons of Gleeson CJ, Gummow, Heydon and Crennan JJ ("joint reasons") in this Court.

The facts

125 *The background facts*: The factual circumstances that gave rise to the prosecution of the accused for the offence of being party to a conspiracy to import prohibited drugs into Australia are set out in the joint reasons[116]. However, those reasons, whilst referring to the "Diez-Lawrence conversations"[117]

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112 *Criminal Appeal Act* 1912 (NSW), s 6(1).

113 (2005) 224 CLR 300.

114 *M v The Queen* (1994) 181 CLR 487 at 492-493, 525. See also *Jones v The Queen* (1997) 191 CLR 439 at 446, 453.

115 The "unsafe and unsatisfactory" ground does not represent the way in which the ground is expressed in the *Criminal Appeal Act* 1912 (NSW), s 6(1), (2), or other such Australian statutes. See *Gipp v The Queen* (1998) 194 CLR 106 at 147-150 [120]-[127]. The language of each statute must be applied.

116 Joint reasons at [6].

117 Joint reasons at [7]-[14].

do not fully explain (as the reasons of the Court of Criminal Appeal did[118]) the prosecution case against the accused and the way in which he contended at the first trial that the Diez-Lawrence conversations, recorded on a listening device, "should be understood as relating exclusively to domestic drug deals and were not related to any proposed importation of cocaine in respect of which the appellant denied he was a party"[119]. This was a threshold point which the accused made clear at both his first and second trials. It was not an after-thought[120]. At all times it was the way the defence case was conducted. As the Court of Criminal Appeal noted[121]:

> "[T]he evidence which he gave admits to involvement in illegal drug activities but the appellant says this was confined entirely to domestic dealings".

126 Such an assertion was, of course, perilous for the accused. Conversations which concede trafficking in illegal drugs *within* Australia might, depending on the circumstances, be relevant to proof of involvement in a conspiracy to *import* such drugs into Australia. At least where the prohibited drug was cocaine, insusceptible to local production in commercial quantities such as the drugs in issue here (120 kilograms)[122], the necessity of a source external to Australia might, depending on the conversations, also suggest arrangements designed to assure a source and hence the involvement of the participants *both* in a conspiracy to import the drugs and in arrangements to trafficking them thereafter within Australia[123].

127 On the other hand, the only offence with which the accused was charged was that of conspiracy to import. It is not unknown for dealings in prohibited drugs to reflect a hierarchy of criminal involvement, so that some offenders are involved in conduct incidental to the importation and others in the subsequent

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118 (2006) 160 A Crim R 243 at 248-251 [21]-[39].

119 (2006) 160 A Crim R 243 at 252 [40].

120 A similar defence, propounded in *Nudd v The Queen* (2006) 80 ALJR 614 at 636 [103]; 225 ALR 161 at 188 was held to be an after-thought prompted by a jury question.

121 (2006) 160 A Crim R 243 at 252 [40].

122 (2006) 160 A Crim R 243 at 245 [1].

123 cf *Leff* (1996) 86 A Crim R 212 at 213-214 per Gleeson CJ; *Nudd v The Queen* (2006) 80 ALJR 614 at 643 [153]; 225 ALR 161 at 198.

domestic dealings. For constitutional reasons[124] the federal offences relating to criminal importations are not open-ended[125]. At a certain point, different State or Territory offences may also arise for consideration. Such offences will typically involve different legal ingredients; different punishments upon conviction; and (sometimes) different prosecuting authorities and decision-makers.

128 To the extent that, at his first trial and thereafter, the accused propounded an explanation of the intercepted conversations that involved him in "domestic dealings" in illegal drugs, he necessarily exposed himself to the risk of prosecution for such offences, unless he might give evidence to contradict his guilt of the federal offence with which he was charged, without running the risk that such evidence could later be used against him in a proceeding for other federal or State offences.

129 This was the issue presented by the accused's request for, and Howie J's grant of, a certificate under s 128 of the NSW Act. In the system of criminal procedure followed in Australia, high particularity is observed in the statement and proof of criminal accusations[126]. It is not enough that the prosecution establishes that an accused person has committed unspecified criminal offences or other wrongs. Still less is it enough that the prosecution establishes that the accused person is of bad character, disreputable or an unsavoury person, accustomed to criminality. An important protection for the liberty of the individual in Australia lies in the fact that, in the accusatorial system of criminal justice[127], the prosecution ordinarily assumes the responsibility of proving, to the requisite standard, the precise accusation alleged in the proceedings (stated in this case in the indictment).

130 *The accused's case*: Whatever perils and consequences might flow for the accused from his concessions of involvement in "domestic dealings", if that were all that was ultimately proved against him beyond reasonable doubt in his trial, the prosecution for the federal offence of conspiring to import into Australia a commercial quantity of cocaine would fail. This, therefore, was the accused's defence to the charge. He was entitled to have that defence lawfully and fairly considered in his trial. This was the approach that the Court of Criminal Appeal took throughout its reasons. In my opinion it was the proper and lawful

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124 Constitution, s 90; cf s 95. See also s 51(xxix).

125 *R v Tannous* (1987) 10 NSWLR 303 at 306-307; cf *Nudd v The Queen* (2006) 80 ALJR 614 at 637 [111]; 225 ALR 161 at 190.

126 *MacKenzie v The Queen* (1996) 190 CLR 348 at 366-368.

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

approach. It was required both by a correct application of the NSW Act and by basic legal principles.

131 I will not set out at length the evidence successively adduced by the prosecution against the accused at his two trials. That evidence is described in the reasons of the Court of Criminal Appeal[128] as is the evidence relevant to the accused's defence given by him at his first trial[129]. The essence of the accused's case, based on the intercepted conversations, was as follows[130]:

> "The appellant admitted that from March 2001 he was engaged in distributing cocaine with Lawrence and that his role included the collection of the money for the distributed cocaine and payments to Diez for the supply. The appellant agreed that the conversations on the tapes concerned the distribution and importation of cocaine. He also agreed that he was in regular contact with Diez after 24 March (the date of the last recorded conversation between Diez and the appellant) but that these meetings did not occur in the appellant's flat. The appellant claimed that although he discussed the possible importation of cocaine with Diez and Lawrence these discussions were merely preliminary and tentative discussions and that eventually he never agreed to be part of an importation venture."

132 Some of the evidence taken from the recorded conversations is difficult to reconcile with the accused's contention that his involvement in the illegal drug activities was "confined entirely to domestic dealings"[131]. However, whether ultimately this was so or not was the question presented for the jury's verdict. As already noted, the jury at the first trial did not agree on their verdict in respect of the accused, although they were agreed that other named defendants, Messrs Diez and Lawrence, should be found guilty and convicted[132].

133 Had the jury at the first trial reached a verdict in respect of the accused, whether of guilty or not guilty, it is unlikely that this Court would have been troubled with any of the fine points now raised. Those points only really present themselves because of the necessity for a retrial and because Blackmore DCJ, presiding in that retrial, took a different view about the availability of a certificate

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128 (2006) 160 A Crim R 243 at 248-251 [21]-[39].

129 (2006) 160 A Crim R 243 at 252-258 [40]-[72].

130 (2006) 160 A Crim R 243 at 248 [23].

131 (2006) 160 A Crim R 243 at 252 [40]. See also at 251 [33].

132 (2006) 160 A Crim R 243 at 245 [3].

under s 128 of the NSW Act from that earlier taken by Howie J. Blackmore DCJ also disagreed with the consequence that flowed from the fact that Howie J had granted such a certificate and made the ruling he did on s 128 and thereafter "required" the accused to give evidence notwithstanding that it "may tend to prove that the witness has committed an offence against or arising under … an Australian law"[133].

The legislation

134 *The terms and history of s 128*: The joint reasons set out the terms of s 128 of the NSW Act, which controls the outcome of the main issues in the prosecution's appeals from the orders of the Court of Criminal Appeal[134]. By reference to the legislative predecessors to that section, the joint reasons explain the course of legislation in England[135] and, more immediately, the provision for certificates in the evidence law of a number of Australian jurisdictions that provided the precedents adapted by the Australian Law Reform Commission ("ALRC") in recommending provisions of the kind now found in s 128 of the NSW Act[136]. It is unnecessary for me to repeat any of these provisions except, where necessary, to give emphasis to particular features.

135 The history of the nineteenth century debates in the United Kingdom, leading to the final enactment of the *Criminal Evidence Act* 1898 (UK) ("the 1898 Act"), recorded in the joint reasons[137], is of much intrinsic interest. So is the history of the evidence statutes in Australia that followed the 1898 Act, which copied and later varied its provisions[138]. I accept that it may be important to appreciate the previous state of the law in Australia governing the evidence of persons accused of a crime when, in their trial for that crime, they claim a privilege against self-incrimination in respect of another and different crime.

136 *Primacy of the text*: Nevertheless, the NSW Act is the counterpart, in one Australian State, of a major enterprise to secure a new law on evidence[139] that

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133 NSW Act, ss 128(1)(a), 128(5).

134 Joint reasons at [9].

135 Esp *Criminal Evidence Act* 1898 (UK). See joint reasons at [30]-[54].

136 See joint reasons at [55]-[56], [59]-[62].

137 Joint reasons at [32]-[54].

138 Joint reasons at [55]-[56], [61].

139 Enacted as the *Evidence Act* 1995 (Cth).

could be used (as it has been) as a template for a uniform evidence law for Australia[140]. In such a major and novel undertaking, the light that may be shed on the meaning of the provisions of the Australian uniform evidence law by debates, controversies and understandings that existed in the United Kingdom Parliament in the late nineteenth century is strictly limited. Old controversies may sometimes help to identify the contemporary mischief to which the new uniform Australian evidence statutes are addressed. But beyond that, it would risk distorting the operation of the new Australian legislation, enacted by Australian Parliaments with their lawmaking authority derived from the Australian Constitution, to chain the meaning of the modern Australian text to controversies that occurred in the United Kingdom more than a century ago. In my respectful opinion, expressions of the law of Australia, and interpretations of Australian legislation, have now moved beyond that imperial approach. Essentially, they have done so for a reason derived from the constitutional independence of this country and its laws.

137 The duty of Australian courts, in giving meaning to the NSW Act, is therefore to ascertain that meaning from the legislative text. True, the text is read in context – including its historical context and its context as part of a national move towards a reformed and uniform evidence law for Australian courts. But statutory interpretation is always a text-based activity[141]. To the extent that we depart from the meaning ascertained from the Australian legislative text, we risk giving effect to judicial, rather than parliamentary, will[142].

The issues

138 *A constitutional question*: The trial of the accused for an offence against the Customs Act involved the New South Wales courts in an exercise of federal

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140 Discussed in New South Wales Law Reform Commission, *Evidence*, Report No 56, (1988); Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, ALRC Report No 102, NSWLRC Report No 112, VLRC Final Report, (2005) ("*Uniform Evidence Law*").

141 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518; *Trust Company of Australia Ltd v Commissioner of State Revenue* (2003) 77 ALJR 1019 at 1029 [68]; 197 ALR 297 at 310.

142 *Coventry v Charter Pacific Corporation Ltd* (2005) 80 ALJR 132 at 148 [76]-[77]; 222 ALR 202 at 220-221; *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 80 ALJR 1509 at 1527-1528 [77]-[84]; 229 ALR 1 at 21-23; *Sons of Gwalia Ltd v Margaretic* (2007) 81 ALJR 525 at 552 [104]; 232 ALR 232 at 261.

jurisdiction. The provisions of evidence law contained in the NSW Act were picked up and applied to the trial pursuant to the provisions of the *Judiciary Act* 1903 (Cth)[143]. The trial being on indictment and the offence being one against a law of the Commonwealth, a jury was required for the trial by s 80 of the Constitution. Such a trial also had to conform to all requirements implicit in Ch III of the Constitution.

139 No arguments were advanced, relevant to the resolution of the issues presented by these proceedings, based upon the procedures inherent in a federal jury trial, or more generally, upon the basis of any due process implications to be found in Ch III of the Constitution[144]. The extent of any such requirements, or implications, was reserved by this Court in *Weiss v The Queen*[145]. It was mentioned by me, but not explored, in *Nudd v The Queen*[146]. As in that case, because the parties were well represented before this Court, I am content to proceed on the basis that no constitutional issue arises. But I do not decide that point.

140 *Issues in the proceedings*: The joint reasons[147] outline the issues as they were argued before this Court. They include (1) the interpretation of s 128; (2) the application of s 128 to the retrial; (3) the prosecutor's belated challenge to Howie J's certificate; (4) the procedural unfairness complained of; and (5) the cross-appeal. I shall, likewise, deal with these issues separately.

141 It is convenient first to deal with the issue raised by the accused's application for leave to cross-appeal for, upon it, the conclusions and orders set out in the joint reasons are conformable with this Court's authority[148]. I support them.

142 *The cross-appeal issue*: The joint reasons explain the imperfections of the treatment by the Court of Criminal Appeal of the accused's complaint to that

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143 s 79. See also s 68(2): *Solomons v District Court of New South Wales* (2002) 211 CLR 119 at 134 [23], 145 [57], 160-162 [111]-[118].

144 cf *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 at 580; *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 606-614, 703-706; *Leeth v The Commonwealth* (1992) 174 CLR 455 at 483-488, 501-503.

145 (2005) 224 CLR 300 at 317-318 [46].

146 (2006) 80 ALJR 614 at 637 [112]; 225 ALR 161 at 190.

147 Joint reasons at [24]-[29].

148 Joint reasons at [102]-[105], [114]-[115].

Court that the evidence demonstrated that he had been "frozen out" of the conspiracy for which he was charged in the indictment. In this Court, detailed written submissions on the point, with ample references to the evidence, were provided. It is not normally the function of this Court to perform, effectively for the first time, the detailed examination of such submissions. To do so would potentially deprive a party, discontented with the outcome, of the opportunity, if so desired, to suggest to this Court either a basic error of approach or of result, sufficient to attract a grant of special leave from the intermediate court.

143 The accused's complaint, if made good, would entitle him to a verdict of acquittal. It had therefore to be dealt with additionally, and separately from, new trial points and in sufficient detail to make it clear that the Court of Criminal Appeal had properly discharged its appellate function in this respect.

144 I therefore agree with the orders proposed in the joint reasons on the cross-appeal. I also agree with the way in which those reasons reaffirm the general principle requiring intermediate courts to deal with potentially decisive grounds of appeal[149]. Needless regurgitation of arguments and evidence is not required. Of course, I am very mindful of, and have not forgotten, the burden that is cast upon the intermediate courts. But there must be sufficient detail to demonstrate that the court has turned its mind adequately to the separate submission. In default of this, there is no alternative but to grant the accused special leave to cross-appeal; to allow the appeal to that extent; and to remit the proceedings to the Court of Criminal Appeal to deal with the "unsafe and unsatisfactory" ground.

145 In my opinion, this is the full extent to which error has been shown on the part of the Court of Criminal Appeal. To demonstrate that this is so, I must deal with the four remaining issues on which I disagree with the approach taken in the joint reasons.

The interpretation of s 128 of the NSW Act

146 *The issue stated*: The first such issue concerns the meaning and application of s 128(8) of the NSW Act. It presents the question whether Howie J was correct in construing the sub-section[150] and whether the Court of Criminal Appeal erred in confirming his interpretation and his consequently issuing a documentary certificate to the accused pursuant to s 128[151]. In my view, the interpretation adopted by the first trial judge, and by the Court of

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149 *Jones v The Queen* (1989) 166 CLR 409 at 411.

150 *R v Bruce Cornwell* [2003] NSWSC 660.

151 *Cornwell* (2006) 160 A Crim R 243 at 260-262 [87]-[94].

Criminal Appeal, represents the preferable, and therefore the correct, interpretation. It should be affirmed by this Court.

147 Several considerations bring me to this conclusion. They include (1) a textual analysis of s 128; (2) an historical examination of the predecessors to the section; (3) a contextual analysis addressed to other provisions of the NSW Act; (4) a reflection on applicable principles of fundamental human rights that help to resolve any ambiguity that may exist in the section; and (5) a consideration of the constitutional primacy of the parliamentary text. I shall deal with these arguments in turn.

148 *Textual analysis of s 128*: The starting point is the language of s 128 itself. Its application is not confined to a criminal proceeding[152]. But it does extend to such a proceeding. Its general object is to strike a proper balance between upholding an objection by a witness to the giving of particular evidence, on the ground that such evidence may tend (relevantly) to prove that the witness has committed an offence against Australian law and, in some cases, to require the witness to give the evidence but in circumstances where the court gives the witness a certificate in respect of the evidence. Such a certificate prevents such evidence, so certified, as given by the witness, from later being used against that person in any proceeding in a NSW court (save for an immaterial exception).

149 If the proceeding in which the question arises is a criminal one, s 128 does not apply in relation to the giving of evidence by a defendant where such evidence is evidence that the defendant did an act, the doing of which "is a fact in issue" in the subject trial[153].

150 In the present proceedings, which were a criminal proceeding, the accused at his first trial objected to giving particular evidence, relevantly, on the ground that such evidence might tend to prove that he had committed an offence against or arising under an Australian law. The objection was foreshadowed. The accused, who was competently represented, sought preliminary or prospective rulings which, properly, Howie J declined to give. However, ultimately, when the accused, as a witness, formally objected he did so in plain terms[154]:

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152 It also extends to evidence that may tend to prove the witness is liable for a civil penalty, or has committed an offence against or arising under the law of a foreign country: see NSW Act, ss 128(1)(a), 128(1)(b).

153 NSW Act, s 128(8)(a).

154 (2006) 160 A Crim R 243 at 252 [41].

"Q. … Some time after you re-established contact with Mr Diez, did he raise with you the possibility of involvement in some form of illegal activity?

A. In February.

Q. You may wish to reserve your legal rights here in answer to this question, Mr Cornwell: what did he say to you about the possibility of your involvement in some illegal activity?

A. Well, I don't want to answer that on the grounds of it may incriminate me."

151 As the Court of Criminal Appeal indicated, the matter that had previously been signalled "was now squarely raised"[155]. A ruling was required so as to permit the accused's evidence to continue, one way or the other. Howie J had earlier indicated that the accused might be entitled to a certificate under s 128[156]. What was obviously of concern to Howie J (properly in my view) was the need to address competing considerations of a highly practical kind, to which he would give expression in his ruling on the point:

- That the accused had exposed himself to general cross-examination by electing to enter the witness box and to give evidence;
- That, by the NSW Act, he nonetheless had a right to object to giving particular evidence where this might tend to prove that he had "committed an offence against … an Australian law";
- That he had foreshadowed his wish to conduct his defence, acknowledging involvement in other offence(s) against Australian law, namely domestic trafficking in drugs, but asserting that he had not entered the conspiracy to import the prohibited drugs, with which he was charged;
- That, to some extent, evidence concerning domestic trafficking might be evidence of a fact that the jury might regard as relevant to the facts in issue, concerning the alleged offence of conspiracy to import;
- That if the accused were to give evidence, along the lines foreshadowed, such evidence might be highly damaging to the co-accused, especially Messrs Diez and Lawrence, and thus valuable to the prosecution in

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155 (2006) 160 A Crim R 243 at 252 [42].

156 (2006) 160 A Crim R 243 at 252-253 [43]-[49].

proving the involvement of those other persons in the importation of the drugs; and

- That a ruling, requiring the accused to give the evidence after causing him to be given a certificate under s 128 of the NSW Act, would obviate *seriatim* objections to individual questions; permit the accused's evidence to proceed without interruption; and afford him the chance to present his case fairly, such as it was, for the verdict of the jury without exposing him to the risk of future convictions for the serious offences of domestic drug dealing which were not before this jury on the count of the indictment by which the accused had been charged.

152 In his ruling on the certificate application, Howie J weighed these and other considerations[157]. He did so by reference to the language of s 128 of the NSW Act. He explained why, in all the circumstances, he concluded that "the interests of justice" required that the accused give the evidence proposed[158] and why he therefore intended to require the accused to give such evidence. With all respect to those of a different conclusion, I agree with the assessment of the Court of Criminal Appeal that the reasoning given by Howie J for the course that he took was both legally accurate and factually compelling.

153 The contest concerning the application of s 128 to the circumstances therefore turns on the meaning of the phrase "fact in issue" in s 128(8). The prosecution contended that the phrase extended to include a "fact relevant to a fact in issue" For many reasons, this is not the preferable construction:

- It is not what s 128(8)(a) actually says;

- The distinction between a "fact in issue" and a "fact relevant to a fact in issue" is well established in the law of evidence[159]. The latter is a category often described as "circumstantial evidence". This is evidence which, although not directly proving a fact in issue in the trial, may tend towards or contribute to, the reasoning by which the decision-maker infers that a fact in issue is established;

- What is "in issue" is determined in criminal, as much as in civil, proceedings, by the pleadings by which the ultimate issues are defined. It was therefore determined, in this case, by the single count of the

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157 *R v Bruce Cornwell* [2003] NSWSC 660 at [18]-[27].

158 NSW Act, s 128(5).

159 See eg *Smith v The Queen* (2001) 206 CLR 650 at 663 [41].

indictment alleging against the accused his guilt of the offence of conspiracy to import illegal drugs. The "facts in issue" are thus the elements, or necessary ingredients, of the offence so stated. Unless a fact is of such a character, it is not "in issue", however much it may be relevant or useful, in terms of evidence, to deriving a conclusion about the establishment of the facts required by the legal issues for trial;

- All of this is to say no more than was said by Gleeson CJ, Gaudron, Gummow and Hayne JJ in *Smith v The Queen*[160], which Howie J cited[161] and which the Court of Criminal Appeal likewise applied[162]; and

- The interpretation adopted was the one that helps s 128 to operate in accordance with its apparent purpose. It upholds the differential entitlement of the accused to refuse to answer questions tending to prove that he had committed offences of trafficking drugs *within* Australia (with which he was *not* charged); but it does so under the protection of a certificate that required him to give his evidence in that regard because that was what "the interests of justice" required in the proceedings for the larger reasons of justice identified by Howie J. Even if I disagreed with the assessment of "the interests of justice" (which I do not), that disagreement would not justify a conclusion that the Court of Criminal Appeal had erred. In decisions made concerning the balance of individual and public interests, contemplated by s 128 of the NSW Act, a high measure of respect must be paid by appellate courts to the assessments and judgment of the trial judge as envisaged by the section.

154 *Limited use of history*: The NSW Act is part of a major effort of national and uniform legislation of Australian evidence law[163]. The assistance that can be derived from the meaning of s 128 of the Act (in some respects novel in its terms) from poking amongst the embers of legal history in the United Kingdom is strictly limited. History may help us to understand the mischief to which s 128 was addressed. But parliamentarians, citizens, most lawyers and not a few judges have little inclination, or time, to delay over distant controversies about

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160 (2001) 206 CLR 650 at 654 [7]. See also at 663-664 [41].

161 [2003] NSWSC 660 at [12]-[13].

162 (2006) 160 A Crim R 243 at 255-256 [61]-[62].

163 Other counterpart laws are *Evidence Act* 1995 (Cth) (applicable to federal courts and the Australian Capital Territory); *Evidence Act* 2001 (Tas); *Evidence Act* 2004 (Norfolk Island). The enactment of such a law in Victoria has been recommended by the Victorian Law Reform Commission: see *Uniform Evidence Law* at 11-12, 17-18.

legal history, when the task in hand is essentially one of interpreting and applying the text of an Australian statute.

155 Nevertheless, when one reads the history that lay behind the enactment by the United Kingdom Parliament of the 1898 Act[164], it is far from casting doubt on the construction of s 128 of the NSW Act favoured by Howie J and the Court of Criminal Appeal. This should not surprise us because the considerations that troubled Howie J in the conduct of the accused's first trial were bound to arise, in the conduct of criminal trials generally, once provision was made for an accused to give evidence in his or her defence.

156 The immediate problem is then presented as to how an accused, who by implication has become a witness and is thus exposed to questioning, might nonetheless be protected in respect of questions that tended to prove the commission of an offence against the criminal law, other than the offence of which the accused is charged, upon which questioning would necessarily have to be expected, given the "fact in issue", as defined by the pleadings? How could the trial, in such circumstances, be stopped from becoming an open-ended inquisition into all or any of an accused's other criminal offences? How could it be kept within the bounds of the charge actually before the jury? How could it be prevented from becoming a general examination of the alleged bad character and past criminal convictions which would be contrary to basic principle, highly prejudicial and divert the decision-makers from the particularity of the charge in issue, which is the object of the accusatorial form of a criminal trial?

157 It is not as if those who drafted the 1898 Act overlooked, or ignored, these problems. To the contrary, as the joint reasons suggest, the successive Bills introduced into the United Kingdom Parliament struggled to resolve the appropriate adjustment of the competing interests at stake so as to address the most obvious concerns[165]. Much attention was directed to limiting questions to matters that were relevant to the trial. Significantly for the meaning of the critical phrase "fact in issue", a proposed 1878 provision extended the right of cross-examination to "the matter in issue and matters relevant thereto"[166]. Similarly, limitations were placed on cross-examination directed to "the defendant's credit or character"[167].

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164 Joint reasons at [32]-[54].

165 Joint reasons at [38]-[46].

166 Criminal Code (Indictable Offences) Bill 1878 (UK). See joint reasons at [41] fn 32.

167 Joint reasons at [41].

158 As the joint reasons show, the particular problem of protecting a criminal accused from being exposed to unlimited questions that might tend to incriminate him or her in the commission of some other offence(s), different from those charged, was dealt with in the Bill, introduced in 1884, to render the accused competent to give evidence[168]. Although that Bill passed the House of Lords, it did not pass the House of Commons. Proviso (c) to cl 2 of an identical Bill, introduced in 1885 to the House of Commons, stated[169] (with emphasis added):

> "A person called as a witness … shall not be asked, and, if asked, shall not be required to answer, any questions tending to show that any defendant has committed or been convicted of any offence *other than that wherewith he is then charged*, unless the proof that the defendant has committed such other offence is admissible evidence to show, that such defendant is guilty of the offence wherewith he is then charged, or unless such defendant has given evidence of good character."

159 In short, although an accused was competent to give evidence, and was thereby laid open to cross-examination "like any other witness on any matter though not arising out of his examination-in-chief"[170], a large exception was carved out, protective of the immunity from self-incrimination for uncharged crimes, save in circumstances where such questioning pursued evidence admissible in respect of the precise offence charged or was opened up by the criminal defendant's assertion of his own good character.

160 This series of checks and balances is evident in the language of the 1898 Act, as ultimately enacted by the United Kingdom Parliament[171]. The critical paragraph provides (with emphasis added):

> "(f) A person charged and called as a witness … shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence *other than that wherewith he is then charged*, or is of bad character, unless –

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168 Joint reasons at [45].

169 Joint reasons at [45] fn 41.

170 United Kingdom, Draft Code to the *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences*, (1879) [C2345], cl 523; cf United Kingdom, *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences*, (1879) [C2345] at 37; joint reasons at [41].

171 Section 1 of the 1898 Act is set out in the joint reasons at [54].

(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

(ii) he [opens up good character]; or

(iii) he has given evidence against any other person charged with the same offence ...".

161 This provision, which became the foundation for legislation on the same subject in the several Australian jurisdictions[172], did not ride rough-shod over an accused's general protection from self-incrimination. To the contrary, it introduced a carefully calibrated provision. It abolished the general protection from self-incrimination; but potentially only with respect to the offence charged. As to other offences, strict limitations were imposed defensive of the immunity from self-incrimination of offences other than those charged, save in the specified circumstances.

162 When s 128 of the NSW Act is read against this historical background, and properly understood, it is clear that the drafters proposing the reformed Australian provision (and the Parliaments enacting it) have attempted to preserve a similar, although not identical, calibration. What is new is the procedure designed to permit over-riding an accused's remaining protection against self-incrimination as to uncharged offences by reference to an evaluation of the requirements of "the interests of justice", as decided by the trial judge and as given effect in a certificate. Such a certificate would permit the judge's insistence upon the giving of such evidence but under conditions protecting the witness from the consequences of condemning himself or herself by such evidence[173]. To the suggestion, set out in the joint reasons[174], that this would be inconsistent with a wide-ranging cross-examination desired by a prosecutor, the answer is plain. That cross-examination is restricted by the procedures envisaged by s 128 and by the terms of any certificate granted under that section. The joint reasons essentially reduce the certificate procedure to a rather pointless and impotent exercise. And that is clearly not what the reformers of the section contemplated.

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172 Joint reasons at [55]-[58].

173 The model for the ALRC certification procedure appears to have been the Evidence Ordinance 1971 (ACT) (since repealed), s 57. See Australian Law Reform Commission, *Evidence*, Interim Report No 26, vol 1, (1985) at [853]-[854]; joint reasons at [61].

174 Joint reasons at [60]-[62].

163 Through this innovative procedure[175], the ALRC, in discharging its task of overhauling Australia's evidence laws, obviously sought to continue, and improve on, some of the provisions of the law that had preceded the reports of the Commission[176]. With the exception of affording the judicial power to overrule the protection from self-incrimination and to "require" evidence to be given by an accused (although there were "reasonable grounds" for objecting to do so) where "the interests of justice" required that course and by providing the procedure for certification protective of later use of such evidence in other "proceedings", the ALRC maintained the chief ingredients of the statutory compromise struck in the United Kingdom Parliament and evident in the 1898 Act.

164 The ruling of Howie J also respected those contours. It was obedient to the language and apparent purpose of the ALRC and of the NSW Parliament in enacting s 128 of the NSW Act. Once Howie J concluded that the questioning of the accused as a witness tended to prove that the accused had committed an offence against Australian law other than that with which he was charged, the accused's entitlement on reasonable grounds to maintain his objection to the questioning was preserved by s 128. By law, he did not have to give such evidence. He could not be required to do so, save under conditions that involved the provision to him of the certificate which Howie J determined in the circumstances should be given in "the interests of justice". Far from undermining the construction of s 128 of the NSW Act which Howie J adopted, the history of the predecessors to the new reformed legislation tends to confirm the view that he, and the Court of Criminal Appeal, took of the balances provided within the section.

165 *Contextual support for the interpretation*: In addition to the foregoing, considerations of context also support Howie J's approach. They include, as his Honour pointed out, several passages in the reports of the ALRC to which reference may be had in construing the legislation that resulted from such reports[177].

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175 As noted in the joint reasons at [61]-[62]. Similar provisions had earlier been enacted in Western Australia (1906) and Tasmania (1910) and were introduced in Queensland later (1997).

176 Australian Law Reform Commission, *Evidence*, Interim Report No 26, vol 1, (1985) at [853]-[854]. See also Australian Law Reform Commission, *Evidence*, Report No 38, (1987) at [214]-[217].

177 (2006) 160 A Crim R 243 at 255 [59] citing Howie J's reasons.

166 The conclusion by Howie J as to the meaning of the expression "fact in issue"[178] was essential to an interpretation of s 128(8) that recognised the differences that could arise in criminal trials between the offence "wherewith [the witness] is then charged"[179] and other offences or general matters of bad character in respect of which, as a general rule, the privilege against self-incrimination remained in place. Only by adhering to the approach adopted by Howie J could the longstanding principle of the criminal law be maintained, based as it is, ultimately, on the particularity of the elements of a crime charged.

167 That this was the way the ALRC itself approached the matter is made clear in the passages of its report on evidence law to which Howie J referred[180]. The Commission said:

> "The expression 'fact in issue' should be interpreted as referring to the issues in the proceedings defined by substantive law and pleadings and thus would extend to facts to be proved in undefended or ex parte proceedings."

168 Moreover, as Howie J pointed out, although the phrase "fact in issue" is not defined in the Dictionary to the NSW Act, or elsewhere, the term, which is clear enough on its face, appears in a number of sections of that Act, not least s 55, the section which deals with the relevance of evidence[181]. Howie J then made a point, derived from his considerable experience in the conduct of criminal trials. With respect, it appears to have been overlooked in the construction adopted in the joint reasons in this Court.

169 In a criminal trial a "fact in issue" must, in the nature of the tasks assigned to the judge by the NSW Act, be capable of determination, at least generally speaking, in advance of the unfolding of much, if not all, of the testimony and even "without understanding the nature of the Crown case or the defence to it"[182].

170 Trial judges do not have the luxury, as this Court does, of pouring over the completed record of the entire proceedings. Rulings of the kind that Howie J had

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178 [2003] NSWSC 660 at [7]-[17].

179 See above at [158], [160]; joint reasons at [45] fn 41, [54]. See also [2003] NSWSC 660 at [10]-[11].

180 Australian Law Reform Commission, *Evidence*, Interim Report No 26, vol 1, (1985) at [641] esp fn 3.

181 [2003] NSWSC 660 at [6].

182 [2003] NSWSC 660 at [9].

to make are necessarily made prospectively, on the run. Of its nature, at the time such a ruling is typically made, neither the jury, nor the judge, will know every fact in dispute in the proceedings, the proof of which might assist the jury in determining whether the accused committed the particular offence charged. This is why it should be inferred from the context that "fact in issue" is an expression used with legal precision. It is concerned not with how probative or significant an evidentiary fact might be to the prosecution case or to the accused's defence of the charge. It is a reference to the "ultimate issues" as defined by the pleading.

171 Only this interpretation is consistent with the hypothesis that s 128 contains, namely that in certain limited circumstances an accused person may be *required* to give evidence, although the giving of it may tend to prove that the person has committed an offence against an Australian law that requires, in "the interests of justice", imposing the obligation to give the evidence but under the condition of the grant of a certificate protecting the person from the use of the evidence to prove different offences. That is what occurred here.

172 With respect, the interpretation adopted in the joint reasons does not reflect the particular purpose for which the certificate provisions in s 128 are provided by the NSW Act. Nor does it accommodate convincingly the other provisions of the NSW Act containing the phrase "a fact in issue", such as s 94 dealing with the related questions of evidence as to credibility, character, reputation or conduct of a person. This, it will be remembered, was a subject which the 1898 Act dealt with in the same provision that generally protected a witness's entitlement to immunity from self-incrimination, save for the offence "wherewith he is then charged"[183].

173 The scheme of the legislation, the reports of the ALRC, and the practical necessities of knowing immediately and in advance of all the evidence the "fact[s] in issue", within provisions such as s 128 of the NSW Act, so that immediate and accurate rulings might be made, all support the approach of Howie J and the Court of Criminal Appeal. As Howie J observed, it is also the approach adopted on this subject by knowledgeable text-writers[184]. These considerations confirm the endorsement of that approach by the Court of Criminal Appeal.

174 *Protecting basic rights*: There is an additional consideration. In so far as the meaning of s 128(8) of the NSW Act is ambiguous and susceptible to the loose interpretation of "fact in issue" adopted in the joint reasons, that

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183 See joint reasons at [54]. See also [2003] NSWSC 660 at [10]-[11].

184 Odgers, *Uniform Evidence Law*, 5th ed (2002) at [1.3.80]; cf [2003] NSWSC 660 at [9].

interpretation should be rejected in favour of the meaning preferred below because it is only that meaning that provides an appropriate measure of protection for the fundamental principle of human rights defensive of the entitlement of all persons ordinarily to be free of a legal obligation of self-incrimination. That principle is expressed in most international statements of fundamental human rights[185]. These include the International Covenant on Civil and Political Rights[186] ("ICCPR") which provides, in Art 14.3(g) that:

> "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> (g) Not to be compelled to testify against himself or to confess guilt."

175 Australia is a party to the ICCPR[187] and to the First Optional Protocol, which affords persons a right to communicate to the United Nations Human Rights Committee complaints of derogations of Australian law from the requirements of the Covenant[188]. The ICCPR is not, as such, part of Australian domestic law. This Court has accepted that where domestic law is clear, it must be given effect (so long as it is constitutionally valid) notwithstanding any disconformity with the ICCPR or other international law[189]. But at least where there is ambiguity, or suggested uncertainty, in the meaning of an Australian statute, a court today will read the statute in a way that resolves the ambiguity or

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185 See eg European Convention on Human Rights, Art 6(1), (2); cf *R v Hertfordshire County Council; Ex parte Green Environmental Industries Ltd* [2000] 2 AC 412 at 416, 422 per Lord Hoffmann; *R v Kearns* [2002] 1 WLR 2815 at 2823, 2829-2830; Lester and Pannick (eds), *Human Rights Law and Practice*, 2nd ed (2004) at 227-228 [4.6.36].

186 See Joseph, Schultz and Castan (eds), *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 2nd ed (2005).

187 The ICCPR (except for Art 41) came into force on 23 March 1976 and into force for Australia on 13 November 1980: [1980] ATS 23. Article 41 came into force generally on 28 March 1979 and for Australia on 28 January 1993.

188 The First Optional Protocol to the ICCPR came into force on 23 March 1976. In respect of Australia it commenced 25 December 1991: [1991] ATS 39.

189 *Polites v The Commonwealth* (1945) 70 CLR 60 at 69, 77-78, 79; *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287-288; *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365 at 414 [136].

uncertainty in favour of conformity with a binding obligation of international law[190].

176 The United Nations Human Rights Committee has interpreted Art 14.3(g) of the ICCPR as conferring a large immunity from compulsory self-incrimination. Such self-incrimination has been treated in the jurisprudence as objectionable, not only because the methods used to extract it are commonly unacceptable but because the practice is ordinarily incompatible with the presumption of innocence. This presumption normally obliges proof of criminal wrong-doing from the evidence of others, not from the mouth of the person accused, given otherwise than by his or her own free will[191].

177 Values, similar to those expressed in the ICCPR are also part of the Australian common law. They have been stated by this Court on several occasions[192]. It would be entirely conformable with the ordinary way in which this Court construes legislation affecting fundamental rights for us to protect that principle in these proceedings[193]. This Court should therefore construe a provision such as s 128 of the NSW Act consistently with the ICCPR (and basic common law principle) so as to give its provisions, protective of the immunity from self-incrimination, a liberal construction, designed to uphold the immunity.

178 Applying this principle, I agree with the submission for the accused that s 128(7) of the NSW Act should be interpreted liberally while s 128(8) should be construed strictly. This approach to the interpretation of the contested provision

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190 *Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363; *Zachariassen v The Commonwealth* (1917) 24 CLR 166 at 181; *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42; *Vasiljkovic v Commonwealth* (2006) 80 ALJR 1399 at 1430 [159]; 228 ALR 447 at 486.

191 Joseph, Schultz and Castan (eds), *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 2nd ed (2005) at 449 [14.128].

192 See eg *Hamilton v Oades* (1989) 166 CLR 486 at 495, 500-501, 508-509; cf *Hartmann v Commissioner of Police* (1997) 91 A Crim R 141 at 146-147 per Cole JA citing *Sorby v The Commonwealth* (1983) 152 CLR 281 at 309 and *Police Service Board v Morris* (1985) 156 CLR 397 at 403.

193 See eg *Potter v Minahan* (1908) 7 CLR 277 at 304; *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 523; *Bropho v Western Australia* (1990) 171 CLR 1 at 18; *Coco v The Queen* (1994) 179 CLR 427 at 437; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492 [30]; *Coleman v Power* (2004) 220 CLR 1 at 96-97 [250].

supports the conclusion as to the meaning and operation of s 128 adopted by Howie J and by the Court of Criminal Appeal.

179 The approach adopted in the joint reasons is neglectful of the true construction of the provision enacted by the NSW Parliament to afford a facility by which, under appropriate judicial certification for reasons of "the interests of justice", potentially inculpating evidence of a defendant in criminal proceedings might be *required* but on condition that it could not be used against that person in later proceedings in a NSW court, contrary to the terms of the certificate.

180 The federal counterpart to the NSW Act, the *Evidence Act* 1995 (Cth), ss 118 and 119, was read in *Esso Australia Resources Ltd v Commissioner of Taxation (Cth)*[194] in such a way as to preserve, and apply, the principles of the common law protective of an ample understanding of the rights of the large corporation there claiming legal professional privilege, so as to preserve challenged documents of the corporation from discovery and inspection. Why should a large immunity be upheld in such a case but denied in the present, where what is at stake is the fundamental privilege of an individual against self-incrimination and the meaning of a statute enacted to protect that privilege under specified conditions and with novel and special procedures? It may sometimes be easier for courts to empathise with an immunity for evidence covered by legal professional privilege of a corporation than with the immunity against compulsory self-incrimination of a criminal defendant such as the accused. But the latter's privilege is no less important. It is expressed in fundamental human rights principles, and statements of the general law, to which this Court should give effect.

181 *Constitutional considerations*: There is a final consideration that derives from the obligations of this Court in construing legislation, such as the NSW Act. As I observed in *Central Bayside General Practice Association Ltd v Commissioner of State Revenue*[195]:

> "A fundamental assumption of the Constitution of the Commonwealth is maintenance of the rule of law[196]. Inherent in that obligation is the notion that courts, disposing of matters within the Judicature, will give effect to the commands of the several legislatures of the States and the Commonwealth, as expressed in the statutes which they

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194 (1999) 201 CLR 49.

195 (2006) 80 ALJR 1509 at 1527 [77]-[78], 1530 [96]; 229 ALR 1 at 21, 26.

196 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 at 193; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 513 [103].

> enact, or in the subordinate laws which they thereby authorise. The Act in question in this case is such a statute. Its validity has not been questioned. On its face, it is valid and applicable. This Court must therefore give effect to it. It must do so according to its terms.
>
> This Court has no authority to ignore or neglect a meaning of legislation which the Parliament intended.
>
> …
>
> For judges, no longer subject to the authority of Imperial or English courts, to maintain obedience to conceptions of [the language in legislation] expressed in … different times, seems, on the face of things, an irrational surrender to the pull of history over contemporary understandings of language used in a modern Australian statute."

182 The primacy of statutory requirements, derived from the language enacted by Parliament, obliges primary attention, in proceedings such as the present, to the legislative text. This is the invariable starting point for deriving the applicable legal rule. In *Brodie v Singleton Shire Council*[197], I said:

> "[T]he duty of a court is to the law. If a valid statute is enacted with relevant effect, that duty extends to giving effect to the statute, not ignoring it. No principle of the common law can retain its authority in the face of a legislative prescription that enters its orbit with relevant effect. The proper starting point for the ascertainment of the legal duties … is the statute."

183 Although in recent years in countless cases this Court has insisted on this approach, it is not the approach which, in my respectful opinion, the joint reasons have taken on this occasion. Instead, they have diverted themselves into an exposition of legal history to reach a conclusion different from that suggested by the statutory text, contrary to that envisaged by the ALRC and inconsistent with that derived from an intuitive reading of the provisions of the Act in the way that such legislation can be expected to be read.

184 Above all, the Act in question is a statute intended for application by judges on the run, often in urgent and fraught circumstances, in the midst of large and complex trials, such as that of the accused in this case. There is no time, nor is it the proper approach, to gloss the statute with implications derived from a very detailed, and contestable, examination of the legislative history of another

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197 (2001) 206 CLR 512 at 602 [231]. See also *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 80 ALJR 1509 at 1527-1528 [82]-[84], 1530 [96]; 229 ALR 1 at 22-23, 26.

country, itself long since repealed. This is the same mistaken approach as was evident in *Central Bayside*[198]. I did not agree with it there; and I do not agree with it here.

185 Where a law is enacted by an Australian legislature, and is designed to reform, re-express, collect and unify Australian law on the subject, it is especially important to derive the governing law from within the four walls of the statute enacted by the authority of Australian legislators. In a sense, such a major enterprise of statutory reform demands a new legal beginning. If the statutory language is encrusted with legal barnacles imported from earlier times, part of the object of the reforming measure will inevitably be lost. The dead hand of lawmakers from other places and earlier times will reach into the present age in a way that is difficult to reconcile with the postulate of democratic lawmaking by Australian Parliaments as envisaged by the Australian Constitution[199].

186 *Conclusion: no error*: For all of the foregoing reasons, the interpretation of s 128(7) and (8), adopted by Howie J, and confirmed by the Court of Criminal Appeal, should be upheld by this Court. The central plank in the prosecution's appeals to this Court therefore fails.

The application of s 128(7) to the retrial

187 *The issue stated*: The next issue is whether the accused's second trial was a "proceeding in a NSW court" so as to attract s 128(7) of the NSW Act and to prevent the use of that evidence "against the person" who gave it in such proceedings.

188 As the joint reasons point out, Blackmore DCJ, in the second trial, concluded that it was such a "proceeding"[200]. However, this was an immaterial conclusion for his Honour because he also concluded that the prosecution could tender such evidence in the second trial provided it was evidence intended to prove the matters outlined, relevantly in s 128(8)(a). Because he took the view that a "fact in issue" was that now adopted by a majority of this Court, sub-s (8) of s 128 did not apply in relation to the giving of the relevant evidence by the accused. The evidence was thus available for tender in later "proceedings" without inhibition, notwithstanding the "certificate" granted by Howie J[201].

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198 (2006) 80 ALJR 1509 at 1527-1528 [83]-[84]; 229 ALR 1 at 22-23.

199 *Coventry v Charter Pacific Corporation Ltd* (2005) 80 ALJR 132 at 153-154 [108]-[114]; 222 ALR 202 at 227-228.

200 (2006) 160 A Crim R 243 at 259 [79].

201 (2006) 160 A Crim R 243 at 259-260 [80]-[86].

189 On Blackmore DCJ's approach, the ruling on the evidence, and the grant of the certificate by Howie J, were legally misconceived. The accused was wholly unprotected from self-incrimination. As a consequence of Blackmore DCJ's indication of this approach, the accused unsurprisingly gave no evidence in his second trial. All of his testimony in the first trial (including by inference that protected by Howie J's "certificate") was placed before the second jury. Howie J's "certificate" proved illusory. The self-incriminatory evidence was received before the second jury without protection. Equally unsurprisingly, the accused was then convicted on the count charged, of conspiracy to import illegal drugs. By inference, on the approach now favoured by this Court, he is liable, in addition, to prosecution, conviction and punishment for the separate offences that he admitted in the evidence that Howie J required him to give of "domestic dealings"[202] in illegal drugs.

190 The joint reasons conclude that the second trial was "not a 'proceeding' to which s 128(7) applied"[203]. The Court of Criminal Appeal had rejected that contention[204]. In my opinion, it was correct to do so.

191 *A second "proceeding"*: My reasons for reaching this conclusion are similar to those expressed by the Court of Criminal Appeal. They follow from the approach to the interpretation of the NSW Act explained above.

192 The joint reasons proffer various grounds of policy why the re-tender of the evidence already tendered in a first trial should be available without hindrance in a second trial of the same charge[205]. It is true that there are arguments why the law should be so expressed. A recent review of the NSW Act (and its other Australian counterparts) has led to a proposal that s 128(7) of the Act should be amended to make it plain that a "proceeding" under the sub-section does not include a retrial for the same offence or an offence arising out of the same circumstances[206]. This conclusion of the three law reform bodies that studied the problem was expressed before the decision of the Court of Criminal Appeal was given in these proceedings. Necessarily, it was based on the opinion that the Act, as here applicable, did not so provide or, at least, did not appear to do so.

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202 (2006) 160 A Crim R 243 at 252 [40].

203 Joint reasons at [87].

204 (2006) 160 A Crim R 243 at 261 [89]-[90].

205 Joint reasons at [87]-[88].

206 *Uniform Evidence Law*, at 534.

193 That was a legally correct opinion. The interpretation of s 128(7) of the NSW Act now adopted by the joint reasons is inconsistent with the language in which s 128(7) of the NSW Act is expressed and with its purpose:

- The language of s 128(7) applies the prohibition on the use of the subject evidence given by a person who is the recipient of a certificate in "any proceeding". The use of the word "any" as an adjective connotes an application of the provision to a number of instances, no matter how many or how much. This is the natural meaning of the word "any" in the context. It imports a universal and unlimited application to the subject described;

- The subject of s 128(7) is a "proceeding in a NSW court". It defies the ordinary meaning of that expression to suggest that the second trial of the accused was not such a "proceeding". It had all of the appearances of a "proceeding". It was certainly a trial "in a NSW court". It was one of "any" such "proceeding" because retrials are not at all unknown. Obviously, a new trial is a species of legal "proceeding".

- The interpretation suggested in the joint reasons requires glossing the language of the NSW Act, in effect to add a qualification such as "in any proceeding *other than a retrial* or the proceeding in which a certificate was given". There is no reason to read such a rider into the NSW Act because Parliament did not put it there;

- Section 128(7) contains in its concluding sentence a qualification expressly limiting its application to a defined criminal proceeding. Had a further such qualification for retrials been intended it would, by inference, also have been expressly so stated;

- Moreover, the general object of s 128(7) is protective of the person who has given the evidence in question. It is designed to defend that person from the adverse use of evidence that he or she had been earlier "required" to give by direction of the court;

- Although the joint reasons are dismissive of the significance of the "certificate"[207] granted under s 128, their approach overlooks the serious step involved in the judicial requirement to give evidence (but under conditions of protection signified by the certificate). Having regard to these features of s 128, the extension of the protection afforded in a criminal proceeding to a defendant who has received such a certificate is

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207 Joint reasons at [91]-[92].

far from surprising. On the contrary, the formality of certification obliges the judge concerned to express any such certificate and to address carefully whether to "require" the witness to give the evidence and, if so, in what terms; and

- The interpretation urged by the accused, adopted on this point by Blackmore DCJ and affirmed by the Court of Criminal Appeal, tends to ensure the continuing availability to the defendant in any later criminal proceedings (even where a retrial is had) of evidence extracted by judicial requirement despite reasonable grounds for an objection based on self-incrimination but it does so under conditions fair to an accused.

194 *Conclusion: no error*: The foregoing are reasons why the language of s 128(7) is intractable. As the Court of Criminal Appeal concluded, that language demonstrates the universal application of a certificate to all other and later proceedings (including a retrial). If a narrower application is desired, the amendment suggested by the three law reform bodies that reviewed the current statutory language would first have to be enacted. In the performance of its judicial function, this Court is not entitled to ignore, or re-express, the statutory text adopted by Parliament.

The belated challenge to certification

195 *The issue stated*: The third contested issue is whether, although it brought no interlocutory appeal against Howie J's grant of a certificate to the accused, it was open to the prosecution, in the retrial, to challenge the certificate granted by Howie J.

196 The conclusion expressed by Howie J, in terms of s 128 of the NSW Act, given on 5 May 2003, read as follows[208]:

> "[I]t is my present opinion that, if Cornwell refuses to answer questions about his involvement in the ongoing supply of drugs on the grounds that it might incriminate him, he is entitled to take that stance, but in the interests of justice I would require him to answer the questions and grant him a certificate in accordance with the section."

197 In the outcome, no documentary certificate was physically issued during the first trial, a fact discovered only after the second trial had commenced[209]. It was then that Howie J, over the objection of the prosecution, issued a form of

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208 [2003] NSWSC 660 at [27].

209 (2006) 160 A Crim R 243 at 258 [73].

documentary certificate that fulfilled, and evidenced, the course contemplated by his earlier reasons[210]:

> "This Court certifies under section 128 of the *Evidence Act 1995* of New South Wales that evidence in these proceedings by Richard Bruce Cornwall [sic] on 5 May 2003, 6 May 2003, 7 May 2003, 8 May 2003, 9 May 2003 and 12 May 2003 in relation to Richard Bruce Cornwall's [sic] involvement with Juan [Diez], John Lawrence and other person in the supply or trafficking in narcotic goods between the 1st January and 10th August 2001 is evidence to which section 128(7) of that Act applies."

198 Despite reservations about the relevance of the "certificate" to the second trial, expressed by Howie J[211], his Honour did not refuse the documentary certificate on that, or on any other, ground (such as delay in seeking it or that the original grant had been misconceived). On the contrary, Howie J concluded that the earlier failure of the accused's representatives to procure the documentary certificate in a timely fashion did not operate as a reason for refusing to issue a form of certificate *nunc pro tunc*[212]:

> "I cannot see how I could refuse to give a certificate to an accused by reason of events that have occurred after the accused was told that he must answer the questions asked but that a certificate would be issued in respect of those answers. Where a witness, including an accused, has been required to answer a question notwithstanding that a valid objection has been taken on the grounds of privilege against self-incrimination, the witness is entitled to have the certificate given to him. Section 128 is mandatory in that if the witness gives evidence under s 128(2) or is required to give evidence under s 128(5) the court 'is to cause the witness to be given a certificate under the section in respect of the evidence'. The issuing of the certificate is a purely administrative step and the court has no discretion in respect of the matter."

199 This was a correct description of the evidentiary step that Howie J was belatedly asked to take. What was important was the ruling that his Honour had made during the course of the accused's first trial. Effectively, and in law, the statutory "certificate" was granted by him at that time, because it had to be. The provision of documentary evidence of the certificate did no more than formalise and evidence the administrative step that had already been taken. It expressed the ambit of the protection afforded to the accused in the precise terms that had

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210 (2006) 160 A Crim R 243 at 258 [73]. See also at [74]-[78].

211 (2006) 160 A Crim R 243 at 258-259 [75]-[78]. See joint reasons at [87]-[88].

212 (2006) 160 A Crim R 243 at 259 [77].

been foreshadowed in Howie J's published reasons for granting the certificate in the first place. There is no invalidity in such formalisation; nor is there any disharmony between the documentary "certificate" published by Howie J and the statutory certificate granted in his earlier ruling.

200 Like the joint reasons, I can pass by the technical question as to whether any appeal was open to the prosecution against the "certificate" at the time it was announced during the accused's first trial or later when it was formalised by Howie J following the commencement of the second trial[213]. Although I do not share the view that the "certificate had no intrinsic importance"[214] (because of my opinion that the statutory formality required indicates a significant alteration in the legal rights of the parties), what was ultimately important was the ruling that Howie J made when he initially granted the certificate and the course that was then taken by the accused, and the first trial, on the faith of that step.

201 *The second trial was bound*: Blackmore DCJ decided that he was not bound by Howie J's ruling under s 128(5) of the NSW Act, nor by the certificate granted by Howie J under s 128(7). The joint reasons support Blackmore DCJ in these conclusions. Their support derives from the view that his Honour adopted concerning the ambit of s 128(8)[215]. For several reasons, it is my opinion that Blackmore DCJ erred in the course that he adopted and in the conclusion that he expressed:

- The ruling made by Howie J in the accused's first trial was one lawfully made in the conduct of a trial, the circumstances of which had not relevantly changed when the second trial began before Blackmore DCJ. With respect, one would ordinarily expect that a single judge of equal or inferior rank in the judicial hierarchy would follow that ruling in any retrial, if only out of comity, leaving it to a court of criminal appeal to correct it later if it were challenged, either in an interlocutory appeal by the prosecution or in any final appeal following completion of the trial;

- Especially is this so, given the preliminary conclusion that Blackmore DCJ had reached (correctly in my view) that the "proceeding" before him and the new jury, involving a fresh indictment with different named parties (some of the original defendants having been convicted by the first jury), was a different "proceeding" within s 128(7), thereby attracting legal consequences for the "certificate" granted in the first trial

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213 Joint reasons at [91]-[92]; cf (2006) 160 A Crim R 243 at 262 [95]-[101].

214 Joint reasons at [91].

215 Joint reasons at [93]-[94].

by Howie J and formalised by that judge whilst the second trial was proceeding;

- Most importantly, it was only after the grant of the certificate by Howie J in the first trial, and his Honour's signification that he "required" the accused to give evidence of his "domestic dealings" in illegal drugs, that the accused embarked on his detailed evidence concerning his drug dealings with Mr Diez and Mr Lawrence, evidence which (save for the protection of the certificate) heavily inculpated the accused in serious but local domestic offences of drug trafficking; and

- The course therefore adopted by Blackmore DCJ treated Howie J's "certificate" as immaterial, despite the fact that it was only after Howie J had determined that a certificate would be granted that the accused gave such evidence and although that certificate then, and to this time, had never been quashed or set aside. As the Court of Criminal Appeal observed[216]:

  "If that certificate could now be quashed, not only could the evidence be tendered at a retrial of the original charge but also would be available to the Crown to tender against him at a separate trial on the 'domestic' charges. This could result in significant injustice."

202 These were strong reasons of legal principle and elementary justice that should have restrained Blackmore DCJ from giving effect to any different opinion that he might have felt concerning the construction of s 128(7) and (8) of the NSW Act. They provide "overwhelming discretionary reasons" to decline the prosecution's attempt, after the course that unfolded during the second trial, retrospectively to reopen the correctness of Howie J's ruling and effectively to "quash" the "certificate" that he had granted although doing so in a lower court without the requisite authority to make an order to that effect[217].

203 *Conclusion: no error*: No error has been shown in the conclusion of the Court of Criminal Appeal on this issue. With respect, the error lay in the decision of Blackmore DCJ. For the reasons earlier stated, his Honour misconstrued s 128(7) and (8) of the NSW Act. And even if his opinion as to the meaning of those sub-sections had been correct, he ought not to have given effect to it whilst Howie J's certificate remained in force. Specifically, he ought not to have treated the ruling and certificate by Howie J as if they had never occurred, were immaterial and could effectively be ignored by him in the retrial.

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216 (2006) 160 A Crim R 243 at 262 [100].

217 (2006) 160 A Crim R 243 at 262 [100].

The procedural unfairness of the course adopted

204 *The issue stated*: The final issue in contest is whether, even if Blackmore DCJ's interpretation of s 128(7) and (8) were legally correct, the earlier provision by Howie J of his ruling and the grant of a certificate under s 128 of the NSW Act rendered the second trial unfair, in the use that was then permitted of the evidence that had been given subject to the ruling and certificate that Howie J had announced.

205 *The proceedings were unfair*: It follows from what I have said that the premise for this last issue does not arise in the construction of s 128 that I favour. Alike with the Court of Criminal Appeal, I would conclude that the original approach of Howie J, his ruling and grant of the certificate under s 128 in the first trial, were entirely correct. Blackmore DCJ erred in law in reaching, and giving effect to, the opposite conclusion.

206 Nevertheless, assuming for the moment that I am wrong in the view I have taken of s 128(7) and (8), the position reached was clearly seriously unjust to the accused. It resulted in an unfair trial. A judge of a superior and constitutional court (the Supreme Court of a State of the Commonwealth) had made a ruling which was announced in open court with the reasons for it duly published. The ruling was made in response to prior discussion between the judge and the parties and the submissions of the parties. The judge had granted a certificate provided by statute carrying important legal consequences.

207 The prosecutor initially declined to assist Howie J, contenting himself by asking that a certificate not be given at all at the stage at which it was sought. Following submissions from the accused and in response to further questions from Howie J concerning s 128(5) and (6) of the Act, the prosecutor again declined to accept the procedure. However, he ultimately appeared to concede that, if the accused was asked whether he did "go ahead and start distributing and to whom, a question along those lines" [ie a question about his involvement in *domestic* drug dealings], then "he would be entitled to a certificate". It was only then that Howie J granted the accused the certificate in the terms later formalised. The prosecutor did not take up Howie J's invitation to make submissions on the "width" of the certificate. In both trials, the prosecutor relied on the accused's evidence in the prosecution case against Mr Diez and Mr Lawrence. Those defendants were convicted in the first trial. It is open to inference that the accused's evidence, the subject of the certificate, contributed to that outcome which was relevantly in "the public interest".

208 Against this background, and in the light of the certificate granted by Howie J, to subject the accused to a second trial in which his evidence in the first was treated as available without restriction (whether from Howie J's ruling, his certificate or otherwise) was basically unfair. Effectively, it involved a pretence that a ruling made, and certificate granted, by a Supreme Court judge had been a

legal nullity although never set aside or doubted by a higher court. Moreover, it ignored the careful steps taken by the accused to give evidence pursuant to judicial direction and on the explicit understanding that such evidence could *not* be used "against him" in breach of the certificate concerning his involvement with Messrs Diez and Lawrence and any other person in the supply or trafficking in illegal drugs *within* Australia during the times indicated.

209 *Conclusion: an unfair course*: No doubt, justice is a disputable virtue. The requirement that a trial conducted in federal jurisdiction (such as this one) be conducted fairly may be constitutionally guaranteed. But whether this is so or not, a fair trial is protected by basic common law principles and by the provisions of the *Criminal Appeal Act* 1912 (NSW) defending convicted prisoners from miscarriages of justice.

210 The accused, by his own admission, was involved in serious "domestic dealings" in prohibited drugs. It would be open to a jury to conclude that his dealings, as recorded in telephonic intercepts, were facts relevant to the facts in issue in his trial on the charge of participating in a conspiracy to import drugs. But the proof of his guilt of the only charge that he faced in these proceedings had to comply with the law. It also had to comply with basic fairness in the manner in which the evidence was procured from the accused himself.

211 In the result of the proceeding before Blackmore DCJ, evidence earlier given upon a ruling (and thus an assumption) as to its limited availability, as defined in the ruling made and certificate granted by Howie J, was then treated as available without limitation or restriction. It was used without any protection for the accused from the self-incrimination inherent in much of that evidence.

212 The course adopted in the successive trials of the accused necessarily exposed him to an unfair trial. The trial miscarried because Blackmore DCJ, unlike Howie J, misunderstood and misapplied s 128(7) and (8) of the NSW Act. But even if this had not been so, the trial miscarried because evidence, given on the faith of the ruling and certificate of a Supreme Court judge, was then used contrary to that ruling and certificate. This was fundamentally unfair as the Court of Criminal Appeal correctly concluded[218].

213 *Remaining immaterial issues*: Whatever view this Court might take of s 128 of the NSW Act, it should not inflict such an unfairness on the accused. The arguments belatedly raised by this Court itself (concerning whether the accused "objected" to giving particular evidence[219] or did so only because he was

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218 (2006) 160 A Crim R 243 at 260-262 [87]-[94], [100], 264 [113].

219 Joint reasons at [106].

"required" to do so by the ruling of Howie J) were never argued below. They were not grounds of appeal to this Court. They raise factual considerations that have not been explored. They could not be passed upon without added procedural unfairness to the accused[220]. The objection and requirement referred to in s 128 are legal steps in a trial. The hypothesis of high emotion or intense objection on the part of an accused, implicit in the joint reasons[221], is not part of the statutory scheme.

214 No argument was advanced before this Court that the "proviso"[222] should be applied if the foregoing conclusions were reached. The Court of Criminal Appeal was correct to conclude that it should not[223]. To order a third trial is a misfortune. Impatience with the arguments of the accused is understandable, given that his defence concedes serious domestic dealings in prohibited drugs. However, that course is required by the high value placed by our law on legal accuracy in criminal trials. Moreover, the contrary conclusion distorts the meaning of a most important statute which is gradually gaining acceptance as a reformed national, uniform law of evidence.

Conclusions and orders

215 Save in respect of the complaint raised by the accused's application to cross-appeal, I would therefore confirm all of the conclusions of law, fact and discretion reached by the Court of Criminal Appeal. Substantially, I would confirm the approach taken by Howie J in the first trial as to the meaning and application of s 128 of the NSW Act. The prosecution's appeals in matters S281 of 2006 and S282 of 2006 should be dismissed[224].

216 For the reasons also discussed, the accused's application for special leave to cross-appeal should be granted and the cross-appeal allowed. The orders of the Court of Criminal Appeal of the Supreme Court of New South Wales should be set aside so as to permit that Court to hear and determine the accused's fifth ground of appeal in the revised grounds of appeal to that Court[225].

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220 *Coulton v Holcombe* (1986) 162 CLR 1 at 7-8.

221 Joint reasons at [106]-[113].

222 *Criminal Appeal Act* 1912 (NSW) s 6(1).

223 (2006) 160 A Crim R 243 at 265 [115].

224 As pointed out in the joint reasons at [114] the DPP agreed that the disposition of the prosecution appeal in matter S 281/2006 determined the outcome of its appeal in matter S 282/2006.

225 See (2006) 160 A Crim R 243 at 245 [1].