HIGH COURT OF AUSTRALIA

GLEESON CJ
KIRBY, HAYNE, HEYDON AND CRENNAN JJ

AJS APPELLANT

AND

THE QUEEN RESPONDENT

AJS v The Queen
[2007] HCA 27
13 June 2007
M2/2007

ORDER

1. *Appeal allowed.*

2. *Set aside paragraph 4 of the orders of the Court of Appeal of the Supreme Court of Victoria made on 7 December 2005 and in its place order that:*

   (a) *judgment and verdict of acquittal be entered in respect of the charge of incest contrary to s 44(1) of the* Crimes Act *1958 (Vic);*

   (b) *there be a new trial limited to the offence of taking part in an indecent act contrary to s 47(1) of the* Crimes Act *1958 (Vic) with the person named in the presentment filed on 3 February 2004.*

On appeal from the Supreme Court of Victoria

Representation

C B Boyce with L C Carter for the appellant (instructed by Victoria Legal Aid)

J D McArdle QC with C M Quinn for the respondent (instructed by Solicitor for Public Prosecutions (Vic))

CATCHWORDS

AJS v The Queen

Criminal law – Verdicts – Statutory alternative verdicts – Appellant convicted by jury of one count of incest – Because of verdict on count of incest jury was not required to consider statutory alternative verdict of indecent act with a child aged under 16 – Court of Appeal quashed the conviction for insufficient evidence and ordered a new trial without specifying what charge or charges were to be tried – Whether the Court of Appeal should have entered a verdict of acquittal on the count of incest.

Criminal law – Verdicts – Appellate jurisdiction – Whether the Court of Appeal's jurisdiction pursuant to s 568(2) of the *Crimes Act* 1958 (Vic) either to enter a verdict of acquittal or order a new trial should be read with the provisions of ss 421 and 425 regulating alternative verdicts.

Criminal law – Verdicts – Whether entry of verdict of acquittal and order for new trial on lesser alternative count engage principles of estoppel or preclusion.

Criminal law – Trials – Evidence – Whether, following an acquittal and order for a new trial on a lesser alternative count, the jury in the new trial should be informed about that earlier acquittal.

Crimes Act 1958 (Vic), ss 421, 425 and 568(2).

1 GLEESON CJ, HAYNE, HEYDON AND CRENNAN JJ. The appellant was convicted at his trial on a charge of incest, contrary to s 44(1) of the *Crimes Act* 1958 (Vic), in that he took part in an act of sexual penetration with a person whom he knew to be his lineal descendant. The presentment contained only the count of incest and alleged that the appellant had digitally penetrated the complainant. On the appellant's appeal against his conviction, the Court of Appeal held[1] that "it was not open, on the evidence given by the complainant as to the issue of sexual penetration, for the jury reasonably to conclude beyond reasonable doubt that the [appellant] introduced his finger to any extent into the complainant's vagina". The Court ordered that the conviction should be quashed and there be a new trial.

2 By special leave, the appellant now appeals to this Court. He contends that the Court of Appeal should have directed the entry of judgment and verdict of acquittal on the charge of incest. He does not dispute that it would then be open for him to be tried for an offence of committing an indecent act with a child under the age of 16, contrary to s 47(1) of the *Crimes Act*. Although not expressly charged in the presentment, that offence of committing an indecent act had been left for the consideration of the jury at the first trial, as a statutory alternative to the offence under s 44(1). That jury could have found him guilty of committing an indecent act, if they had not returned a verdict of guilty to the charge of incest.

3 Neither before nor after the Court of Appeal made its orders did the appellant make any submission to that Court about the form of the orders to be made if his appeal succeeded. The consequence is that the Court of Appeal has not expressly considered the issues that now arise. It is for the appellant to formulate the precise orders which are sought in an appeal. If that is done, any controversy about the form of the orders can be identified, and arguments advanced that will assist the Court to resolve that controversy. If, after publication of reasons and pronouncement of orders, some issue emerges about the form of those orders, application should be made, before the order is perfected, to relist the matter for further argument about the form that the orders should take. These steps not having been taken in this matter, this Court must deal with the matter without the benefit of the Court of Appeal's consideration of the issues that have been debated.

4 The Director of Public Prosecutions accepts that he should not prosecute the appellant again on the charge of incest which was the subject of the first trial

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1 *R v AJS* (2005) 12 VR 563 at 571 [38].

and the appeal to the Court of Appeal. He has undertaken not to do so. He submits that, nonetheless, the Court of Appeal should not have directed the entry of judgment and verdict of acquittal on that count. This submission should be rejected. The charge of incest preferred against the appellant, having been prosecuted at trial and found by the Court of Appeal not to be sustainable, should be finally determined. The conclusion reached by the Court of Appeal required that that charge be determined by entry of judgment and verdict of acquittal. The order for a new trial should stand but, for the avoidance of doubt, it should be amended to provide that a new trial be had, limited to the offence of committing an indecent act contrary to s 47(1) of the *Crimes Act*.

5 Directing the entry of judgment and verdict of acquittal would not engage principles of estoppel or preclusion that fall for consideration where there is a double prosecution of an accused, either in the one proceeding[2] or in successive proceedings[3]. A new trial of the appellant, limited to a charge of committing an indecent act, would not be a second or subsequent prosecution. It would be the continuation of so much of the original prosecution as remained alive after the Court of Appeal's determination of the appeal. In particular, the entry of judgment and verdict of acquittal on the count of incest would not found a plea of autrefois acquit in answer to the statutory alternative offence, any more than a jury's verdict of not guilty to the count of incest, at the first trial, would have precluded the jury from going on to consider that alternative offence.

6 It is convenient to treat the appeal as requiring consideration of three issues. They may be described as the significance of the availability of alternative verdicts at the first trial, the scope of the appellate jurisdiction of the Court of Appeal, and the consequences of an acquittal at a new trial of the alternative offence.

Alternative verdicts

7 Consideration of the present matter must begin by reference to those provisions of the *Crimes Act* allowing for the return of alternative verdicts. Section 421(2) provides that:

> "Where, on a person's trial on indictment or presentment for any offence except treason or murder, the jury find him not guilty of the offence

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2 *Pearce v The Queen* (1998) 194 CLR 610.

3 *Island Maritime Ltd v Filipowski* (2006) 226 CLR 328.

> specifically charged therein, but the allegations in the indictment or presentment amount to or include (expressly or by necessary implication) an allegation of another offence falling within the jurisdiction of the court of trial, the jury may find him guilty of that other offence."

Sub-section (3) of that section provides that any allegation of an offence shall be taken as including an allegation of an attempt to commit that offence. Sub-section (4) permits the judge, if "the judge considers that in the interest of justice it is expedient for the judge to do so", to order that the guilt of the person charged of all or any of the other offences of which the person may by virtue of s 421 be found guilty, not be determined at the trial. It was not suggested that s 421(4) should have been engaged in this matter.

8 Section 422 of the *Crimes Act* deals with the procedure that is to be followed where the facts proved on trial disclose an offence more serious than the offence that is charged. Again, those provisions are not engaged in the present matter.

9 Specific provision is made for alternative verdicts for certain charges of sexual offences. Section 425(3) provides that:

> "If on the trial of a person charged with an offence against section 44 or 45(1) the jury are not satisfied that he or she is guilty of the offence charged or of an attempt to commit the offence charged but are satisfied that he or she is guilty of –
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> (a) assault with intent to commit the offence charged; or
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> (b) an offence against section 47(1) (indecent act with child under the age of 16); or
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> (c) an offence against section 18 (causing injury intentionally or recklessly) –
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> the jury may acquit the accused of the offence charged and find him or her guilty of whichever of those offences they are satisfied that he or she is guilty and he or she is liable to punishment accordingly."

Section 425(4) provides that the section "does not restrict the operation of section 421 or 422".

10 It follows then, that at the appellant's trial, if the jury had not concluded that he should be found guilty of the offence of incest, contrary to s 44(1), the jury would have been obliged to return its verdict in respect of the statutory

alternative of an offence against s 47(1) (indecent act with child under the age of 16).

11 The obligation to consider that alternative verdict would have arisen from the combined operation of ss 421 and 425. Section 425(3) was engaged because no order was made under s 421(4) that the appellant's guilt of the alternative offence not be determined at the trial of the offence of incest. And, although s 425(3) was the specific provision which regulated the availability of an alternative verdict in this case, it is important to recognise that this operation of s 425(3) was a particular species of the genus of cases regulated by s 421(2): cases in which "the allegations in the indictment or presentment amount to or include (expressly or by necessary implication) an allegation of another offence falling within the jurisdiction of the court of trial". The allegation of digital penetration of the lineal descendant of the appellant (a descendant who, at the time of the alleged offence was aged less than 16 years) necessarily included an allegation of committing an indecent act with the complainant.

The appellate jurisdiction of the Court of Appeal

12 It is next necessary to consider the provisions regulating the appellate jurisdiction of the Court of Appeal that were engaged in this matter. The Court of Appeal concluded that the verdict of the jury on the count of incest "should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence"[4]. The Court's powers in that event are described in s 568(2):

> "Subject to the special provisions of this Part the Court of Appeal shall, if it allows an appeal against conviction, quash the conviction and *either* direct a judgment and verdict of acquittal to be entered *or* direct a new trial to be had." (emphasis added)

Neither the appellant nor the respondent contended that any of the "special provisions" of Pt 6 of the *Crimes Act* was engaged.

13 The respondent emphasised the disjunction between the alternatives of directing entry of judgment and verdict of acquittal, on the one hand, and directing a new trial, on the other. The respondent submitted that if the Court of Appeal allows an appeal against conviction and quashes that conviction, the Court must then choose between directing a judgment and verdict of acquittal, or

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

directing a new trial. And, so the argument proceeded, that choice was to be made in respect of the particular charge the conviction for which was quashed. Thus, in the present case, it was said that having decided to quash the appellant's conviction for incest, the Court of Appeal was obliged to choose between directing a judgment and verdict of acquittal on the charge of incest, or directing that a new trial *of that charge* be had.

14 There are several difficulties in the way of accepting this construction of the provision. First, the submission treats the conviction for a particular offence as the fulcrum about which the other elements of the provision turn. That conviction is said to be the only proper subject of the Court of Appeal's orders to quash, to direct entry of judgment and verdict of acquittal or to direct a new trial. This construction does not give due weight to the statutory context in which s 568(2) operates and its legislative predecessors[5] operated. That context includes, and always has included, provisions permitting the return of alternative verdicts. The provisions for alternative verdicts made by the Victorian criminal legislation in force when the *Criminal Appeal Act* 1914 (Vic) was first enacted[6] did not include a general provision cast in the terms now found in s 421(2), but provisions for verdicts on offences alternative to those "specifically charged"[7] have always formed a part of the context within which the appellate provision for ordering a new trial has had to operate.

15 In that context, it would be wrong to read the power to order a new trial as confined to ordering a new trial for the offence that was the subject of the appellant's conviction and subsequent quashing on appeal. The power to order a new trial extends to ordering a new trial for an offence for which the appellant could have been convicted at the first trial. And that is what this Court ordered in

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5 The history of the provisions is traced in *R v Wilson and Grimwade* [1995] 1 VR 163 at 182. The provisions of s 568(1), (2) and (4) of the *Crimes Act* can be traced to s 4 of the *Criminal Appeal Act* 1907 (UK) but the provision in s 568(2) permitting the Court, as an alternative, to direct a new trial was an innovation added by s 4(2) of the *Criminal Appeal Act* 1914 (Vic).

6 Conveniently gathered together in the consolidating legislation of 1915: *Crimes Act* 1915 (Vic), ss 452-465.

7 s 421(2).

the Victorian case of *Kelly v The King*[8] and the Full Court of the Supreme Court of Victoria ordered in *R v Miller*[9].

16 Secondly, the respondent's construction of the provision leads to an awkward, if not an absurd, result. The respondent accepted that when, as here, the conviction in question was quashed because it was not open to the jury to be persuaded beyond reasonable doubt of the accused's guilt of that offence, it would be an abuse of process for the prosecution to attempt again to secure the accused's conviction for that offence. It follows, if the respondent's construction of the provision were to be accepted, that to direct a new trial in circumstances like the present would be to direct an abuse of process, for the Court could only direct a new trial on the charge of incest. This is reason enough to reject the respondent's construction of the provision.

17 Thirdly, if the construction advanced by the respondent is right, there would be no order or other judicial act of the Court of Appeal that would support the presentation of the accused person for trial on an indictment directly alleging a charge that was a statutory alternative to the offence the conviction for which the Court of Appeal quashed. The absence of such an order may then be said to have substantive consequences. In particular, filing a new presentment alleging the statutory alternative offence would, or at least may, then raise double jeopardy questions of the kind considered in *Island Maritime Ltd v Filipowski*[10]. The resolution of those questions would turn upon whether the further presentment was to be treated as constituting the institution of a second or fresh proceeding separate from the proceeding which, on the hypothesis advanced by the respondent, would have been brought to an end by the orders of the Court of Appeal quashing the conviction.

Consequences of acquittal for incest at new trial on alternative count

18 Argument was directed by both parties to what would follow from an order by the Court of Appeal directing that judgment and verdict of acquittal be entered on the count of incest preferred against the appellant. Much of the argument on this aspect of the matter proceeded by reference to general propositions articulated at a level of abstraction divorced from the particular

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8 (1923) 32 CLR 509. See also *Callaghan v The Queen* (1952) 87 CLR 115 at 125.

9 [1951] VLR 346.

10 (2006) 226 CLR 328.

circumstances of this case. Thus, reference was made to the incontrovertibility of a verdict of acquittal[11] and to the necessity for a person who has been charged with and acquitted of an offence to have the full benefit of that acquittal[12]. And particular reference was made to the Court's decisions in *Pearce v The Queen*[13] and *Island Maritime*[14] concerning questions of double jeopardy. But the issues that now arise for consideration are more particular than the statements of general principle that have been mentioned, and differ in important respects from the questions of double jeopardy considered in *Pearce* and *Island Maritime*. The immediate question is what order a court of appeal should make in disposing of an appeal against conviction where the count charged was not made out and a lesser, statutory alternative offence has never been considered by a jury.

19 No question of double jeopardy arises in the present matter. The proceedings commenced by the prosecution against the appellant were, as the Court of Appeal's orders recognised, only partly determined by that Court's disposition of the appeal. The second of the offences now under consideration (the offence of committing an indecent act) was a statutory alternative to the first. There has been and would be no *double* prosecution of the kind considered in *Pearce*. In *Pearce*, the prosecution sought and obtained convictions for two offences charged in the one indictment. Further, unlike *Island Maritime*, there would be no separate institution of a second prosecution. In this case the prosecution does not seek to institute new and different proceedings against the appellant after the final determination (against the prosecution) of earlier proceedings. The charge of incest preferred against the appellant has now been finally resolved in his favour. He is entitled to the entry of judgment and verdict of acquittal of that offence. But the other, lesser, statutory alternative offence of committing an indecent act put in issue by the presentment charging the appellant with incest has not been determined by the Court of Appeal and remains unresolved.

20 In *Murrell*[15], the Court of Criminal Appeal of New South Wales considered issues generally similar to those that arise in the present matter. In

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11 *Rogers v The Queen* (1994) 181 CLR 251; *Island Maritime* (2006) 226 CLR 328.

12 *R v Storey* (1978) 140 CLR 364.

13 (1998) 194 CLR 610.

14 (2006) 226 CLR 328.

15 (2001) 123 A Crim R 54.

Murrell, the Court concluded[16] that a properly instructed jury would have to entertain a reasonable doubt about the appellant's guilt of murder. The Court quashed the appellant's conviction for murder but ordered a new trial generally. The Court considered whether to direct entry of a verdict of acquittal for murder and direct a new trial for manslaughter alone but declined to do so on the basis[17] that "[i]t would be prudent to avoid any residual question of autrefois acquit arising".

21 For the reasons given earlier, that course should not be followed in the present matter. No question of double jeopardy arises. Whether there may be said to be considerations peculiar to the law of homicide which would support the particular conclusions reached in *Murrell* was not examined in this appeal and need not be decided.

22 The appellant submitted that it may be necessary to explain to the jury at his trial for the offence of committing an indecent act why he does not then stand charged with an offence of incest. The appellant suggested that this necessity would arise because the complainant will likely give evidence of digital penetration. If that evidence were to be given, it is not immediately apparent why the jury would have to be told anything about an offence of incest. But if, for whatever reason, either or both of the parties at a new trial sought to broach that subject, there appears to be no reason why the jury could not be told that the prosecution accepts that the evidence is not sufficient to establish any intentional penetration.

23 There may be a more general problem, common in new trials, presented by a witness (in this case the complainant) giving an account in evidence that is said to differ from evidence given in the earlier proceeding. It was in this respect that the appellant submitted that principles established in cases like *Storey*[18] and *Rogers v The Queen*[19] would be engaged. The appellant submitted that, consistent with *Storey* and *Rogers*, it would be necessary to explain to the jury that, in considering the complainant's evidence, the appellant should have the "full benefit"[20] of his acquittal of the charge of incest.

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16 (2001) 123 A Crim R 54 at 62 [33].

17 (2001) 123 A Crim R 54 at 64 [42].

18 (1978) 140 CLR 364.

19 (1994) 181 CLR 251.

20 *Storey* (1978) 140 CLR 364 at 372 per Barwick CJ.

24 When an accused person has been acquitted of a charge by verdict of a jury, it will not be possible to know why the jury reached its verdict. In those circumstances, the reference to the person having the "full benefit" of an acquittal may reflect the opacity of that verdict. But it is important to recognise that the references made to the "full benefit" of an acquittal are no more than a particular restatement of a more fundamental principle. That principle is that the verdict, as recorded in the court's record, is not to be controverted[21]. And where, as here, the reasons for quashing the conviction are known, the reasons for directing entry of judgment and verdict of acquittal are known. There would be a controverting of that record only if the jury were to be left in a position where in the course of considering whether the appellant had committed an indecent act they might consider whether there had been, or may have been, an act of digital penetration of the complainant. A concession by the prosecution that the evidence may not be understood by the jury as establishing that there had been that penetration, or in default of such a concession, a direction to that effect, would give the appellant the full benefit of the verdict to which he was and is now entitled in respect of the count of incest.

25 While the exact content of directions to the jury must depend upon the way in which the real issues in the case emerge at trial, it is not immediately apparent why it would be necessary to explain to the jury the reason that the conclusion that there had been digital penetration is not open. If, as may be expected, the credit of the complainant is taxed with her earlier accounts of the events giving rise to the prosecution, that would be reason enough for the jury to be told that they must proceed on the footing that there was no digital penetration. Further explanation of why they must proceed on that basis would very probably not be necessary. In particular, to tell the jury of an earlier trial, conviction and successful appeal would, at first sight, appear to introduce unnecessary and distracting complexity to the trial of the offence of committing an indecent act.

26 Further, it would seem unlikely that it would be necessary or desirable to permit any evidence to be led about the appellant's acquittal on the charge of incest. The critical point that would have to be made, if the complainant gave evidence of penetration, is that the jury may not conclude that penetration occurred. If reference were to be made to the appellant having been prosecuted for incest (and as earlier indicated, it is not apparent why that should be so) it

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21 *Pearce* (1998) 194 CLR 610 at 627-628 [60]-[61] per Gummow J.

would be necessary to tell the jury only that he had been acquitted of that offence and that they must accept that he did not digitally penetrate the complainant.

Conclusion and Orders

27 The appeal should be allowed. Paragraph 4 of the orders of the Court of Appeal of the Supreme Court of Victoria made on 7 December 2005 should be set aside and in its place there should be orders directing that judgment and verdict of acquittal be entered in respect of the charge of incest contrary to s 44(1) of the *Crimes Act* 1958 (Vic) and that a new trial be had, limited to the offence of taking part in an indecent act contrary to s 47(1) of the *Crimes Act* 1958 (Vic) with the person named in the presentment filed on 3 February 2004.

28 KIRBY J. I agree in the orders proposed in the reasons of Gleeson CJ, Hayne, Heydon and Crennan JJ ("the joint reasons").

A present entitlement to acquittal of incest

29 I agree with the reasons for those orders as set out in the analysis by their Honours of the provisions of the *Crimes Act* 1958 (Vic) under which the appellant was tried for the crime of incest; the powers of the Court of Appeal in disposing of the appellant's appeal to it; the appellant's entitlement to a direction for a judgment and verdict of acquittal on the charge of incest; and the availability to the prosecution of a new presentment against the appellant for the statutory alternative offence of "indecent act with a child under the age of 16"[22].

30 The last step, as the joint reasons have demonstrated, comes about by the combined operation of ss 425(3) and 47(1) of the *Crimes Act*, and s 568(1), taking into account the fact that the jury in the first trial never reached the alternative statutory offence, because of their verdict of guilty of incest which the Court of Appeal concluded was unreasonable and could not be supported having regard to the evidence.

31 Upon reaching that conclusion, in my view, it was the appellant's right in law to have a verdict and judgment of acquittal directed by the Court of Appeal. Whatever consequences might follow, either for the appellant or for the prosecution, lie in the future. Strictly, they are not presented at this stage by any evidentiary facts. Further, there are three reasons of prudence why this Court should not, in my respectful view, decide or predict their disposition.

Immateriality of possible future proceedings

32 *Uncertainty of a second trial*: First, as this Court has said many times, the direction that a new trial be had (here on the statutory alternative charge left undecided by the first trial) is not a direction that a new indictment or presentment *must* be found by the prosecution[23]. That decision belongs to the Director of Public Prosecutions. The Court was told that the decision had not yet been made.

33 In the present case, having regard to the repeated evidence of the complainant that digital penetration had occurred during the alleged offence and the decision of the Court of Appeal that a verdict of guilty of incest on that basis

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22 *Crimes Act*, s 425(3).

23 cf *MacKenzie v The Queen* (1996) 190 CLR 348 at 376-377; *Dyers v The Queen* (2002) 210 CLR 285 at 297 [23], 317 [88], 331 [135].

was unreasonable and could not be supported, it is possible that the prosecution might accept the judgment and verdict of acquittal in the Court of Appeal as determinative of the complainant's real accusation.

34 Retrials are a most significant burden for the accused, the complainant, witnesses, juries and the public. I would not regard it as inevitable that a proper exercise of the prosecutorial discretion in this case would result in a retrial. As I understood it, the respondent's real concern about the outcome, as argued before this Court, was addressed to questions of principle: the rights of prosecutors and accused persons generally; the dispositive powers of the Court of Appeal; and the obligations of that Court in these and analogous circumstances. All of these points are now set to rest by the compelling analysis of the joint reasons and by this Court's disposition.

35 *Avoiding hypothetical decisions*: Secondly, experience teaches that it is ordinarily wise to withhold substantial comments on the consequences of future events for legal rights and duties. Those events (if they occur at all) have an unpleasant habit of following an unpredictable course, often quite different from that anticipated at an earlier time. From its earliest days to the present, this Court has been reluctant to proffer legal advice and predictions on the basis of hypothetical facts that have not yet arisen[24]. In part, this reluctance has grown out of the constitutional requirement for there to be a "matter" before the Court. There is no problem in that regard in the present proceeding. The appellant's appeal is such a "matter". In part, it has arisen because of the Court's usual unwillingness to expand the ambit of the "matter" by offering predictions about the outcome of arguments of double jeopardy, in any future trial of the appellant, in advance of any such trial and without the concrete circumstances, enlivened by evidence, said to give rise to the peril of double jeopardy forbidden by the earlier judgment of acquittal. As recent divided decisions of this Court show, this is a tricky area of the law. It contains many difficulties[25].

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24 *The State of South Australia v The State of Victoria* (1911) 12 CLR 667 at 674-675; *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 267; *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 623, cf 666-668; *Bass v Permanent Trustee Company Ltd* (1999) 198 CLR 334 at 357 [49] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

25 *Pearce v The Queen* (1998) 194 CLR 610; *Island Maritime Ltd v Filipowski* (2006) 226 CLR 328. See also *R v Carroll* (2002) 213 CLR 635.

36 The same is true of any direction that might be appropriate in any second trial concerning the "full benefit"[26] of the acquittal of the charge of incest to which the appellant would then be entitled on the basis of the Court of Appeal's orders and reasons. I should prefer to deal with these issues, if and when they arise, in the light of the evidence at a second trial; the considered rulings on that evidence and directions given by a trial judge; the verdict of the second jury; and the consideration of the points, fully developed, by the intermediate appellate court. We have none of those ingredients before the Court in the present case. This Court should not offer what is effectively advice about eventualities that have not yet arisen, may never arise or may arise in entirely different and unpredictable ways.

37 Specifically, if (as I believe) the appellant was entitled, as of legal right, to a direction by the Court of Appeal that a verdict and judgment of acquittal be entered, it is not material to that entitlement that it should be established that the consequent order presents no (or little) practical difficulty to the prosecution in proceeding against the appellant on the statutory alternative charge. That is as it may be. The verdict of acquittal was the appellant's legal entitlement. It does not follow, in my view, because ordering it would not create undue problems in a second trial, specifically problems for the prosecution in advancing a different, but related, charge[27].

38 *Full benefit of the acquittal*: Thirdly, there is a particular reason why this Court should withhold comment in the appellant's case on the meaning and content of the "full benefit" of the acquittal of the charge of incest ordered by the Court of Appeal. Consideration of that question has been raised in another appeal whose hearing followed this and which stands for judgment[28]. In that appeal, the issue is a live one and one of the questions argued before the Court. It arises because the appellant there was twice tried for offences bearing certain similarities. In the first trial he was acquitted in consequence of a jury's verdict of not guilty. In the second trial, the accused asked for directions from the trial

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26 The phrase used by Barwick CJ in *R v Storey* (1978) 140 CLR 364 at 372; cf *R v Wilkes* (1948) 77 CLR 511 at 518; *Garrett v The Queen* (1977) 139 CLR 437; *R v Young* [1998] 1 VR 402 at 421-422.

27 In supplementary written submissions, filed by leave, the appellant argued that there was no possibility, if a second trial were had for the offence described in s 47(1) of the *Crimes Act*, of a successful plea in bar of autrefois acquit. However, the appellant correctly submitted: "Even *if* there is a possibility of a future plea in bar, the appellant maintains his submission that he was still entitled, as of right, to a judgment and verdict of acquittal on the count of incest." (original emphasis)

28 *Washer v The Queen*, reserved 27 April 2007.

judge, relevant to the "benefit" that he claimed as a result of the first jury's verdict. He was denied such directions in a ruling upheld by the Court of Appeal of the Supreme Court of Western Australia[29]. These are concrete circumstances in which the issue of "full benefit" may be elaborated by this Court by reference to precise evidentiary facts. I therefore prefer to reserve my opinion on the point and to withhold it in the present proceedings where it is, in a sense, an issue twice removed.

39 I appreciate that it is sometimes useful for intermediate courts, once an appeal is allowed, to offer observations for the assistance of a judge presiding at a retrial. Occasionally, similar remarks are also offered by this Court. I also realise that, in considering legal outcomes, it can sometimes be relevant to assess their viability by reference to their consequences. However, because this Court is a court of error, my own feeling is that such advice should be conserved to essential matters and avoided on issues that are, or may become, controversies because they affect the rights of parties and depend on the way any future trial develops.

Orders

40 With these reservations, but with full agreement otherwise in the joint reasons, down to their treatment of the consequences of acquittal at a new trial on the alternative count[30], I concur in the orders proposed by the joint reasons.

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29 *Di Lena v Western Australia* (2006) 165 A Crim R 482.

30 Joint reasons at [1]-[17].