HIGH COURT OF AUSTRALIA

GLEESON CJ,
KIRBY, HAYNE, HEYDON AND CRENNAN JJ

RAYMOND JAMES WASHER APPELLANT

AND

THE STATE OF WESTERN AUSTRALIA RESPONDENT

Washer v The State of Western Australia [2007] HCA 48
8 November 2007
P6/2007

ORDER

Appeal dismissed.

On appeal from the Supreme Court of Western Australia

Representation

D Grace QC with C B Boyce for the appellant (instructed by the Office of David Grace QC)

S Vandongen with S F Rafferty for the respondent (instructed by Director of Public Prosecutions (WA))

CATCHWORDS

Washer v The State of Western Australia

Evidence – Admissibility – Relevance – Appellant convicted of conspiracy to possess a prohibited drug with intent to sell or supply it to another – Appellant had been previously acquitted of a conspiracy covering different times, parties and object, to possess a prohibited drug with intent to sell or supply it to another – Trial judge admitted evidence tending to show the appellant was a drug dealer (the "drug dealing evidence") – The drug dealing evidence had been adduced in the earlier trial in which the appellant was acquitted – Trial judge directed the jury not to use the drug dealing evidence to infer that a person who dealt in drugs on one occasion was more likely to do so subsequently – Whether the drug dealing evidence was relevant to the offence of which the appellant was convicted – Whether evidence that the appellant had been acquitted of the previous charge was relevant and admissible.

Words and phrases – "the full effect of an acquittal", "the full benefit of an acquittal".

1 GLEESON CJ, HEYDON AND CRENNAN JJ. Following a trial before Wisbey DCJ and a jury in the District Court of Western Australia, the appellant was convicted of conspiring with John Di Lena and Andrea Scott, between 18 May 2000 and 2 June 2000, to possess a prohibited drug, methylamphetamine, with intent to sell or supply it to another contrary to the *Misuse of Drugs Act* 1981 (WA). The alleged conspiracy involved the proposed importation into Western Australia from Queensland of a large quantity (1.96 kg) of methylamphetamine. It was alleged that John Di Lena was the principal organiser of the transaction, and that the appellant's role was to provide part ($55,000) of the funds used to acquire the drugs. The alleged conspiracy related to a specific parcel of methylamphetamine which was purchased in Queensland but which, in the events that occurred, fell into the hands of the authorities before it reached Western Australia. The planned importation turned into something of a fiasco.

2 At an earlier trial, before Fenbury DCJ and a jury, the appellant had been acquitted of a charge that, between 13 April 2000 and 21 March 2001, he conspired with Gavin Whitsed and William Bowles to sell or supply a prohibited drug, namely methylamphetamine. The alleged conspiracy was said to have extended over about a year, and to have covered an ongoing business of the supply of drugs by the three conspirators to other persons. An alleged agreement between the three men to participate in a business of supplying drugs to third parties was of the essence of that alleged conspiracy.

3 Some of the evidence, including evidence obtained by covert police surveillance of conversations between the appellant and Messrs Whitsed and Bowles, and evidence of physical property found in certain premises occupied by the appellant, which had been relied on at the earlier trial, was tendered by the prosecution at the trial with which this appeal is concerned. The admissibility of that evidence is not in issue in this appeal. In the course of the trial, counsel for the appellant sought, through cross-examination of a police witness, to adduce evidence of the fact of the appellant's acquittal at the earlier trial. Counsel began to question the witness about the charge of conspiracy the subject of the earlier trial, objection was taken by the prosecutor, and, after argument in the absence of the jury, Wisbey DCJ disallowed the line of questioning on the ground that it was "not appropriate to ask this witness about another charge and the outcome of that other charge."

4 Having appealed unsuccessfully against his conviction to the Court of Appeal of the Supreme Court of Western Australia[1], the appellant now appeals,

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

by special leave, to this Court. The grounds of appeal are narrower than those in the Court of Appeal. The first ground is that Wisbey DCJ erred in not allowing the appellant's counsel to adduce evidence of the fact that the appellant had been charged with, and acquitted of, the conspiracy the subject of the earlier trial. The second ground is that Wisbey DCJ should not only have received the evidence of the acquittal but should have directed the jury "that they were bound to give the [a]ppellant the full effect of his acquittal". The two grounds are inter-related. The admissibility of the evidence of the acquittal depended upon its relevance, and a useful practical test of its relevance is to ask what the trial judge could or should have said to the jury as to the use they could make of it in their deliberations. In his written submissions, counsel for the appellant acknowledged that, in the circumstances of this case, it would make little sense to a jury simply to tell them "to accord an accused the full benefit of his earlier acquittal". Counsel went on, therefore, to propose a form of direction that might properly and usefully have been given. That is a matter to which it will be necessary to return. Before dealing with questions of principle, however, it is necessary to examine, with some particularity, the relationship between the two trials.

5 The alleged conspiracies were distinct in terms of parties and object, although there was some overlap in terms of time and in the evidence relied upon by the prosecution. It is not argued that a verdict of guilty at the trial presently in question inevitably controverted the earlier acquittal, or that the earlier acquittal precluded the tender of particular evidence, or that the proceedings on the indictment were an abuse of process and should have been stayed on the grounds applied in *R v Carroll*[2]. As was pointed out in *Carroll*[3], there are cases where, at a later trial of other allegedly similar conduct by an accused, evidence of conduct may be adduced even though the accused had earlier been charged with, tried for, and acquitted of an offence said to be constituted by that conduct. Whether, in such a case, evidence of the fact of the earlier acquittal is relevant and ought to be admitted is a question that can be answered only by reference to the particular circumstances. The answer to the question is neither "yes, always" nor "no, never". Relevance depends upon whether the evidence could rationally affect, directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceedings[4]. That can be determined only by an analysis of the

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2 (2002) 213 CLR 635.

3 (2002) 213 CLR 635 at 651 [50].

4 *Goldsmith v Sandilands* (2002) 76 ALJR 1024 at 1025 [2]; 190 ALR 370 at 371. The definition of relevance is taken from the *Evidence Act* 1995 (Cth), s 55. That

(Footnote continues on next page)

facts in issue in the proceedings, and the circumstances which bear upon the question of probability. It also requires consideration of the process of reasoning by which information as to the fact of the acquittal could rationally affect the assessment of the probabilities. The word "rationally" is significant in this context. In order to establish relevance, it is necessary to point to a process of reasoning by which the information in question could affect the jury's assessment of the probability of the existence of a fact in issue at the trial.

The prosecution case at trial

6 The appellant was tried jointly with John Di Lena and Andrea Scott. All three, like Whitsed and Bowles, and most of the others who featured in the evidence, were members of a motorcycle club. Scott was Di Lena's de facto partner. In his remarks on sentence, Wisbey DCJ said:

> "[E]ach of you being at the relevant time members of the Rebels Outlaw Motorcycle Gang arranged through contacts in Brisbane, presumably members of the same group, to purchase two kilograms of methylamphetamine. The state asserted that you, Mr Di Lena, were the principal organiser of the transaction and you, [the appellant], involved in financing to the extent of $55,000, a sum sufficient it would seem to give you a substantial beneficial interest in the drug and the control of it.
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> The arrangement was that an associate by the name of Fisher would fly to Brisbane to collect the drug and transport it back to Western Australia. As arranged, Fisher flew to Brisbane but for reasons which were never identified at trial it became necessary for him to acquire a Hertz Rent-A-Car to return to Western Australia with the drug. Because he did not have the requisite financial capacity, the necessary credit facility was arranged by agreement with Ms Scott, who undertook with Hertz Rent-A-Car to have the hiring charges debited to her credit card account.
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> In the event the transaction was frustrated when Fisher's travelling companion [Ms Lennon] left him in a motel in northern New South Wales, taking the car and the drug concealed in the car. The police became involved; Fisher was apprehended, and a subsequent covert operation revealed the participation of each of you in the agreement to unlawfully acquire the drug".

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legislation does not govern the present case, but the definition reflects the common law.

7 The following summary of the evidence relied on by the prosecution is taken from the reasons of Roberts-Smith JA, with whom Wheeler JA and Pullin JA agreed, in the Court of Appeal.

8 On 19 May 2000, Di Lena flew to Brisbane, allegedly for the purpose of making arrangements for the drug transaction. He returned to Perth on 22 May. Fisher flew to Brisbane on 28 May. From there, he made phone calls to Di Lena and to an associate of Di Lena. On 30 May, Ms Lennon flew to Brisbane to join Fisher. As part of a covert surveillance operation, the appellant's phone calls were being monitored. Some of Di Lena's phone calls were being monitored as from 10 July. There were listening devices installed in their homes, in the case of the appellant as from 9 June 2000. On 30 May, the day Ms Lennon flew to Brisbane, the appellant was recorded as saying in a phone conversation that he was in a hurry to go to Brisbane and would be there for about a week.

9 The appellant travelled to Brisbane and remained there until 6 June 2000. In the meantime, the arrangements with Hertz were made by Andrea Scott in Perth. Fisher collected the car from Hertz in Brisbane. He and Ms Lennon left Brisbane on 31 May 2000 in the car. When they were at a town in northern New South Wales, on 31 May, they quarrelled, and Ms Lennon drove off in the car. Two days later, still in New South Wales, the car ran out of fuel. Lennon was spoken to by police, who searched the car and found concealed in it 1.96 kg of methylamphetamine. She was arrested. In the meantime, Fisher was making telephone calls as part of frantic attempts to find Ms Lennon and the drugs. He was arrested on 6 June. On the same day, the appellant returned to Perth. In mid-June, police investigated the hiring of the car, and established Andrea Scott's complicity.

10 On 29 June 2000, the appellant had a conversation with a person named Page. It contained what were said to be references to drug dealing, but it did not appear to relate to the importation from Queensland.

11 On 30 June 2000, the appellant had a conversation with Gavin Whitsed at the appellant's home. The conversation, according to the prosecution case, was generally about drug dealing, but in the course of it there was specific reference to the Brisbane transaction. It was not the prosecution case that Whitsed was involved in that transaction. The appellant told Whitsed certain things about the proposed importation and said that he believed Di Lena should go to Brisbane urgently to sort the matter out. He said "they" were "spinning out", that he had given over "fifty grand upfront" and that it was "killing him". He went on to describe to Whitsed his arrangements with Di Lena. He criticised Di Lena's handling of the matter.

12 On 3 July, the appellant had a conversation at his home with William Bowles. Again, it was not the prosecution case that Bowles was involved in the Brisbane transaction. The conversation included discussion of what the prosecution said were sales of drugs. As he had done with Whitsed, the appellant said a number of things about the Brisbane transaction and spoke critically of Di Lena. On 7 July, there was a further conversation in which the appellant criticised Di Lena and said it looked as if the appellant would have to "go over east and sort it out". He said there were problems with the suppliers in the east. On 11 July there was a recorded conversation at the appellant's home between the appellant and Whitsed. It did not include any reference to the Brisbane transaction, but referred to transactions which the prosecution alleged were drug transactions.

13 On 12 July 2000, the police executed a covert search warrant at the appellant's house and found, in the kitchen, a set of scales and a grinder containing traces of methylamphetamine. On 19 July, the appellant and Di Lena travelled together by air to Brisbane. They were under police surveillance. They returned to Perth together on 23 July. On 24 July, in a telephone conversation between Di Lena and Whitsed, Di Lena made references to the appellant saying the appellant was "doing what he should have been doing all along."

14 A conversation between Di Lena and Scott at their home on 7 September 2000 was recorded. It contained extensive discussion of the Queensland matter including what the prosecution said was criticism of Fisher. On 13 September, there was a conversation between Di Lena and Scott in which they discussed a request by the police to interview Scott.

15 On 21 September 2000, police seized a number of items, including some scales and a grinder with traces of methylamphetamine located at the appellant's house (which was different from the house he was occupying in July). The police also seized an account book of the appellant which contained an entry: "29.5, 55,000 J". On the prosecution case, J was a reference to John Di Lena. This entry was said to be specific evidence of the appellant's role in the Brisbane transaction.

16 The appellant was interviewed by police on 21 September 2000. Although he acknowledged being a member of the Rebels motorcycle organisation he denied any association with methylamphetamine. He said he owned a pressure cleaning business and a timber business. His recent visits to Brisbane, he said, were purely social. In a later interview on 22 March 2001, when the secretly recorded conversations were played to him, the appellant denied he was talking about drugs. He denied that the grinder with traces of methylamphetamine belonged to him. As to the scales, he suggested that some drug dealer may have entered his house surreptitiously and made clandestine use

of them. The entry in his account book, he said, could have related to dealings in shares or commodities. He denied that it had anything to do with drugs.

17 At the trial, the prosecution called Ms Lennon as a witness. She gave an account of the events in Queensland. The appellant did not give evidence.

The "drug dealing evidence"

18 As has been noted, the prosecution tendered evidence of conversations, or parts of conversations, between the appellant and others, including Whitsed and Bowles, which were alleged to relate to drug dealing other than the specific transaction involving the importation from Queensland. The prosecution also tendered physical evidence such as the scales and grinder which was not specifically linked to that importation. These forms of evidence were described in argument as "the drug dealing evidence". It is because some of that evidence had been tendered as part of the evidence at the earlier trial concerning an alleged conspiracy with Whitsed and Bowles that the present issue arises. There is no ground of appeal in this Court relating to the admissibility of that evidence, but it is material to note how it was used at the (second) trial.

19 To the extent to which the evidence of the conversations and the physical evidence did not relate specifically to the importation from Queensland but, as alleged by the prosecution, showed that the appellant was a dealer in drugs, the Court of Appeal said its admissibility was governed by s 31A of the *Evidence Act* 1906 (WA), concerning propensity evidence, which is admissible if it has significant probative value and that probative value (to put it briefly) outweighs any risk of an unfair trial. The Court of Appeal held that part of the probative value of the evidence was that it went to prove the element of intent to sell or supply in the offence with which the appellant was charged. It is necessary to bear in mind that, at the time the evidence was led, it was not known whether the appellant would give evidence, or what answer he might seek to make to the prosecution case. In the Court of Appeal, it was argued for the appellant that the quantity of drugs the subject of the proposed importation was so great that it would have been fanciful to deny intent to sell or supply. As Roberts-Smith JA pointed out, no admission of the element of intent was made at trial, and, in the circumstances, the prosecution was obliged to lead, in its case, evidence to prove that element.

20 Roberts-Smith JA, dealing with arguments as to the admissibility of the evidence, and referring to both appellants in the Court of Appeal, said:

> "The drug dealing evidence here had substantial probative force to [support] a proposition that the appellants' association with each other and with others concerned in giving effect to the conspiratorial agreement [eg

> Fisher], was not an innocent association, but an aspect of the appellant[s'] drug dealing business. It similarly tended to negate the suggestion advanced on behalf of the appellants, that they were talking about things other than methylamphetamine, and that the book entry was to do with share or commodity trading. The evidence also tended to prove the element of intent to sell or supply. Indeed, it was not put otherwise either to us or at trial: the argument was not that the evidence did not have probative value in that way, but rather that it ought not to have been led because it was unnecessary as that element was not in issue."

21 Five particular conversations were in question. The first was the conversation on 29 June 2000 between the appellant and Page. They discussed the weight of something that was supposed to be six or seven grams, but had been weighed at only four grams. The appellant said it is "a lot for one person to be using", and then spoke about drug abuse, and said "if you stop dealing they'll just get it from someone else".

22 The second conversation was between the appellant and Whitsed on 30 June 2000. Part of the conversation referred to dividing amounts or quantities between various people. There was then what was, according to the prosecution, a reference to Di Lena and a discussion which involved the appellant describing to Whitsed the proposed importation from Queensland, and the roles in it of the appellant and Di Lena. The conversation left that topic and returned to what the prosecution alleged was general discussion of drug dealing (although there was no specific reference to drugs). The third and fourth conversations were between the appellant and Bowles, on 3 and 7 July 2000. The fifth conversation was between the appellant and Whitsed on 11 July 2000. Evidence of the second, third, fourth and fifth conversations had been led at the earlier trial concerning the appellant's alleged conspiracy with Whitsed and Bowles. Evidence of the first conversation (with Page) had not been led at the earlier trial.

23 The evidence of some of the conversations went beyond propensity evidence. Some of it related specifically to the Queensland transaction. It was also relevant to show the association between the appellant, Di Lena and Fisher. At the trial, the prosecution did not allege, or set out to establish, that the appellant was a party to any agreement with Whitsed or Bowles concerning the supply by the three of them to others of drugs. The defence case (unsupported by evidence from the appellant) was that the items that were discussed between the parties to the conversations did not include drugs but were items of legitimate commerce. The prosecution case was that the items were, or included, drugs. The inference for which the prosecution contended did not involve accepting that the appellant, Whitsed and Bowles were themselves parties to an agreement by which the three of them would supply drugs to others. The inference that they were talking about drugs did not depend upon any view about the roles of

Whitsed and Bowles in any drug dealing. At the earlier trial, the prosecution had alleged that all three men were parties to a conspiracy to supply. It was not put to the jury at the trial with which this appeal is concerned that it was necessary, or even material, to consider whether there was a general conspiracy relating to drug supply between the appellant, Whitsed and Bowles. On the contrary, the jury were told not to speculate about Whitsed and Bowles.

24 Wisbey DCJ directed the jury that evidence suggesting that the appellant was a dealer in drugs could only be used to determine whether the appellant intended to sell or supply the methylamphetamine from Queensland in the event that he came into possession of it. It was not to be used for the purpose of reasoning that, if the appellant had dealt in drugs on other occasions, he was more likely to have been involved in the Brisbane transaction.

The earlier trial

25 At the earlier trial before Fenbury DCJ and a jury, the appellant, Whitsed and Bowles were acquitted of conspiring, between 13 April 2000 and 21 March 2001, to sell or supply methylamphetamine. The evidence at that trial included evidence of the four conversations set out above, and of the items (scales and grinder) earlier described. A video recording of an interview between the police and the appellant on 22 March 2001 was tendered at both trials. In that interview, the appellant denied that any of the recorded conversations were about drugs.

26 It was not alleged that Whitsed and Bowles were parties to the conspiracy to possess the Queensland parcel of methylamphetamine. The conspiracy to which they and the appellant were allegedly party was a general conspiracy to supply, extending over a period of about a year. The acquittal at the earlier trial established as between the appellant and the prosecution that the appellant was not guilty of that alleged conspiracy. It did not establish that the appellant was innocent of drug dealing, or that his conversations with Whitsed and Bowles were not about drugs. No argument put to the jury at the trial before Wisbey DCJ controverted the decision at the earlier trial. It cannot be said that the two verdicts were inconsistent. It cannot even be said that the verdict at the trial presently in question casts doubt upon the correctness of the verdict at the first trial. The trial before Wisbey DCJ concerned a specific transaction. The evidence against the appellant included an accounting entry which, in the context of the whole of the evidence, could have been regarded as providing strong support for the prosecution case. The fact that the appellant was a drug dealer was directly relevant to the intent with which he took part in the alleged transaction, and the evidence of his discussions with Whitsed and Bowles (and Page), if it bore the complexion the prosecution put upon it, tended to show that

the appellant was a drug dealer. Parts of it also tended to show that the appellant was personally involved in the importation from Queensland.

27 In argument in this Court, an attempt was made by counsel for the appellant to identify some inconsistency between the case for the prosecution at the trial before Wisbey DCJ and the acquittal at the earlier trial. The attempt was unsuccessful. Furthermore, and significantly, the attempt to demonstrate such inconsistency necessarily required consideration of details of the conduct of the earlier trial that would have been unavailable to the jury at the later trial. When invited to identify a conclusion by the jury that would be inconsistent with the verdict at the first trial, counsel referred to a conclusion that the appellant's conversations with Whitsed and Bowles revealed an intention on the part of the appellant to sell or supply drugs. When it was pointed out that the verdict at the earlier trial at the most acquitted the appellant of an intent to sell or supply drugs in combination with Whitsed and Bowles, counsel submitted that this paid insufficient attention to the way the earlier trial was conducted. That was not shown to be correct, but even if it were so, how would the jury at the second trial know in sufficient, or any, detail how the earlier trial was conducted? For example, this Court was told in argument that, although the appellant did not give evidence at the earlier trial, a witness was called to give evidence that he and the appellant had dealings in gold, and the defence at the earlier trial relied on that evidence to support a suggestion that the items discussed between the appellant, Whitsed and Bowles could have been gold, or some other innocent commercial items. The same witness, however, was not called at the trial before Wisbey DCJ. Furthermore, the earlier trial was not concerned with the Queensland importation. If the jury at the earlier trial had heard all the evidence given at the later trial about that matter, it might well have influenced their interpretation of other parts of the conversations. Although there was some overlapping of the evidence, there were also substantial differences.

28 It is impossible to know why the jury at the earlier trial acquitted the appellant of conspiring with Whitsed and Bowles to supply drugs to third parties. They may have doubted that the conversations between the appellant and Whitsed and Bowles related to drugs. They may have doubted that the conversations showed more than that the appellant was in the business of dealing in drugs on his own account. They may have concluded positively that the appellant was a legitimate businessman. It is not possible to tell; and it could not be suggested that the jury at the trial before Wisbey DCJ should have been invited to re-examine the conduct of the earlier trial in order to reach their own conclusion about what the jury at the earlier trial must have decided.

Was the earlier acquittal relevant?

29 In the present case, the question is whether, at the trial before Wisbey DCJ, the judge should have admitted evidence of the fact that the appellant had been charged with conspiring, between April 2000 and March 2001, with Whitsed and Bowles, to supply drugs to third parties, that the evidence relied on in support of that charge had included some of the evidence relied on at the current trial, and that a jury had acquitted the appellant of that alleged offence. In some other cases, the question of the significance of a prior acquittal has been presented in a different manner, perhaps by way of a plea in bar, or an argument about abuse of process, or a complaint about directions given to a jury. In whatever way the problem arises, and whether it takes the form of a question of admissibility of evidence, preclusion of proceedings, or the exercise of a discretion to stay proceedings, the underlying legal principles relating to double jeopardy require, in their application, an accurate identification of the effect of the earlier acquittal and its relationship to the later charge. Where the issue arises as one of the admissibility of evidence, then relevance is likely to be the focus of argument. Relevance will be decided in the light of the legal principles applicable to the prosecution and defence of the charge against the accused, as related to the facts and circumstances of the particular case. If, in this case, the appellant had a legal right, by reason of his acquittal, to be given the benefit of an assumption relevant to the assessment of the other evidence in the case, then evidence of the acquittal would be relevant. If the fact of the acquittal had some logical connection with the assessment of the probabilities concerning some fact or facts in issue, the evidence would be relevant. In either case, however, a decision about relevance requires consideration of the effect of the acquittal. Accepting that the appellant was entitled to "the full benefit of the acquittal"[5], the question is what that "full benefit" entailed.

30 In *Garrett v The Queen*[6], the complainant and the accused had a long-standing sexual relationship, in which there were episodes of violence. The complainant had alleged that the accused raped her in November 1975. He was charged, tried, and, in early 1976, acquitted. In July 1976, the complainant again alleged that the accused raped her. The accused's defence was that the intercourse was consensual. The prosecution adduced, at a trial of the charge concerning the 1976 rape, evidence of the alleged 1975 rape and of the charge and the acquittal, on the basis that those events made it improbable that, in mid-1976, the complainant would have consented to intercourse. This Court held that

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5 *Garrett v The Queen* (1977) 139 CLR 437 at 445 per Barwick CJ.

6 (1977) 139 CLR 437.

the evidence was inadmissible. The Court also held that, by directing the jury that the acquittal of the accused was "neutral" on the question whether what occurred in 1975 was an act of rape, the trial judge had erred. Barwick CJ said that "it was not neutral and, if the prosecutrix were rightly permitted to give the evidence she gave, the acquittal was a dominant fact of which the applicant was entitled to full credit. To have said that the acquittal was neutral was to deny the applicant the full benefit of the acquittal and not to lay that emphasis upon it for which the circumstances called."[7] The Chief Justice did not suggest that the expression "full benefit of the acquittal" was either necessary or sufficient for the purpose of a direction to a jury. It was used by Barwick CJ in stating his opinion of the legal error in the trial judge's direction.

31 In most cases, for a trial judge simply to tell a jury that an accused should be given the full benefit of his or her acquittal would convey little. A likely response would be a request from the jury for an explanation. At that stage, the trial judge would have to address the question earlier identified: what, in the particular circumstances of the second case, does giving the accused the "full benefit" of the earlier acquittal entail? The admonition cannot be left hanging in the air. There could be cases in which its meaning would be reasonably clear; in other cases it may be quite obscure. To use it without further explanation would always be dangerous, and sometimes positively misleading.

32 The appellant placed much reliance upon *R v Storey*[8], a decision of this Court not long after *Garrett*. The Court divided four to three, and there was a division within the majority as to the admissibility of the critical evidence. The appellant, however, relied upon the case for what was said about directions to a jury concerning a prior acquittal. The respondents were tried for rape, having been acquitted earlier of forcibly abducting the prosecutrix with intent that she be carnally known. The offences arose out of a single incident. The defence to the charge of rape was consent. The headnote to the report of the case fairly summarises the consensus as being that evidence tending to show that an accused was guilty of an offence of which he has been acquitted may be admitted if it is otherwise relevant and if the jury can be and is directed not to interpret it in such a way as to deny the acquittal. The relationship between the earlier charge of forcible abduction and the later issue of consent was direct. Much of the reasoning of the members of the Court was taken up with a discussion of the application to criminal proceedings of the doctrine of issue estoppel. In that

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7 (1977) 139 CLR 437 at 445.

8 (1978) 140 CLR 364.

respect, the case has now been overtaken by *Rogers v The Queen*[9] and *Carroll*[10]. Members of the Court made general statements about appropriate jury directions. For example, Barwick CJ said[11]:

> "The correct principle relevant to the admissibility in a subsequent trial of evidence given in an earlier trial which has resulted in an acquittal is, in my opinion, no more than this: that a verdict of acquittal shall not be challenged in a subsequent trial: the accused in the hearing of a subsequent charge must be given the full benefit of his acquittal on the earlier occasion. Evidence which was admissible to establish the earlier offence is, in my opinion, not inadmissible merely because it was tendered in the earlier proceedings: but it may not be used for the purpose of challenging, or diminishing the benefit to the accused of, the acquittal. Such evidence will be admissible, provided it is relevant to the subsequent charge or to a defence to it but must only be allowed to be used to support that charge or negative a defence. Where evidence which would tend to prove the earlier charge or some element of it is admitted in the subsequent charge, the jury must be duly warned that they must accept the fact of the earlier acquittal and not use the evidence in any wise to reconsider the guilt of the accused of the earlier offence or to question or discount the effect of the acquittal.
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> I find no need myself to subsume that principle under the principle that matters decided having passed into judgment must be accepted as true in the sense of the judgment, ie, as it is said, they form res judicata. It is, of course, a res judicatum that the accused was acquitted: found not guilty of the offence charged. *But, as I think, no inference can be drawn from the acquittal that any particular fact was found or negatived by the jury so as to make that fact a res judicatum.*
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> But the citizen must not be twice put in jeopardy, that is to say, as relevant to the present discussion, must not be placed at the risk of being thought guilty of an offence of which he has been acquitted, or of in any sense being treated as guilty. It is the use of the evidence given on the prior occasion to canvass the acquittal which, if allowed, would offend the rule against double jeopardy, giving that rule a generous application. The principle that the accused in the subsequent trial must be given the full

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9 (1994) 181 CLR 251.

10 (2002) 213 CLR 635.

11 (1978) 140 CLR 364 at 372-373 (reference omitted).

> benefit of the acquittal thus might be regarded as akin to but not a mere extrapolation of the principle of autrefois acquit, both being grounded upon the protection of the law against double jeopardy. But, to my mind, they are distinct principles. In my opinion, the remarks of Lord MacDermott in *Sambasivam v Public Prosecutor Federation of Malaya*, sufficiently established the basic principle though, as I have indicated, I would take the reference to res judicata to be confined to the fact of acquittal and not to extend to any fact supposedly found or denied in arriving at that verdict." (emphasis added)

33 On the facts of that case, the use of the evidence of forcible abduction to negative consent in the later trial could properly be described as an attempt to canvass the acquittal.

34 Jacobs J compared cases where the earlier charge was of an offence which comprised only one element and cases where it comprised a number of elements. He said that where there was only one element of the earlier offence, that element cannot be proved at a later trial. Where there are multiple elements then it is not open to the jury at the later trial to conclude that *all* elements are proved at the later trial and the jury must be directed clearly and specifically to that effect[12].

35 Gibbs J said[13]:

> "From this survey of the authorities it will have been seen that there is a well-established principle that a verdict of acquittal once given is binding and that the Crown cannot in subsequent proceedings seek to show that the accused was guilty of an offence of which he has previously been acquitted. Whether this principle is regarded as an extension of autrefois acquit, or as an application of the rule against double jeopardy, does not much matter. Since the Crown cannot challenge an acquittal, and the accused is to be taken as entirely innocent of the offence of which he was previously acquitted, it must follow that evidence will be inadmissible if its only relevance is to show that the accused was guilty of an offence of which he has been acquitted. The evidence in question in *Sambasivam's Case* should in my opinion have been excluded entirely, as their Lordships hinted, but no objection was taken to it at the trial. However evidence otherwise relevant is not rendered inadmissible by the fact that it may tend to show that the accused was guilty of an offence of which he has been

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12 (1978) 140 CLR 364 at 408-409.

13 (1978) 140 CLR 364 at 387-388.

> acquitted. Where such evidence is admitted it will *sometimes* be necessary to warn the jury that the accused having been acquitted in the previous proceedings is to be taken as entirely innocent of the offence with which he was then charged. Such a warning will hardly be necessary if the question whether the accused has committed that offence is not raised in the later proceedings, and it would not be likely to occur to the jury to consider that question." (emphasis added)

36 In *R v Z*[14], the House of Lords considered an issue that was summarised by Lord Hutton, at the commencement of his reasons, as follows[15]:

> "[T]he issue which arises on this appeal is whether relevant evidence which the Crown wishes to adduce as part of its proof to establish the guilt of the defendant for an offence is inadmissible because it shows that the defendant had, in fact, been guilty of an earlier and different offence of which he had been acquitted."

37 That is not the issue in the present appeal. It is unnecessary for the purposes of this appeal to consider whether the approach of their Lordships to the issue was different from the approach of this Court in cases such as *Garrett*, *Storey*, *Rogers* or *Carroll*. Lord Hobhouse of Woodborough[16], dealing with the considerations of fairness relevant to a discretion to receive or exclude similar fact evidence, pointed out that the fact that an earlier trial ended in an acquittal may be a factor to be put in the balance, in the exercise of the discretion.

38 It was submitted that the present case is indistinguishable from *R v Young*[17], a Victorian case concerning the reception of evidence described as similar fact, or propensity, evidence. The submission should be rejected. There, the Court of Appeal of Victoria was concerned with a charge that the appellant indecently assaulted boys. Evidence was led of earlier incidents, in respect of which the appellant had been charged and acquitted. The incidents would not have been relevant if they had not been incidents of indecent assault. What the Court of Appeal said about the matter demonstrates the difference from the present case, where the prosecution did not invite the jury to conclude that the

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14 [2000] 2 AC 483.

15 [2000] 2 AC 483 at 488.

16 [2000] 2 AC 483 at 510.

17 [1998] 1 VR 402.

appellant was a party to a conspiracy with Whitsed or Bowles. The Court of Appeal said[18]:

> "In the present case the vice inherent in the Crown case, of which the applicant complains, does not arise out of a challenge to the earlier acquittals whereby the prosecution sought a directly contrary finding or verdict in the later trial, but by reason of its calling evidence seeking to establish that the applicant had been guilty of indecent assaults on three other occasions in respect of which there had been final verdicts of acquittal. It matters not whether one calls it similar fact, propensity or 'guilty passion' evidence: what was wrong was that the Crown sought to use it in a way which challenged the findings explicit in the earlier three acquittals. It did that by asking the jury to accept, admittedly for the limited purposes to which such evidence may be adduced, that these incidents were indecent assaults, so that it thereby sought to undermine what was already the subject of a binding judgment of the court."

39 In this case, the prosecution did not ask the jury to accept that the conversations between the appellant and Whitsed and Bowles showed the appellant making or pursuing an agreement with Whitsed and Bowles that the three of them would supply drugs to other people. It asked the jury to accept that the appellant, at the time of the proposed importation from Queensland, was a drug dealer, and from that to infer, among other things, that he intended to sell or supply to others his share of the amount imported. It was neither explicit nor implicit in the acquittal at the earlier trial that the appellant was not a drug dealer. For the purposes of the law, the acquittal established that the appellant was not a party to a conspiracy with Whitsed and Bowles to supply drugs to others; nothing more, and nothing less.

40 Should the jury, nevertheless, have been told that? Anticipating the comment that the suggested relevance of that information could be tested by considering an appropriate direction to the jury, explaining its possible significance, counsel for the appellant formulated a proposed direction in the following terms:

> "The acquittal is relevant to help weigh the evidence of the propensity evidence [sic]. From the acquittal you may infer innocence. The fact of the earlier acquittal may make it less likely that the accused conspired to deal in drugs with the intent to sell on the occasions other than the charged

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18 [1998] 1 VR 402 at 423.

occasion. The acquittal may thereby make it less likely that the accused conspired to possess drugs with the prohibited intent on this occasion".

41 It has already been noted that the trial judge directed the jury that they were *not* to use the evidence of drug dealing to reason that a person who dealt in drugs on one occasion would be more likely to deal in drugs on another. The evidence was said to be available to be used for the purpose of showing that, since he was a drug dealer, it was likely that the appellant intended to sell his share of what was to come from Queensland. The conversations also had other purposes of direct relevance in that they connected the appellant with the Queensland transaction and with the other participants in it, and it was open to the jury to find that they included admissions by the appellant of participation in the Queensland transaction. The inference of intent to sell might have been thought almost irresistible from the sheer quantity involved. That, indeed, was an argument relied on by the appellant on the question whether the drug dealing evidence should have been excluded. Let it be supposed that the jury had been informed that the appellant had been charged previously with being a party to an agreement (not related to the Queensland importation) with Whitsed and Bowles, that he had been acquitted, and that the jury must therefore act on the basis that there was no agreement to supply between those three men. That would have been a complete statement of what was involved in the benefit of the acquittal. There was no process of reasoning whereby that information would have made less plausible any step in the prosecution case as it was finally left to the jury. There was nothing more that the jury could properly have been told. If the jury had been told that the earlier acquittal established that the appellant was not a drug dealer, or that he was not talking about drugs in his conversations with Whitsed and Bowles, that would have been untrue. If the trial judge had told the jury they must give the appellant the full benefit of his acquittal without further explanation, that would have been mischievous.

42 No doubt there are cases in which the reception at a later trial of evidence of conduct that has been the subject of an earlier trial will make evidence of the fact of acquittal at the earlier trial relevant and admissible. However, as Gibbs J recognised in *Storey*, it will not be so in every case. It was not so in this case.

Conclusion

43 The appeal should be dismissed.

44 KIRBY J. This Court has hitherto affirmed a principle that: "Where evidence which would tend to prove [an] earlier charge or some element of it is admitted in [a] subsequent charge, the jury must be duly warned that they must accept the fact of the earlier acquittal and not use the evidence in any wise to … question or discount the effect of the acquittal."[19]

45 This principle is founded on considerations of legal policy upheld by the common law. It was conventionally observed in the Crown's prosecution practice[20]. The reasons for the principle include a recognition of the conclusiveness of an acquittal, as between the parties to an earlier criminal adjudication, so that the acquittal is treated as binding in all subsequent proceedings in respect of matters necessarily inherent in that adjudication[21]. However, the principle also gives effect to a wider protection of an accused from repeated vexation arising out of similar or overlapping evidence[22]. A further foundation for the rule is the principle of public policy whereby courts respect the institution of jury trial; treat the jury of citizens as the "constitutional tribunal" of fact[23] in matters committed to their verdicts; and regard a jury's verdict of acquittal in a criminal trial as legally equivalent to a determination in law that the accused is innocent of that accusation[24].

46 In Australia, it will rarely, if ever, happen that, following acquittal of one charge, an accused person will thereafter be prosecuted for exactly the same charge or for another charge on the basis of exactly the same evidence. Statutory warrant aside, the prosecution would rarely, if ever, be so brazen. Such conduct could invite the application of the principle of *res judicata,* given effect by a plea

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19 *R v Storey* (1978) 140 CLR 364 at 372 per Barwick CJ; see also at 391 per Stephen J, 397 per Mason J, 425 per Aickin J.

20 See *Pearce v The Queen* (1998) 194 CLR 610 at 638-640 [95]-[98].

21 *Sambasivam v Public Prosecutor, Federation of Malaya* [1950] AC 458 at 479 (PC) per Lord MacDermott.

22 cf *Davern v Messel* (1984) 155 CLR 21 at 67 per Deane J.

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

24 *Director of Public Prosecutions v Shannon* [1975] AC 717 at 772 per Lord Salmon; Williams, "A Judgment of Innocence: The Effect of an Acquittal in Australian Law", (1987) 61 *Australian Law Journal* 134.

of *autrefois acquit*, or possibly a plea in bar or an application for a stay of the proceedings[25].

47 In this case, having earlier been found not guilty by a jury (and acquitted) of a drug-related conspiracy, the appellant was tried again on another such conspiracy. At his second trial, evidence and argument were proffered before the second jury, in some respects identical to that advanced in the first trial. In the second trial, the appellant sought to adduce evidence of his earlier acquittal. He did so in order that the second jury would take that acquittal into account in their deliberations. That application was denied by the judge at the second trial. The jury in that trial found the appellant guilty of the second charge and he was convicted. An appeal against his conviction was dismissed by the Court of Appeal of Western Australia[26]. Now, by special leave, the appellant appeals to this Court seeking a new trial at which he would be given the full benefit of his earlier acquittal before a new jury.

48 In my view, the appellant has made good his complaint about the refusal of the judge at the second trial to permit him to prove his earlier acquittal and to direct the jury on the use that they might make of that fact. However, in the circumstances of the overwhelming evidence of the appellant's guilt of the offence charged in the second trial, the case is, as the respondent argued, one for the application of the "proviso"[27]. The appeal should be dismissed. But on that ground.

The facts

49 Mr Raymond Washer ("the appellant") was first presented on indictment for trial in the District Court of Western Australia. His first trial took place before Fenbury DCJ and a jury in September 2004. The indictment contained a single count of conspiracy with co-accused, Messrs Whitsed and Bowles, to supply a prohibited drug contrary to the *Misuse of Drugs Act* 1981 (WA), ss 6(1)(c) and 33(2)(a). The jury found the appellant and his co-accused not guilty of the charge and they were acquitted.

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25 *Rogers v The Queen* (1994) 181 CLR 251 at 276-277; *Pearce* (1998) 194 CLR 610 at 614 [9], 620 [28]-[29], 637-638 [92], 645-647 [108]-[112]; *Island Maritime Ltd v Filipowski* (2006) 226 CLR 328 at 339-341 [30]-[32], 343-344 [43], 345-346 [49], 359 [91], 360 [95].

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

27 *Criminal Appeals Act* 2004 (WA), s 30(4).

50 Six months later, in March 2005, also in the District Court of Western Australia, the appellant was tried on a charge of a separate drug-related conspiracy with different co-accused, Mr John Di Lena and Ms Andrea Scott. The second trial took place before Wisbey DCJ and a new jury. It was in this trial that the prosecution tendered evidence of drug dealing on the part of the appellant ("the drug dealing evidence") some of which coincided exactly with evidence that had been tendered against him in his first trial[28].

51 The appellant challenged the admissibility of this overlapping evidence. However, Wisbey DCJ admitted the evidence. His Honour held that the prosecution could lead it in proof of "the element of intent to sell or supply and to rebut innocent association" between the alleged conspirators[29]. By implication, Wisbey DCJ found that the evidence had probative value and afforded relevant proof of the offence charged in the second indictment.

52 The drug dealing evidence included recorded conversations between the appellant, on the one hand, and Messrs Bowles, Whitsed and Page, on the other. Most of that evidence had been tendered in the first trial. So was evidence of items discovered in searches made of the appellant's premises in July and September 2000. That evidence was consistent with the appellant's being "involved in drug dealing at a time approximate to the period of the alleged offence"[30]. The police found, among other things, scales and a grinder with traces of methylamphetamine located on top of the refrigerator. A business and expenditure recorder was found in the bus in which the appellant was living at the time of the September search[31]. An entry in this recorder was said to reflect a substantial financial transaction between the appellant and Mr Di Lena.

53 At trial and in the Court of Appeal, the appellant challenged Wisbey DCJ's ruling that the drug dealing evidence was admissible in the second trial. The appellant accepts that the *Evidence Act* 1906 (WA), s 31A was designed to abrogate the test for the admission of propensity evidence favoured by the majority of this Court in *Pfennig v The Queen*[32]. He acknowledges that the section was intended, in effect, to enact the test for admissibility of such evidence

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28 See also the reasons of Gleeson CJ, Heydon and Crennan JJ ("the joint reasons") at [21]-[22].

29 (2006) 165 A Crim R 482 at 492 [47].

30 (2006) 165 A Crim R 482 at 492 [47].

31 (2006) 165 A Crim R 482 at 490 [38].

32 (1995) 182 CLR 461.

propounded by McHugh J in that decision[33]. Nonetheless, the appellant submitted that the drug dealing evidence did not satisfy the conditions for admissibility described in s 31A(2)(a) and (b) of the *Evidence Act*. That submission was rejected by the Court of Appeal, which upheld the admissibility of the drug dealing evidence[34]. The appellant sought special leave to challenge that determination. Special leave was refused on that point. As the reasons of Gleeson CJ, Heydon and Crennan JJ ("the joint reasons") indicate, the admissibility of the drug dealing evidence in the appellant's second trial was not in issue in this appeal[35].

54 This left the appellant with his second (and alternative) objection to the conduct of his second trial. This objection was raised in that trial once the drug dealing evidence had been ruled admissible. The appellant submitted that he should be permitted to adduce evidence before the second jury that some of that evidence had been proffered by the prosecution and relied on by it in the first trial where the prosecution failed. The appellant contended that, otherwise, the prosecution would be allowed, in effect, to impugn the first jury's verdict (and the resulting acquittal); that he would be denied a benefit of that verdict by the course being adopted; and that the second jury should be informed of the first jury's verdict and of their duty, in their deliberations, not to impugn that verdict with its imputed finding that he was innocent of the earlier conspiracy charge.

55 The prosecutor objected to the second jury's receiving any such evidence. Wisbey DCJ upheld that submission. He ruled against the line of questions proposed by the appellant's counsel. Argument on the point was taken in the absence of the second jury[36]. They, therefore, had no knowledge of the earlier proceedings. Specifically, they were completely unaware of the earlier use of some of the drug dealing evidence; of the verdict of the first jury; and of the appellant's acquittal. Wisbey DCJ held that the second case "is nothing about" the first[37].

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33 (1995) 182 CLR 461 at 528-530 per McHugh J.

34 (2006) 165 A Crim R 482 at 498-499 [78]-[85], 501 [93]-[94], 511 [148].

35 Joint reasons at [3].

36 The exchange is set out in (2006) 165 A Crim R 482 at 508-509 [133]-[134]. There are parallels in the comment of Holt LCJ in *R v Harrison* (1692) 12 How St Tr 833 at 864.

37 (2006) 165 A Crim R 482 at 508 [134].

56 The Court of Appeal upheld the ruling of Wisbey DCJ in this respect[38]. It did so on the basis of its understanding of the comments of Gibbs J in *R v Storey*[39]. His Honour had there suggested a qualification to the general principle, stated at the outset of these reasons, that a person, acquitted of an earlier charge, was entitled to the "full benefit" of that acquittal:

> "Where such evidence is admitted it will sometimes be necessary to warn the jury that the accused having been acquitted in the previous proceedings is to be taken as entirely innocent of the offence with which he was then charged. Such a warning will hardly be necessary if the question whether the accused has committed that offence is not raised in the later proceedings, and it would not be likely to occur to the jury to consider that question."

57 The appellant was granted special leave by this Court to permit argument on the principle governing his case; the application of that principle in the circumstances; and whether any error of law or miscarriage of justice had occurred. In essence, the first question presented by this appeal is whether the appellant's case fell within the primary rule stated in *Storey* or within an exception. The second question is presented by the "proviso" governing the outcome of criminal appeals.

The legislation

58 *The relevant offences*: Because of the exclusion of issues of admissibility of the drug dealing evidence from the grant of special leave, it is unnecessary to note the language of the *Evidence Act* concerning propensity evidence in trials in Western Australia. However, it is appropriate to set out the provisions of ss 33(2) and 6(1) of the *Misuse of Drugs Act*. Those provisions express the offences for which the appellant successively stood trial.

59 At the relevant time, s 33(2) provided:

> "A person who conspires with another to commit an offence (in this subsection called 'the principal offence') commits –
>
> (a) if the principal offence is an indictable offence under section 6(1) … the indictable offence, but is liable on conviction to the penalty referred to in section 34(1)(b)".

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38 (2006) 165 A Crim R 482 at 485 [1], 511 [148], 522 [191].

39 (1978) 140 CLR 364 at 388; cf (2006) 165 A Crim R 482 at 510 [141].

60 By s 6(1) of the same Act, provision is made for "[o]ffences concerned with prohibited drugs generally". At the relevant time the sub-section provided:

> "Subject to subsection (3), a person who –
>
> (a) with intent to sell or supply it to another, has in his possession;
>
> (b) manufactures or prepares; or
>
> (c) sells or supplies, or offers to sell or supply, to another,
>
> a prohibited drug commits an indictable offence…".

61 *"Proviso" in criminal appeals*: In light of the respondent's submissions before the Court of Appeal, and in this Court, it is also necessary to notice the new provision applicable in Western Australia, governing criminal appeals. That provision has been removed from the *Criminal Code* of the State[40]. Section 30 of the *Criminal Appeals Act* 2004 (WA) now relevantly provides:

> "(1) This section applies in the case of an appeal against a conviction by an offender.
>
> (2) Unless under subsection (3) the Court of Appeal allows the appeal, it must dismiss the appeal.
>
> (3) The Court of Appeal must allow the appeal if in its opinion –
>
> (a) the verdict of guilty on which the conviction is based should be set aside because, having regard to the evidence, it is unreasonable or cannot be supported;
>
> (b) the conviction should be set aside because of a wrong decision on a question of law by the judge; or
>
> (c) there was a miscarriage of justice.
>
> (4) Despite subsection (3), even if a ground of appeal might be decided in favour of the offender, the Court of Appeal may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred."

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40 Formerly s 689(1) of the *Criminal Code* (WA). See *Krakouer v The Queen* (1998) 194 CLR 202 at 216 [36].

Full credit for an earlier acquittal

62 *History of the principle*: The principle which the appellant invoked in this appeal has a long history in our law. Well before the recent concerns about fundamental human rights, Blackstone wrote about the foundation for the principle[41]:

> "If the jury therefore find the prisoner not guilty, he is then for ever quit and discharged of the accusation".

63 To similar effect, Chitty observed that[42]:

> "When the prisoner is acquitted upon the merits, upon a sufficient indictment, he is for ever free and discharged from that accusation … [T]he general principle [is] that an acquittal is to be taken as a complete establishment of innocence."

64 In essence, the rule was propounded as a necessary consequence of the jury's verdict of not guilty on the conspiracy charged in the first trial. The appellant argued that when, in an attempt to establish the second conspiracy in the second trial, the prosecution sought to rely on evidence, some of which it had tendered in the first trial, he was not obliged to sit quietly and accept this course of conduct. He could not plead *autrefois acquit*, because the successive offences charged were not the same. The case was not one of *res judicata*. Interlocutory stays for abuse of process are but rarely granted. However, if he could establish, in the second jury's mind, that it was inherent in the first jury's verdict, based on the overlapping evidence, that he was innocent of drug dealing in respect of which the drug dealing evidence was tendered in the second trial, he was at least entitled to have that argument considered by the second jury and given due weight by them. They were entitled to know of the verdict and thus of the conclusion of the first jury, for whatever consequence it might have for their deliberations when some of the same evidence was tendered in the second trial.

65 If he were denied this opportunity, the appellant suggested, the first jury's verdict would be disrespected. The "discharge of the accusation" and "complete establishment of innocence" would turn out to be hollow. The risk of prosecutorial harassment by invoking the same evidence in a later charge would be enlarged. In my view, there is more to these arguments than is acknowledged in the joint reasons. Those reasons reflect the conclusion of the second trial judge and the Court of Appeal that, because the second conspiracy involved a

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41 Blackstone, *Commentaries on the Laws of England*, (1769), bk 4, c 27 at 355.

42 Chitty, *A Practical Treatise on the Criminal Law*, (1816), vol 1 at 648-649. See also Friedland, *Double Jeopardy*, (1969) at 129.

different crime, there was no relevant overlap and no appropriate "benefit" to extend to the appellant. This represents an unduly narrow appreciation of the governing legal principle.

66 *Scope of full benefit*: Because, in the present case, no question of *res judicata* arises, expressed (relevantly) in a plea of *autrefois acquit*[43], and nor was there any plea in bar or application for a stay to prevent abuse of the court's process, and because arguments as to the admissibility of the drug dealing evidence are not before this Court[44], the issue of principle arising is confined to what a judge in a second criminal trial should do where, to some extent at least, there is an overlap between the charges, evidence and arguments in the two trials, in the first of which the accused was acquitted.

67 Sometimes (perhaps usually) an accused might make a tactical decision to let sleeping dogs lie. After all, raising the fact of an earlier criminal trial, albeit for a different offence, might possibly place the accused in an unfavourable light. It could provide an odour of criminality which might be the last thing that the accused would want to have revealed to the second jury.

68 However, where, as here, the accused weighs the tactical disadvantages; seeks to demonstrate the degree of overlap; and wishes to use it to his own forensic advantage before the second jury, should the second trial judge forbid that course? Is the second jury entitled to know of the verdict of the first? Is it possible that this might assist them to accord proper respect to the earlier verdict? Could it help them to reach a proper and lawful verdict on the issues before them?

69 Similar questions of principle had to be decided by the Privy Council on appeal from the Court of Appeal of the Supreme Court of the Federation of Malaya in *Sambasivam v Public Prosecutor, Federation of Malaya*[45].

70 In *Sambasivam*, the accused was tried for two firearms offences and was acquitted of one of those offences, that of being in possession of ammunition contrary to law. A retrial was ordered on the other firearms offence, that of carrying a firearm. On the retrial, the assessors were not told that the accused had been found not guilty of one of the firearms offences with which he had been charged in the first trial. The assessors were therefore not instructed to treat the accused as entirely innocent of the matters of which he had been acquitted.

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43 *R v Wilkes* (1948) 77 CLR 511 at 518-519.

44 See above these reasons at [53].

45 [1950] AC 458.

Reversing the Court of Appeal's decision, the Privy Council found that the error involved in the procedure adopted at the second trial undermined the acceptability of the verdict of guilty at that trial. The error justified setting that verdict aside[46].

71 Lord MacDermott, who gave the reasons of the Privy Council, in an opinion that has proved influential and has been applied many times in this Court[47], said[48]:

> "[A] verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim 'Res judicata pro veritate accipitur' is no less applicable to criminal than to civil proceedings. Here, the appellant having been acquitted at the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness of that verdict and was precluded from taking any step to challenge it at the second trial."

72 Their Lordships made it clear that what was not permissible in the second trial was to tender, as unqualified, evidence that had been used in the first trial and was part of the foundation on which, in the first trial, the accused had been acquitted of a charge thereby decided in his favour[49]:

> "[T]he second trial ended without anything having been said or done to inform the assessors that the appellant had been found not guilty of being in possession of the ammunition and was to be taken as entirely innocent of that offence. … [T]hat should have been made clear when the statement had been put in evidence, if not before. Their Lordships … cannot avoid the conclusion that the effect of the omission was to render the trial unsatisfactory in a material respect. Had the assessors realized that only a part of the statement could be relied on, they might have attached greater weight to the other criticisms regarding it and rejected it altogether. And had they done so it by no means follows that they would have been prepared to accept the testimony of the [prosecution witnesses]

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46 [1950] AC 458 at 480.

47 *Kemp v The King* (1951) 83 CLR 341 at 342; *Mraz v The Queen [No 2]* (1956) 96 CLR 62 at 68; *Garrett v The Queen* (1977) 139 CLR 437 at 444-446; *Storey* (1978) 140 CLR 364 at 372-373, 387, 397, 408-410, 424-425; *Rogers* (1994) 181 CLR 251 at 277-278; *R v Carroll* (2002) 213 CLR 635 at 648 [37]. See also *Filipowski* (2006) 226 CLR 328 at 343 [41].

48 [1950] AC 458 at 479.

49 [1950] AC 458 at 480.

> in preference to that of the appellant. What they would have done … must, of course, remain a matter of conjecture. But the uncertainties are sufficiently reasonable to jeopardize the verdict reached and to justify the view … that it ought not to stand."

73 The principle expressed in *Sambasivam* involves nothing more than basic fairness to a person who has earlier been acquitted, on overlapping evidence, of a different offence. The Privy Council's decision makes it plain that analysis of the degree and nature of the overlap is required in every case. It is not necessary for the accused to establish with certainty that the second verdict was actually affected by lack of knowledge of an evidentiary overlap with the evidence that resulted in the earlier verdict. (Obviously, in the nature of jury trial, such certainty could not be attained because a jury does not give reasons for its decision.) It is enough that the "uncertainties are sufficiently reasonable" to have required the issue to be openly ventilated and considered in the second trial[50].

74 Before long, the principle in *Sambasivam* was being applied in this Court. Moreover, it was applied in circumstances similar to the present case where the accused person was seeking to place before a second jury evidence of an acquittal before the first jury; and seeking directions to the second jury that they must give him or her the "full benefit" of that acquittal.

75 *Australian applications*: In *Garrett v The Queen*[51], Barwick CJ (with the concurrence of Stephen, Mason and Jacobs JJ)[52] gave effect to the principle of *Sambasivam* in the context of a second trial for rape where the jury were directed as to the use that they should make of the evidence of an earlier acquittal. The trial judge had instructed the second jury that (the incidents subject to the charges being different) the acquittal on the earlier charge was a neutral fact and that no inference should be drawn from it, for or against the accused or the complainant[53]. The intermediate court upheld this ruling[54]. Barwick CJ explained why it was erroneous[55]:

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50 [1950] AC 458 at 480.

51 (1977) 139 CLR 437.

52 (1977) 139 CLR 437 at 446.

53 (1977) 139 CLR 437 at 442-443.

54 *R v Garrett* (1977) 15 SASR 501.

55 (1977) 139 CLR 437 at 445.

> "To have said that the acquittal was neutral was to deny the applicant the full benefit of the acquittal and not to lay that emphasis upon it for which the circumstances called. …
>
> [I]n my opinion the former acquittal could not be called in question by evidence led by the Crown in the subsequent trial. This conclusion does not depend on the purpose which the Crown sought to achieve by the admission of the evidence. It depends entirely on the tendency of the evidence itself.
>
> … [T]he direct tendency of the evidence of the [complainant] was to establish rape on the former occasion. It inevitably challenged the verdict of acquittal."

76 In the following year, in *Storey*[56], the same basic principle was restated. The debate in *Storey* substantially concerned the application of the doctrine of issue estoppel in criminal proceedings. That aspect of the matter does not concern us now[57]. However, Barwick CJ took the occasion to restate the basic rule governing the course to be taken by a judge in a trial, where the prosecution relied upon evidence that overlapped with evidence relied upon in an earlier trial in which there was an acquittal. His Honour said[58]:

> "Such evidence will be admissible, provided it is relevant to the subsequent charge or to a defence to it but must only be allowed to be used to support that charge or negative a defence. Where evidence which would tend to prove the earlier charge *or some element of it* is admitted in the subsequent charge, *the jury must be duly warned that they must accept the fact of the earlier acquittal and not use the evidence in any wise to reconsider the guilt of the accused of the earlier offence or to question or discount the effect of the acquittal*."

77 Allowing that the extent of any overlap in evidence and the purposes of the propounded use of the same prosecution evidence in successive trials will necessitate careful analysis (and that assessments of such evidence may differ), the principles successively stated by Barwick CJ in *Garrett* and *Storey* have been applied many times in intermediate courts in Australia.

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56 (1978) 140 CLR 364.

57 See *Rogers* (1994) 181 CLR 251 at 255-256 per Mason CJ, 272-278 per Deane and Gaudron JJ.

58 (1978) 140 CLR 364 at 372 (emphasis added).

78 In *R v Young*[59], the decision of the Court of Appeal of Victoria recognised that it would be rare that an accused would face a direct prosecution contradiction of the earlier acquittal. It is of the nature of the problem presented in these cases that the issue will be more subtle[60]. Thus, in *Young*, that Court said[61]:

> "[T]he vice inherent in the Crown case … does not arise out of a challenge to the earlier acquittals whereby the prosecution sought a directly contrary finding or verdict in the later trial, but by reason of its calling evidence seeking to establish that the applicant had been guilty of indecent assaults on three other occasions in respect of which there had been final verdicts of acquittal. It matters not whether one calls it similar fact, propensity or 'guilty passion' evidence: what was wrong was that the Crown sought to use it in a way which challenged the findings explicit in the earlier three acquittals. It did that by asking the jury to accept, *admittedly for the limited purposes to which such evidence may be adduced*, that these incidents were indecent assaults, so that it thereby sought to undermine what was already the subject of a binding judgment of the court. In that sense the applicant was not being given the 'full benefit of his acquittal'".

79 Correctly, the Victorian Court of Appeal pointed in *Young* to the fact that the governing principle is broader than one forbidding only a direct contradiction of the earlier acquittal. For such a contradiction *res judicata* and the plea of *autrefois acquit* (not to say relief by way of a stay of proceedings for abuse of process or possibly the discretionary exclusion of evidence) stand as adequate protections for the accused. A broader principle is required where the contrariety is less absolute and the undermining of the first jury's verdict is more subtle[62]:

> "It is not merely the possibility that the evidence might 'tend to overturn' a verdict already entered but the likelihood that the jury will be invited to reach conclusions directly contrary to the effect of the acquittal, albeit for the purpose of determining guilt on another charge, and *it is that sort of attack by a side wind which is seen to be contrary to the requirement that a properly entered verdict must be treated as 'incontrovertibly correct'*."

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59 [1998] 1 VR 402.

60 See [1998] 1 VR 402 at 422-423.

61 [1998] 1 VR 402 at 423 per Ormiston and Charles JJA and Vincent AJA (emphasis added).

62 *Young* [1998] 1 VR 402 at 422 (emphasis added).

The broader principle is endorsed by the decisions of this Court in *Garrett* and *Storey*.

80 *Overseas authority*: The trend of Canadian judicial authority has been similar to that expressed in the Privy Council and in Australian courts[63]. However, more recently, in *R v Z*[64], the House of Lords has departed from, or qualified, the *Sambasivam* doctrine. Substantially, the effect of the decision in *Z* has been to confine the earlier principle to cases where the accused is put on trial again for the offence of which an acquittal was earlier entered or is in some way to be punished again for that same offence[65]. The position adopted in the decision in *Z* appears to have been followed in New Zealand[66] at a time when the courts of that country were still subject to appeal to the Privy Council.

81 Whether the approach adopted in the House of Lords in *Z* may be reconciled with the reasoning in this Court in *Garrett* and *Storey* was a matter of dispute between the parties. Certainly, the decision in *Z* appears to favour a much narrower expression of the governing rule. It is one that runs the risk of effectively defining the rule out of existence. Neither party urged on this Court a reconsideration of the principles stated in *Sambasivam*, *Garrett* and *Storey* or an embrace, instead, of the approach stated in *Z*. And, even in *Z*, Lord Hobhouse of Woodborough acknowledged that "[f]airness requires that the jury hear all relevant evidence"[67].

82 In the United States of America, the problem now before us arises in cases where an accused has invoked the double jeopardy clause in the Constitution[68]. This is not an occasion to explore the somewhat confusing decisional law on that provision. However, with respect to the particular question now before this Court, the trend of United States authority appears to be in favour of the right of

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63 *R v Arp* [1998] 3 SCR 339 at 381-383 [76]-[78]; see also *Grdic v The Queen* [1985] 1 SCR 810.

64 [2000] 2 AC 483.

65 See [2000] 2 AC 483 at 487 per Lord Hope of Craighead, 499 per Lord Hutton, 510 per Lord Hobhouse of Woodborough.

66 *R v Degnan* [2001] 1 NZLR 280; cf *R v Gee* [2001] 3 NZLR 729.

67 [2000] 2 AC 483 at 510.

68 The United States Constitution, Fifth Amendment relevantly provides: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb". There is a provision in some ways similar in the International Covenant on Civil and Political Rights, Art 14.7: see *Pearce* (1998) 194 CLR 610 at 631 [75].

an accused person to place before a second jury the fact of acquittal in an earlier jury trial, in rebuttal of evidence received again in a second trial and as a procedure inherent in the guarantee of fairness of criminal trials expressed by the Supreme Court of the United States[69].

83 *Academic support*: Commentary on the resulting state of judicial authority, and on the requirements of fairness applicable to such cases, appears to endorse the principle of allowing an accused to place before a jury evidence of an earlier acquittal (accompanied by an appropriate judicial direction on the use to be made of that evidence) in circumstances where the prosecution leads "similar fact" evidence and such evidence had been tendered in support of the earlier charge of which the accused was acquitted.

84 The commentaries sometimes justify this course on the basis that it amounts to the accused employing the earlier acquittal as a "shield", in defence against any unfair attempt by the prosecution to use the same evidence twice, albeit in respect of offences that are technically different. The substantial unanimity of academic opinion on this point lends support to the appellant's submission that the trial judge and the Court of Appeal took too narrow a view of the legal rule that was to be applied in the circumstances of this case[70].

85 *Conclusion: using acquittal as a shield*: The result of this review of authority, principle and policy is, in my view, this. The courts below (and now a majority of this Court) have adopted an unduly narrow approach to the rule which, in a second trial, following an earlier acquittal, permits an accused (1) to prove before the second jury the fact of the earlier acquittal; (2) to seek by evidence and argument to demonstrate that inherent in the earlier acquittal was a decision adverse to the prosecution on the particular evidence and argument that it wishes to offer in the second trial; and (3) to secure from the judge at the second trial directions that the acquittal at the first trial is to be given "full effect" and is not to be undermined or disregarded by the use made there of the identical or similar overlapping evidence. The majority in this appeal is reluctant to give

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69 *Dowling v United States* 493 US 342 at 362 (1990) per Brennan J. See also *Hess v Alaska* 20 P 3d 1121 (2001).

70 Hirst, "Contradicting Previous Acquittals", (1991) *Criminal Law Review* 510 at 519; New Zealand, Law Commission, *Evidence: Reform of the Law*, Report No 55, Vol 1 (1999) at 67; Mirfield, "Res Judicata Rejected", (2001) 117 *Law Quarterly Review* 194; Mahoney, "Evidence", (2002) *New Zealand Law Review* 101 at 110; Stuesser, "Admitting Acquittals as Similar Fact Evidence", (2002) 45 *Criminal Law Quarterly* 488 at 507; McDonald, "The Admissibility of 'Acquittal Evidence' in Criminal Trials: Toward Reform", (2003) 34 *Victoria University of Wellington Law Review* 639 at 657, 661-662.

effect to this rule. However, in my view, legal authority and legal principle suggest that its application was appropriate.

86 *Two remaining issues*: Two questions remain. The first is whether, in the circumstances, the refusal of the trial judge to permit the appellant to prove to the second jury the fact of his acquittal in the first trial, and the failure of the trial judge to direct the jury on the fact of acquittal and the way the drug dealing evidence should be considered by them, amounted to a "wrong decision on a question of law" or "miscarriage of justice". The second issue, if the first is decided in favour of the appellant, is whether, in the circumstances of this case, notwithstanding any such error(s) "no substantial miscarriage of justice has occurred"[71].

The exclusion of proof of acquittal was erroneous

87 *The different offences*: The majority of this Court has accepted the respondent's argument that, having admitted the drug dealing evidence, the trial judge in the second trial was correct in refusing to permit the appellant to prove his acquittal in the first trial and in declining to direct the jury about the fact of acquittal of the first conspiracy and about the way that evidence should be considered by them[72].

88 In the Court of Appeal, the prosecution conceded that "most, if not all, of the recorded conversations had been led against the appellant on his earlier trial"[73]. In this Court, the respondent did not contest the generality of that concession. It pointed out that a conversation that was recorded on 29 June 2000 was not in fact adduced in evidence at the first trial. Nonetheless, the other recorded conversations were certainly tendered in evidence at both trials. To that extent, the prosecution evidence in both trials overlapped.

89 *The evidentiary differences*: On the other hand, there is no denying the fact that there were differences between the issues under consideration before the successive juries in the first and second trials:

(1) The conspiracy, the subject of the first trial, was to *sell or supply* a prohibited drug to another contrary to s 33(2)(a) of the *Misuse of Drugs Act*; whereas at the second trial it was to *possess* a prohibited drug with

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71 *Criminal Appeals Act* 2004 (WA), s 30(4).

72 Joint reasons at [41]-[42]; reasons of Hayne J at [113].

73 (2006) 165 A Crim R 482 at 502 [97].

intent to sell or supply it to another. The first conspiracy engaged s 6(1)(c) of the *Misuse of Drugs Act*. The second engaged s 6(1)(a);

(2) The alleged participants in the two conspiracies were different. The first conspiracy allegedly involved the appellant with Mr Whitsed and Mr Bowles. In the second, it allegedly involved him with Mr Di Lena and Ms Scott;

(3) Although the two conspiracies were alleged to overlap in time, the first referred to a much longer interval (13 April 2000 to 21 March 2001). The second was shorter and much more precisely defined (18 May 2000 to 2 June 2000);

(4) Necessarily, the offence in the second trial being more specific and narrower, the drug dealing evidence was tendered only by reference to those narrower issues;

(5) In the second trial, Wisbey DCJ told the jury not to speculate about the role of Messrs Whitsed and Bowles[74]. This was so although the evidence of conversations between the appellant and those men was before the second jury and common to both trials. In his first trial, the appellant's case had been that their discussions could have been related to gold or some other innocent commercial purposes[75]; and

(6) The earlier trial was not concerned with the importation of drugs to Western Australia from Queensland, as was the conspiracy alleged in the second trial[76].

90 I understand the conclusion, reached in the joint reasons, contrary to mine on this point. As the Privy Council's reasoning in *Sambasivam* shows, we are not dealing here with certainties but with "uncertainties [that] are sufficiently reasonable to jeopardize the [second] verdict reached"[77]. Nevertheless, with due respect to those who have reached a different conclusion, it is my opinion that the better view of the application of established authority is that the trial judge in the second trial, in the light of the overlapping evidence tendered and submissions made in the two trials, ought to have permitted the appellant to prove before the second jury the verdict of acquittal in the first trial. It was an ingredient that

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74 See the joint reasons at [23].

75 See the joint reasons at [27].

76 See the joint reasons at [18].

77 *Sambasivam* [1950] AC 458 at 480.

potentially stood in the appellant's favour. I shall state the factual considerations that bring me to this conclusion.

91 *Overlap between the two trials*: The following common features of the overlapping evidence should be noted:

(1) The appellant was an accused in each trial and was the one participant in common, affected by the overlapping evidence;

(2) In each trial the basic offence charged was the same, namely statutory conspiracy;

(3) In each trial, the conspiracy related to a drug prohibited by the *Misuse of Drugs Act*. Indeed, it was the same drug, namely methylamphetamine;

(4) Although the purposes of the conspiracies were different (being respectively to "sell and supply" in the first trial and to "possess" the prohibited drug in the second), the indictment in the second trial charged the appellant with conspiring to possess methylamphetamine "with intent to sell or supply to another". There was therefore a significant coincidence in the actual offences alleged which the successive juries were required to consider;

(5) There was also an overlap in time between the two offences. The second alleged conspiracy fell entirely within the interval during which the first conspiracy was said to have occurred. Accordingly, this was not a case (as sometimes happens) of completely different conspiracies, alleged to have occurred successively and at different times. The coincidence in time raises a possible interpretation that the drug dealing evidence was part of coincident or inter-connected criminality;

(6) Although there was much different, and additional, evidence to support the charge in the second indictment against the appellant, the prosecution's reliance on the drug dealing evidence makes it difficult to deny that some coincidence of reasoning on the part of the jury to guilt of the second offence might have arisen out of their evaluation of that evidence. In particular, the use by the prosecution of the recorded conversations involving Messrs Whitsed and Bowles (the alleged co-conspirators in the first conspiracy) left it open to the second jury to infer that whatever arrangement the appellant was discussing with Messrs Whitsed and Bowles, it was the same as, or materially similar to, that alleged with Mr Di Lena and Ms Scott;

(7) In the opening and closing addresses of the prosecutor in the second trial, express reference was made to the conversation between the appellant and Mr Whitsed of 30 June 2000 which had been critical in the prosecution's

case in the first trial. Thus, in that opening, the prosecutor said: "[T]he conversation is generally about drug dealing between Washer and Whitsed, but then it progresses on to be specific about the failure of this drug deal." By this comment, the question is immediately presented as to whether the appellant was entitled to have the jury in the second trial told that the charge "generally about drug dealing between Washer and Whitsed" had been the subject of an earlier prosecution; that the appellant had been found not guilty and acquitted of that offence; that, in law, he was to be treated therefore as innocent of that offence; that the first jury's verdict was to be respected by the second jury and given full effect by that jury; and that no inferences were to be drawn from that conversation with Mr Whitsed that the appellant was guilty of the second conspiracy with Mr Di Lena and Ms Scott, now under consideration;

(8) Similarly, in relation to a conversation between the appellant and Mr Whitsed on 11 July 2000, proved in both trials, the prosecutor told the second jury:

> "On 11 July 2000, in another recorded conversation at Washer's house, Washer and his colleague Whitsed embark on a lengthy discussion about drug transactions within the Rebels club in Perth. Particularly discussing amounts of drugs and moneys outstanding.
>
> This kind of evidence about drug transaction[s] the [S]tate says is relevant to prove a number of things: firstly, it's to prove that Washer is not talking about sand or carrots or sausages or anything innocent, he's talking about drugs; secondly, it's to show that Washer's intention or his intention when those drugs arrived in Perth, the ones from Queensland, his intention was his share of it at least was to sell or supply them as part of his … moneymaking venture."

The judge could direct the jury (as he did) not to speculate about the appellant's dealings with Messrs Whitsed and Bowles. However, such a direction would be somewhat uninstructive in the light of the affirmative statements made by the prosecutor. Arguably, the appellant was entitled to have the negative impact of these conversations (and the proof of his business relationship with Mr Whitsed) redressed and corrected by having the judge at the second trial tell the jury about the earlier charge; the appellant's acquittal upon it; and the consequence that such acquittal had for the use that the jury might make of the evidence presented by the prosecution in both trials; and

(9) Once the drug dealing evidence was admitted at the second trial, the use that the jury might make of it was (subject to any clear directions from the trial judge) entirely a matter for them. To say the least, it was possible

> that the second jury, uninformed about the first jury's verdict of not guilty, might have treated such evidence as damning of the appellant and proving that he was a drug dealer *generally* and therefore a drug dealer *specifically*, conspiring as alleged in the second indictment. To the respondent's protestations before this Court that such reasoning on the part of the jury was furthest from the prosecution's intentions, a question immediately arises. If the conversations with Messrs Whitsed and Bowles were designed to prove that Mr Washer "*is not talking about … anything innocent*", was the appellant not entitled to have the second jury informed that, notwithstanding any conclusion that they might otherwise reach about such evidence, an earlier jury had, in fact, found the appellant not guilty of the offence with which he was then charged? And that this jury finding was to be treated as a finding that he was innocent and given full effect by the second jury?

92 *An error of law occurred*: I can understand the reluctance on the part of Wisbey DCJ, in the second trial, to permit the appellant to open the fact of his acquittal in the first trial. I accept that, once the fact of the acquittal is opened, confining proof about the evidence, submissions and significance of the first trial would present difficulties for the judge conducting the second trial. I acknowledge that there were dangers, then, of confusion on the part of the second jury. Moreover, as the joint reasons point out in this Court, there were difficulties in formulating precisely a judicial direction to assist the second jury as to the "full effect" that they were to give to the jury's verdict in the first trial[78]. I make due allowance for all of these problems.

93 The fact remains that the prosecution, both by the evidence that it called before, and the submissions that it made to, the second jury, brought about a definite overlap between the matters presented to the second jury and those which had been passed upon by the verdict of the first jury. The prosecution should not have it both ways. In particular, it could not tell the second jury that the appellant's recorded conversation with Mr Whitsed was not "anything *innocent*" (but was talking about drugs) when the first jury's verdict arguably implied that that jury concluded that the conversation was not proved to be about drugs at all but rather something that was indeed legally *innocent*. By their verdict, the first jury were taken to have found the appellant *innocent* of a conspiracy to deal in drugs with Messrs Whitsed and Bowles, a matter of which the second jury should have been informed and which they should have taken into account in their deliberations.

94 *The appropriate directions*: In the end, the principles stated in this Court in *Garrett* and *Storey* should not have been ignored in the circumstances

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78 Joint reasons at [40]-[41].

presented by the prosecution evidence and argument in the appellant's second trial. It is true, as Gibbs J pointed out in *Storey*[79], that a warning not to impugn (but to give full effect to) an earlier jury verdict will not be necessary if the question "whether the accused has committed that offence is not raised in the later proceedings". However, by introducing the overlapping evidence of suggested drug dealing of the appellant with Messrs Whitsed and Bowles and by then expressly contending before the second jury trial that such evidence showed a lack of innocence in the appellant's conversations, the prosecutor, in the second proceeding, was arguably impugning the earlier verdict. At least, the prosecutor was placing an interpretation before the second jury that they might look on differently if they were informed of the verdict of the first jury.

95 As a matter of law, the appellant therefore became entitled to attempt to rebut at least the common part of the prosecution's case by invoking the evidence of this acquittal that stood in his favour. If that is what he wished to do, he was entitled to prove the outcome of the earlier trial. He was also entitled to have the judge tell the second jury that they must remove from their deliberations any otherwise adverse inferences of guilt of drug dealings by the appellant with Messrs Whitsed and Bowles appearing in his recorded conversations with them. In respect of those conversations, the second jury were required to take into their deliberations the conclusive fact that the appellant was found innocent of conspiracy with Messrs Whitsed and Bowles.

96 I can appreciate why, forensically, the prosecution fought to keep this fact from the second jury. However, the considerations that I have outlined suggest that the appellant's request was correct in law. It was also fair. It should have been upheld.

97 *Conclusion: an erroneous decision*: It follows, in my view, that Wisbey DCJ erred in law in rejecting the appellant's application to be allowed to prove what had happened at his earlier trial. In light of the ruling, the form of the directions that would then have been appropriate did not arise. In any event, any difficulties presented by formulating such directions cannot be determinative. It is inherent in the approach taken in *Garrett* and *Storey* that proper directions to a second jury can be formulated. So much is also inherent in the overseas decisions that endorse the requirement for such jury directions in proper cases.

98 It is not necessary for this Court to attempt to formulate the judicial directions here. The directions would be founded on the evidence that was adduced about the first trial (or, as I would expect, they would commonly follow an agreement reached between counsel). Essentially, no more was claimed than that the second jury should have been acquainted with the verdict reached by the

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79 (1978) 140 CLR 364 at 388.

first; an instruction on what was in law inherent in that verdict, especially with respect to the overlapping evidence of the conversations with Messrs Whitsed and Bowles; and directions to the second jury that it was their duty not to impugn the effect of the earlier finding of innocence with respect to the drug dealing evidence but to give full respect and force to it in their deliberations.

99 The contrary view is not, in my opinion, consistent with the rule expressed by Barwick CJ in *Garrett* and *Storey*. No party challenged the correctness of those decisions. They are decisions that conform to much earlier law and ensure basic fairness and transparency in criminal trials. They are consistent with established common law authority. They are also conformable with the fundamental norms of human rights. The appellant has therefore established error of law in the conduct of his second trial. But has "no substantial miscarriage … occurred"?

A proper case for the "proviso"

100 *Appellant's submission*: The appellant submitted that, if this Court reached the foregoing conclusion, there would be no scope for the operation of the "proviso". He argued that the jury's verdict was tainted by the admission of the drug dealing evidence, absent any evidence of his acquittal (and innocence) in respect of dealings described in part of that evidence. I accept that this is a powerful submission. In this country, an accused person is normally entitled to have the trial conducted on the basis of admissible evidence tendered by a party, appropriate submissions and accurate directions on the governing law. Not only is this the assumption upon the basis of which the "proviso" is written into the law. This too is generally a fundamental civil right, reflected in the provisions of the International Covenant on Civil and Political Rights ("the ICCPR")[80].

101 *Approach to the "proviso"*: On the other hand, recent authority of this Court has emphasised the requirement, in every case where the "proviso" is invoked, that the appellate court should consider the entirety of the record for itself, in order to answer the question posed by the common form in which the "proviso" is expressed in cases of appeals against criminal convictions[81]. Relief is not automatic when errors in rulings on evidence occur or where misleading addresses go uncorrected or judicial directions are imperfect or inadequate. To

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80 The ICCPR, Art 14.2 reads: "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law."

81 *Weiss v The Queen* (2005) 224 CLR 300 at 316 [41]. See also *Dietrich v The Queen* (1992) 177 CLR 292 at 338.

say otherwise, would be to restore the Exchequer rule which it was "the legislative objective [of] the proviso … to do away with"[82].

102 In this case, in the approach that I favour, it falls to this Court to apply the "proviso". When all of the evidence in the present appeal is reconsidered and weighed, the result, in my opinion, is an outcome similar to that reached by this Court in *Festa v The Queen*[83] and *Nudd v The Queen*[84]. The evidence adduced by the prosecution, even wholly omitting the overlapping evidence which the appellant sought to qualify, was convincing, overwhelming and ultimately unanswered by the appellant. The general nature of that evidence is described in the joint reasons[85]. I will not repeat it.

103 In this Court, the respondent submitted that, had the appellant been permitted to adduce evidence of his earlier acquittal, it would have been prejudicial to his case as revealing that he had previously been charged with an offence involving the same prohibited drug as was the subject of his second trial. However, this cannot be a complete answer to the appellant's invocation of *Garrett*, *Storey* and the other decisions on which he relied. Where an accused seeks to adduce evidence of an earlier acquittal, he or she must make risky tactical decisions. It is not for the prosecution to render such decisions unavailing by propounding a concern for the prejudice they may occasion to the person seeking to make them.

104 By the same token, proof of the earlier verdict and the ensuing acquittal, even with clear judicial instructions on the limited use to be made of it, was not wholly neutral for the appellant. Whatever the judicial warning, it is inescapable that some jurors might have reasoned: "where there's smoke there's fire". If the appellant's considered decision was that he wished to prove his earlier acquittal and to have judicial instructions concerning its effect, the law, in my view, entitled him to embark on that course. Nevertheless, when this Court, on appeal, comes to consider for itself the "proviso", it is entitled to put into the balance the clear forensic consequences to the appellant that such a course involves. The verdict of acquittal in the first trial was relatively confined in its effect.

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82 *Weiss* (2005) 224 CLR 300 at 315 [38].

83 (2001) 208 CLR 593 at 604 [28], 633 [124]-[127], 657 [213], 662 [229]-[230], 671 [263].

84 (2006) 80 ALJR 614 at 622 [20], 637 [109], 645 [162]; 225 ALR 161 at 169, 189, 200-201.

85 Joint reasons at [6]-[17].

105 *Conclusion: no substantial miscarriage*: Inescapably, where the "proviso" is invoked, there are "borderline" cases[86]. In the end this is not one. The evidence against the appellant was overwhelming and effectively undisputed. I have therefore concluded that, although the appellant has established that a "wrong decision on a question of law by the judge" at trial occurred, uncorrected by the Court of Appeal, "no substantial miscarriage of justice has occurred"[87]. That conclusion requires an outcome adverse to the appellant.

Order

106 The appeal should be dismissed.

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86 *Nudd* (2006) 80 ALJR 614 at 637 [109]; 225 ALR 161 at 189.

87 *Criminal Appeals Act* 2004 (WA), ss 30(3)(b) and 30(4).

107 HAYNE J. I agree with Gleeson CJ, Heydon and Crennan JJ that the appeal should be dismissed.

108 At his trial for conspiracy to possess a prohibited drug, with intent to sell or supply the drug, the appellant sought to adduce evidence that he had previously been charged with, but had been acquitted of, another and different offence of conspiracy. It will be convenient to refer to this other offence of conspiracy as the "earlier charge" and to refer to the appellant's trial for that offence as the "earlier trial". The trial that gives rise to the present appeal will be referred to as the "later trial".

109 At both trials, evidence was adduced which the prosecution alleged showed that the appellant dealt in drugs. The evidence included physical evidence such as scales and a grinder bearing traces of methylamphetamine found at the appellant's house. It included recordings of conversations the appellant had had with others. It is convenient to refer to this as the "drug dealing evidence".

110 The appellant did not submit that the drug dealing evidence was not admissible at his later trial. In particular, he did not submit that his acquittal of the earlier charge prevented the prosecution at the later trial adducing the drug dealing evidence that had been led at his earlier trial. Rather, he contended that he was entitled to supplement the drug dealing evidence led at the later trial by proving that he had been charged with, but acquitted of, the earlier charge.

111 Were the facts that there had been the earlier trial, and that the appellant had been acquitted of the earlier charge, relevant to any fact in issue in the later trial? As the reasons of Gleeson CJ, Heydon and Crennan JJ demonstrate, neither the fact that there had been the earlier trial, nor the fact that the appellant had been acquitted of the earlier charge, was shown to be relevant to any fact in issue in the later trial.

112 In the later trial (the trial that gives rise to the present appeal) the appellant was alleged to have conspired with John Di Lena and Andrea Scott, between 18 May 2000 and 2 June 2000, to possess a quantity of methylamphetamine that was to be brought from Queensland to Western Australia with the intent to sell or supply that substance. The earlier charge had alleged that, between 13 April 2000 and 21 March 2001, the appellant had conspired with Gavin Whitsed and William Bowles to sell or supply methylamphetamine. The dates of the alleged conspiracies overlapped. They related to the same kind of drug (methylamphetamine). But the parties to the alleged conspiracies differed and it was not suggested, at the earlier trial, that the drugs which the prosecution said that the appellant and Mr Whitsed and Mr Bowles had agreed to sell or supply included the shipment that was the subject of the later charge.

113 What the jury at the earlier trial had made of any of the drug dealing evidence cannot be known. All that is known is that the appellant was acquitted of conspiring, between 13 April 2000 and 21 March 2001, with Mr Whitsed and Mr Bowles, to sell or supply methylamphetamine. The appellant's acquittal on that earlier charge is incontrovertible[88]. He did not, between those dates, conspire with Mr Whitsed and Mr Bowles to sell or supply methylamphetamine. But knowing, and accepting, that the appellant did not do that, says nothing about whether he conspired with persons other than Mr Whitsed and Mr Bowles to possess some other drugs. And unless a logical connection was identified between the fact of his acquittal on the earlier charge and some fact in issue at his later trial, evidence of the fact of the acquittal (or of the fact that there had been a trial that resulted in that verdict) was irrelevant at the later trial. The appellant identified no such connection. The evidence was rightly excluded as irrelevant.

114 It is unnecessary to consider what directions to the jury would have been necessary if the evidence had been admissible.

115 The appeal should be dismissed.

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88 *Rogers v The Queen* (1994) 181 CLR 251; *R v Carroll* (2002) 213 CLR 635.