HIGH COURT OF AUSTRALIA

GUMMOW ACJ
KIRBY, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ

Matters No S141/2008 & S142/2008

BRUCE BURRELL APPELLANT

AND

THE QUEEN RESPONDENT

Matters No S327/2007 & S328/2007

BRUCE BURRELL APPLICANT

AND

THE QUEEN RESPONDENT

Burrell v The Queen
[2008] HCA 34
31 July 2008
S141/2008 & S142/2008,
S327/2007 & S328/2007

ORDER

1. *Dismiss so much of the appellant's applications for special leave to appeal to this Court on grounds other than those upon which the appeals to this Court are founded.*

2. *Appeals allowed.*

3. *Set aside the order of the Court of Criminal Appeal made on 23 March 2007.*

4. *Set aside the order of the Court of Criminal Appeal made on 16 March 2007.*

5. *Remit the appellant's appeal against conviction and his application for leave to appeal against sentence to the Court of Criminal Appeal for rehearing.*

On appeal from the Supreme Court of New South Wales

Representation

I M Barker QC with D G Dalton SC for the appellant/applicant (instructed by Legal Aid Commission of NSW)

M G Sexton SC, Solicitor-General for the State of New South Wales with T L Smith for the respondent (instructed by Solicitor for Public Prosecutions (NSW))

CATCHWORDS

Burrell v The Queen

Criminal law – Appeal and new trial – Orders dismissing appeals formally recorded – Reasons for judgment contained substantial factual errors – Whether superior court of record can reopen proceedings after its orders disposing appeals formally recorded – Whether power to reopen appeals – Finality of litigation – Procedural fairness.

Criminal Practice – Court of Criminal Appeal (NSW) – Appeal – Power to reopen proceedings after orders disposing of appeals formally recorded – Finality of litigation – Avoidance of injustice to parties – Procedural fairness.

Courts – Court of Criminal Appeal (NSW) – Appeal – Reasons for judgment contained substantial factual errors – Power to reopen proceedings after orders disposing appeals formally recorded – Relevance of status and general powers of Court – Whether implied or inherent powers to avoid injustice to parties suffice to sustain orders reopening proceedings.

Words and phrases – "finality", "perfecting", "procedural fairness", "reopen", "superior court of record".

Criminal Appeal Act 1912 (NSW), ss 3-23.
Criminal Appeal Rules 1952 (NSW), rr 51, 53.

1 GUMMOW ACJ, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ. The Court of Criminal Appeal of New South Wales published reasons for decision and pronounced orders dismissing the appellant's appeals against conviction and sentence. After those orders had been formally recorded, the Court discovered that its reasons contained substantial factual errors. Could the Court reopen the appeals and reconsider the orders that had passed into record?

2 The appellant submitted, on appeal to this Court, that the Court of Criminal Appeal had no power to reopen the appeals. He submitted that this Court should set aside the orders first made by the Court of Criminal Appeal on account of the errors the Court of Criminal Appeal made. He further submitted that this Court should set aside the second orders of the Court of Criminal Appeal, confirming its first orders, on the ground that the second orders were made without jurisdiction. The appellant further submitted that his appeals to the Court of Criminal Appeal should be remitted to that Court for rehearing. Those submissions should be accepted and orders made accordingly.

Proceedings below

3 In 2006 the appellant was tried in the Supreme Court of New South Wales, before Barr J and a jury, on an indictment charging that on 6 May 1997 he detained Kerry Patricia Whelan with intent to hold her for advantage, and that on or about the same day he murdered Mrs Whelan. The jury returned verdicts of guilty to both counts on 6 June 2006. The appellant was sentenced to life imprisonment on the count of murder and to 16 years' imprisonment, with a non-parole period of 12 years, on the count of kidnapping.

4 The appellant appealed against his convictions, and sought leave to appeal against the sentences imposed, to the Court of Criminal Appeal. On 16 March 2007, that Court (McClellan CJ at CL, Sully and James JJ) published[1] reasons for its decision to dismiss the appeal against convictions, grant leave to appeal against sentence, but dismiss that appeal. Orders to that effect were pronounced by the Court.

5 That same day, 16 March 2007, notification of the Court's determination of what was described in the notice as "the application of Bruce Burrell to appeal against conviction and sentence" was prepared in the Registry of the Court of Criminal Appeal, signed on behalf of the Registrar of that Court and stamped

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1 *Burrell v The Queen* [2007] NSWCCA 65.

with the Court's seal. The notification was required by r 51 of the Criminal Appeal Rules 1952 (NSW). That rule then provided:

> "The Registrar shall send a notice (Forms Nos XI and XII) of the determination of any appeal, or of any application incidental thereto, to the appellant, if he was not present when the matter was determined, to the proper officer of the Court of Trial, to the Director-General of Corrective Services and to the Sheriff, if the appeal is against a conviction involving a sentence of death or is against a sentence of death."

6 It is common ground that on the same day, 16 March 2007, particulars of the Registrar's notification were entered on the records of the Supreme Court of New South Wales as the court of trial. That step was required by r 53 of the Criminal Appeal Rules which then provided:

> "(1) Such proper officer shall thereupon enter the particulars of such notification on the records of the Court of Trial.
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> (2) Such entry shall be made in conformity with the administration of the Court of Trial on:
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> (a) the indictment,
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> (b) the appropriate Court file, or
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> (c) the appropriate computer record."

7 There is no dispute that these steps, or some of them, constituted the formal recording of the orders of the Court of Criminal Appeal that had been pronounced orally. It is not necessary to decide whether both steps were essential to the formal recording of the order or, as has been held[2] by the Court of Criminal Appeal, only the steps required by r 53.

8 On the next business day, 19 March 2007, the matter was again called on by the Court of Criminal Appeal. At the request of the Court, counsel for the parties attended. McClellan CJ at CL, who had given the reasons of the Court of Criminal Appeal that had been published on the previous Friday, 16 March 2007, said that it had been brought to the attention of his Honour's associate "this morning [19 March 2007] that the judgment, which I prepared and the other

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2 *R v Reardon (No 2)* (2004) 60 NSWLR 454.

members of the Court joined in, when recounting the Crown case has some inaccuracies". McClellan CJ at CL said that:

> "[the] inaccuracies are there because in preparing the document I drew upon a document prepared by the appellant headed '[f]acts alleged in the Crown case'. That document came to the judges as part of the appellant's submissions. It would seem I mistakenly assumed that was an accurate document. It turns out it is not."

The Court asked counsel how it should set out correcting the error that had been made. Counsel then appearing for the respondent submitted that the error could not be corrected.

9 The matter was stood over for further argument on 21 March 2007. That further argument proceeded on the footing that the prosecution had sought to reopen the appeals, but as the description of events that has been given shows, the initiative for reconsideration came from the Court of Criminal Appeal, not either of the parties. Neither in the further argument of the matter in the Court of Criminal Appeal nor subsequently has there been any dispute between the parties that, as the Court of Criminal Appeal was later to state in its second set of reasons[3], "the understanding which the Court had of evidence at the trial was in some respects not correct".

10 The present appellant submitted to the Court of Criminal Appeal that that Court had no power to reopen the appeals and further submitted that the Court of Criminal Appeal, as then constituted, should not redetermine the matter because there would be a reasonable apprehension in the ordinary fair-minded person that the Court as then constituted may be biased. In its reasons delivered on 23 March 2007, the Court of Criminal Appeal rejected both submissions. The Court of Criminal Appeal held[4] that the Court had power to reopen the appeals. In particular, the Court of Criminal Appeal concluded[5] that:

> "In this case the appeal has been determined and reasons published upon a false understanding as to some matters. The appeal has not been

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3 *R v Burrell* [2007] NSWCCA 79 at [2].

4 [2007] NSWCCA 79 at [39].

5 [2007] NSWCCA 79 at [41].

determined in relation to the relevant evidence. For that reason it has not been finally determined."

The Court reconsidered the conclusions it had earlier expressed having regard to the identified factual errors that had been made in its first reasons for judgment, and ordered that the orders of the Court dismissing the appeals should be "confirmed".

Appeal to this Court

11 By special leave, the appellant now appeals to this Court against the first orders of the Court of Criminal Appeal made on 16 March 2007 and the second orders made on 23 March 2007. The central issue in this Court is whether the Court of Criminal Appeal had power to reopen the appeals after orders disposing of them had been formally recorded.

12 Against the possibility that remitter to the Court of Criminal Appeal, for rehearing of the appeals by that Court, may not be thought appropriate, the appellant sought special leave to appeal on grounds alleging, in effect, that the Court of Criminal Appeal should have found errors in the proceedings at trial. In so far as the application for special leave raised those matters, it was referred for consideration by the Full Court of this Court that would hear and determine the appeals. The matters giving rise to these additional grounds should be dealt with afresh on the rehearing of the matter in the Court of Criminal Appeal. So much of the appellant's applications for special leave to appeal to this Court on grounds other than those upon which the appeals to this Court are founded should be dismissed. As is implicit in what has been said, however, that dismissal is not to be understood as expressing any view about the merits of those other issues.

Some basic considerations

13 The question that arises in this appeal concerns the powers of a superior court of record[6] to reopen a proceeding and reconsider the orders that have been made. The position of courts other than superior courts of record need not be examined and what is said in the balance of these reasons considers only the orders of a superior court of record.

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6 See as to "superior court of record": *DMW v CGW* (1982) 151 CLR 491 at 503-505; [1982] HCA 73; *Re Macks; Ex parte Saint* (2000) 204 CLR 158 at 177-178 [19]-[23], 235-236 [216], 274-275 [328]-[329]; [2000] HCA 62.

14 Consideration of the issues presented in this matter must begin from the recognition that, as pointed out in *DJL v Central Authority*[7], "clarity of thought and the isolation of the true issues [is not] encouraged by submissions expressed in general terms respecting the position in 'intermediate courts of appeal'". Rather, as the plurality went on to point out in *DJL*[8]:

> "In the case of each such court, State or federal, attention must be given to the text of the governing statutes and any express or implied powers to be seen therein. Nor is it of assistance to consider the position with respect to this Court in the exercise of its entrenched jurisdiction as a court of final appeal under s 73 of the Constitution, or with respect to the Privy Council or the House of Lords after *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte [No 2]*[9]".

15 Secondly, it is important to recognise that underpinning consideration of the issues presented in this matter are fundamental principles about finality of litigation. As was said in *D'Orta-Ekenaike v Victoria Legal Aid*[10]: "A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances." That tenet finds reflection in rules concerning the bringing of an action to set aside a final judgment on the ground that it was procured by fraud[11] and in doctrines of res judicata and issue estoppel. The principal qualification to the general principle of finality is provided by the appellate system. But in courts other than the court of final resort, the tenet also finds reflection in the restrictions upon reopening of final orders after they have been formally recorded.

16 The third consideration of principle which it is necessary to state at the outset is related to the second. It is that the principle of finality serves not only to protect parties to litigation from attempts to re-agitate what has been decided, but

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7 (2000) 201 CLR 226 at 247 [43]; [2000] HCA 17.

8 (2000) 201 CLR 226 at 247 [43]. See also *Elliott v The Queen* (2007) 82 ALJR 82 at 85 [7]; 239 ALR 651 at 654; [2007] HCA 51.

9 [2000] 1 AC 119.

10 (2005) 223 CLR 1 at 17 [34]; [2005] HCA 12.

11 *DJL v Central Authority* (2000) 201 CLR 226 at 244-245 [36]-[37].

also has wider purposes. In particular, the principle of finality serves as the sharpest spur to all participants in the judicial process, judges, parties and lawyers alike, to get it right the first time. Later correction of error is not always possible. If it is possible, it is often difficult and time-consuming, and it is almost always costly.

The premise for argument

17 It is desirable to expose and explore a premise that underpinned the debate in the present matter about the powers of the Court of Criminal Appeal. The premise for the arguments of both the appellant and the respondent was that the formal recording of the orders of the Court of Criminal Appeal was a significant step. Why is that so? In answering that question it is desirable to notice a point about terminology: the use in this context of the word "perfected" or cognate words.

18 The formal recording of the orders of a superior court of record is often referred to as the "perfecting" of that order. Whether a court may reopen a proceeding and reconsider the order that has been pronounced is often described as hinging about whether the order has been "perfected". This use of terminology must not be seen as giving form and procedure precedence over substance and principle. The questions that arise in this matter must depend for their answer not upon what forms and solemnities have been observed but upon how effect is to be given to the principle of finality. In particular, what is to mark the point at which a court concludes its consideration of a controversy?

19 The end of a court's powers to consider and determine a controversy cannot depend upon whether one party asserts that the court has made some error in the conclusion it has reached. If allegation of error in the court's orders were the criterion, there would never be an end to some disputes. And because one party's assertion of error cannot provide a sufficient criterion, a court's belief that it has recognised its own mistake can provide no useful criterion. Such a belief could provide no useful criterion because, in the end, the accuracy of the belief would have to be tested against the arguments of the parties. It follows therefore that no matter whether it is a party that alleges error, or it is the court itself which believes that it recognises its own error, a decision that an error *had* been made could be reached only after giving all parties an opportunity to be heard. And it is this reargument of issues that would constitute the departure from the principle of finality.

20 Identifying the formal recording of the order of a superior court of record as the point at which that court's power to reconsider the matter is at an end

provides a readily ascertainable and easily applied criterion. But more than that, identifying the formal recording of the order as the watershed both marks the end of the litigation in that court, and provides conclusive certainty about what was the end result in that court.

21 The power to correct the record so that it truly does represent what the court pronounced or intended to pronounce as its order[12] provides no substantial qualification to that rule. The power to correct an error arising from accidental slip or omission, whether under a specific rule of court or otherwise, directs attention to what the court whose record is to be corrected did or intended to do. It does not permit reconsideration, let alone alteration, of the substance of the result that was reached and recorded.

22 Neither the appellant nor the respondent challenged any of these propositions. Rather, the accepted premise for the debate was that formal recording of the orders of the Court of Criminal Appeal ordinarily does mark the end of that Court's power to consider the issues which were tendered in the proceedings that yielded those orders. Hence the expression of the question for this Court as whether the Court of Criminal Appeal had power to *reopen* the appellant's appeals and *reconsider* its orders. And as explained earlier, if the Court of Criminal Appeal had power to reopen the appellant's appeals and reconsider the orders it had made, that power must be found in "the text of the governing statutes and any express or implied powers to be seen therein"[13]. That is, the power must be found in the *Criminal Appeal Act* 1912 (NSW) ("the Criminal Appeal Act").

23 Part 2 of the Criminal Appeal Act (ss 3 and 4) constitutes the Supreme Court of New South Wales as the Court of Criminal Appeal and permits the appointment of a Registrar and other officers of that Court. Part 3 of that Act (ss 5-9) provides rights of appeal and provides for the determination of appeals. Part 4 (ss 10-23) provides for the procedure of the Court of Criminal Appeal.

24 In *Grierson v The King*[14], this Court held that the jurisdiction of the Court of Criminal Appeal of New South Wales "is statutory, and the court has no

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12 *L Shaddock & Associates Pty Ltd v Parramatta City Council [No 2]* (1982) 151 CLR 590 at 594-595; [1982] HCA 59.

13 *DJL* (2000) 201 CLR 226 at 247 [43].

14 (1938) 60 CLR 431; [1938] HCA 45.

further authority to set aside a conviction upon indictment than the statute confers"[15]. More particularly, this Court held that the Court of Criminal Appeal had no jurisdiction to reopen an appeal which it had heard upon the merits and finally determined. *Grierson* has been followed in this Court on a number of occasions, most recently in *Elliott v The Queen*[16].

25 The Solicitor-General for New South Wales, appearing for the respondent in the present proceedings, expressly disclaimed any application to have this Court reconsider its decision in *Grierson*. Instead, the Solicitor-General submitted only that, "*[i]f* there was a denial of procedural fairness in this matter it lay in the fact that the order [disposing of the appeal] was perfected the same day and very soon after the reasons for judgment were handed down" and that "*[i]f* the denial of procedural fairness qualification referred to in [*Pantorno v The Queen*[17]] and [*Postiglione v The Queen*[18]] applied, then this inadvertent procedural unfairness may have allowed the court to re-open the order to allow the acknowledged factual errors to be corrected" (emphasis added).

26 It is not necessary to consider whether some forms of denial of procedural fairness could warrant grafting some exception upon the general rule stated in *Grierson*. Nor is it necessary to examine what was said in either *Pantorno* or *Postiglione* about these matters. Neither case decided that the general rule in *Grierson* should be qualified according to whether there had been a denial of procedural fairness. It is therefore not necessary to consider what root could be found in the Criminal Appeal Act for such a proposition, and as both *Grierson* and *DJL* make abundantly plain, it is there that the source of any such exception must be found.

27 Rather, it is sufficient in this case to say that formally recording the orders of the Court of Criminal Appeal before the parties had examined the published reasons of the Court did not amount to any denial of procedural fairness. Each party had had a full opportunity to place his or its arguments before the Court of Criminal Appeal. If either party had detected the factual errors made in this matter in the reasons of the Court of Criminal Appeal before its orders were

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15 (1938) 60 CLR 431 at 435.

16 (2007) 82 ALJR 82 at 85 [7]; 239 ALR 651 at 654.

17 (1989) 166 CLR 466 at 484; [1989] HCA 18.

18 (1997) 189 CLR 295 at 300; [1997] HCA 26.

perfected, that party could have and should have[19] at once moved the Court of Criminal Appeal to intercept the processes of formal recording of the orders and to hear argument about whether errors had been made. But it would be contrary to principle to hold that the Court of Criminal Appeal must afford a sufficient opportunity for parties to consider whether such an application should be made.

28 The parties to an appeal are given procedural fairness by allowing each a proper opportunity to make submissions before the court makes its decision. Once the court announces the decision it has made, any further hearing is exceptional. To hold that parties must be given a sufficient opportunity to consider whether to ask for a further hearing would convert the exception into the rule. That step should not be taken.

29 For these reasons, the appeal to this Court should be allowed. The Court of Criminal Appeal did not have power to reopen the appeals after its first orders had been formally recorded. The second orders of the Court of Criminal Appeal were made without power and for that reason should be set aside. There being no dispute that the first orders were pronounced on an infirm factual foundation, those orders must also be set aside. It would not be appropriate for this Court to undertake the fresh consideration of the appeals to the Court of Criminal Appeal that must now be undertaken. The better course is to remit the appellant's appeal against conviction, and his application for leave to appeal against sentence, to the Court of Criminal Appeal for rehearing.

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19 *Texas Co (Australasia) Ltd v Federal Commissioner of Taxation* (1940) 63 CLR 382 at 457; [1940] HCA 9; *DJL* (2000) 201 CLR 226 at 244 [34].

Amendment to Criminal Appeal Rules

30 Since the Court of Criminal Appeal decision in this matter, the Criminal Appeal Rules have been amended to permit the Court of Criminal Appeal, of its own motion, to set aside or vary an order within 14 days after it is entered "as if the order had not been entered"[20]. No question about the validity or operation of that rule was argued in this matter and none need be or is decided.

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20 Criminal Appeal Rules 1952 (NSW), r 50C(3).

31 KIRBY J. On the return of an application arising from a judgment and order of the New South Wales Court of Criminal Appeal[21], this Court granted special leave to appeal, limited to two grounds. Those grounds concerned the course taken in a second hearing and disposition by that Court.

32 Specifically, the first ground was limited to whether the Court of Criminal Appeal had jurisdiction and power to reopen an appeal which it had earlier determined by an order of dismissal, publicly pronounced and formally entered in the records of the Supreme Court of New South Wales as the court of trial[22]. The second ground asserted that the members of the Court of Criminal Appeal erred in failing to disqualify themselves from deciding the reopened appeal, assuming the Court to have had such jurisdiction. Because of apprehended bias by pre-judgment, based on the earlier disposition, it was submitted that the Court of Criminal Appeal ought then to have referred to a differently constituted bench both the application to reopen the appeal and any reconsideration of it, if reopening were legally permissible and appropriate.

33 In addition to these threshold issues, the panel granting special leave referred into the Full Court of this Court residual applications for special leave to appeal based upon grounds addressed to the substantive merits of the appeal as it had earlier been presented to the Court of Criminal Appeal. Full written submissions were received from both parties, addressed to the appeal and to the residual applications.

34 Upon the return of the proceedings before this Court, we elected to hear first the parties on the first admitted ground of appeal. The other arguments were postponed to a later proceeding should that prove necessary[23].

35 In the result, I agree in the orders proposed by Gummow ACJ, Hayne, Heydon, Crennan and Kiefel JJ in their joint reasons. It is not necessary, nor would it be appropriate, for this Court to embark upon a consideration of the merits of the substantive submissions advanced by Mr Bruce Burrell in support of his application. He is entitled to succeed upon his threshold contention that his appeal to the Court of Criminal Appeal miscarried, resulting in an error which that Court had neither jurisdiction nor power to correct for itself. Mr Burrell having succeeded on that ground, the challenge in this Court results in a

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21 *Burrell v The Queen* [2007] NSWCCA 65 (first decision of 16 March 2007).

22 *Burrell v The Queen* [2007] NSWCCA 79 (second decision of 23 March 2007).

23 [2008] HCA Trans 221 [610].

conclusion that he has not had his "appeal" determined by the Court of Criminal Appeal as the *Criminal Appeal Act* 1912 (NSW) ("the Act") envisages. He is entitled to an appeal that conforms to the Act. That is why I agree in the orders proposed in the joint reasons.

36 I will explain these conclusions in my own words. I do so because:

- I am rather more sympathetic to the legal propositions advanced by the Court of Criminal Appeal to sustain the course that it adopted than appears in the joint reasons. I consider that there is more to the course followed in that Court than my colleagues perceive;

- Some of the past reasoning in this Court (as well as submissions of legal principle) suggest a possible legal foundation for what was done; and

- My respect for that Court and the extensive arguments of the parties encourage me to offer this elaboration.

37 With Gibbs J in *Gamser v Nominal Defendant*[24], I say again that:

> "I regard it as unfortunate that the inherent power of an appellate court does not extend to varying its own orders when the interests of justice require it."

38 I have said this[25], and suggested[26] so much in earlier decisions in this Court. I remain of the same opinion. However, I am required to acknowledge that the opinion that prevails in this Court's authority, specifically when addressed to the jurisdiction and powers of a court of criminal appeal such as that in New South Wales, denies any legal entitlement of such a court, in a case such as the present, to reopen its own orders, formally pronounced and entered in court records. This is so, despite some indications to the contrary in decisional authority and in terms of legal principle. I will explain how I come to this conclusion. Effectively, it requires that the matter be returned to the Court of Criminal Appeal for a completely fresh hearing.

The facts

39 Mr Burrell was charged with detaining Mrs Kerry Whelan with intent and for advantage on 6 May 1997 and with murdering her on or about 6 May 1997.

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24 (1977) 136 CLR 145 at 147; [1977] HCA 7.

25 *DJL v Central Authority* (2000) 201 CLR 226 at 266 [98]-[99]; [2000] HCA 17.

26 *Postiglione v The Queen* (1997) 189 CLR 295 at 343; [1997] HCA 26.

On that day, in Sydney, Mrs Whelan disappeared without expectation, warning or notice. She left behind her husband and three children, to whom the evidence showed she was devoted.

40 The evidence also showed that Mrs Whelan was expecting later that day to depart with her husband by plane for Adelaide. Mr Burrell had at one stage worked for a company with which Mrs Whelan's husband was associated. In December 1990 he had been made redundant. Shortly before Mrs Whelan's disappearance, Mr Burrell re-established contact with Mr Whelan and his wife. At trial, the prosecution case against Mr Burrell relied on circumstantial evidence. It is unnecessary for the issue that determines this appeal to describe that evidence. Suffice it to say that, in certain respects, it was not insubstantial. In crimes of the kind charged, it is by no means unique, or even unusual, for the prosecution to have to rely on circumstantial evidence[27].

41 The charges detailing the subject offences were first brought in April 1999. In December of that year, Mr Burrell was committed for trial upon them. Hearings anterior to a first trial took place in the Supreme Court of New South Wales between January and April 2001 before Sully J. After a number of *voir dire* hearings, the trial did not commence. The matter was stood over to a date to be fixed. In April 2001 the Director of Public Prosecutions for New South Wales filed a *nolle prosequi* in respect of both counts.

42 Following an inquest in May and June 2002 into Mrs Whelan's disappearance, the Director, in September of that year, filed a fresh *ex officio* indictment. This contained the two stated counts relating to the disappearance and alleged murder of Mrs Whelan. There followed applications by Mr Burrell for a stay of the proceedings upon those charges. Such applications were refused. The refusals were, in turn, contested without success before the Court of Criminal Appeal and in this Court.

The trials and the appeal

43 In the result, in August 2005, the first substantive trial of Mr Burrell on the charges began in the Supreme Court of New South Wales before Barr J and a jury. At the end of that trial the jury were unable to agree upon their verdicts. At a second trial before Barr J and a fresh jury, verdicts of guilty were returned on both counts. Mr Burrell was convicted. He was sentenced to imprisonment for life for the offence of murder and to imprisonment for sixteen years for the offence of detaining the deceased for advantage.

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27 cf *De Gruchy v The Queen* (2002) 211 CLR 85 at 95 [40]; [2002] HCA 33.

44 Mr Burrell appealed to the Court of Criminal Appeal against his convictions. He also sought leave to appeal against the sentences imposed on him by Barr J. His proceedings were heard on all issues on 30 November 2006 before a court constituted by McClennan CJ at CL, Sully and James JJ. On Friday, 16 March 2007, that Court dismissed the appeal against the convictions. It granted leave to appeal against the sentence but ordered that such appeal also be dismissed.

45 The reasons of the Court for these orders were delivered by the presiding judge. The other members of the Court concurred in his reasons without added reasons of their own. The reasons of the Court comprised, in all, 126 pages. By inference, they were published and handed down in the conventional way at a public sitting of that Court. In accordance with the then practice of the Court, a notification of the Court's determination of the "application of Bruce Burrell to appeal against conviction and sentence" was prepared in the Court's registry on the day of the pronouncement of the orders ("the Notification"). The Notification was contained in a document to which the seal of the Court of Criminal Appeal of New South Wales was attached, together with a signature of a person stated to be executing the Notification "for the Registrar [of the Court of Criminal Appeal]".

The second hearing on appeal

46 *Relisting on discovery of mistakes*: On Monday, 19 March 2007, a transcript discloses that a further hearing of the Court of Criminal Appeal took place before McClellan CJ at CL, sitting alone. Representatives of both parties appeared, including the Solicitor-General for New South Wales, appearing for the prosecution. McClellan CJ at CL is recorded as stating that it had been brought to his associate's attention that morning "that the judgment, which I prepared and the other members of the Court joined in, when recounting the Crown case, ha[d] some inaccuracies". This eventuality was explained by reference to his Honour's having drawn "upon a document … headed 'Facts alleged in the Crown case'". That document was said to have come "to the judges as part of the appellant's submissions". This led to its being "mistakenly assumed [to be] an accurate document. It turns out it is not."

47 McClellan CJ at CL questioned counsel as to whether "either [counsel] have had a chance to look at the judgment to see the inaccuracies". He said that the mistakes needed "to be corrected". He sought submissions as to how this might be done, given that one of the judges constituting the Court of Criminal Appeal (Sully J) was due to retire on the following Friday, 23 March 2007. Counsel for Mr Burrell immediately submitted that the judgment could not be corrected. However, the Solicitor-General stated "[w]e agree that it can be corrected at this stage."

48 On 21 March 2007 the proceedings were relisted for argument before the Court of Criminal Appeal, constituted as before. At that hearing, counsel for Mr Burrell submitted that the proceedings should be relisted before a bench differently constituted. He repeated the submission that correction of the judgment and orders was beyond the power of the Court of Criminal Appeal, given that the pronounced orders of that Court had passed into judgment and had been entered in the record of the Court, as signified by the Notification under the seal of the Court and the signature for its Registrar. The prosecution again supported a power to correct in the circumstances.

49 *New order and amended Notification*: After reserving its decision for two days, on 23 March 2007, the Court of Criminal Appeal delivered supplementary reasons titled "Judgment". The formal order made at the conclusion of those reasons was pronounced for the Court by McClellan CJ at CL. It was that "the order of the Court dismissing the appeal should be confirmed". Again, Sully and James JJ agreed with that disposition, without additional reasons of their own. What was described as an "Amended Notification of Court's Determination of Application" recounted that the Court:

> "… on 16 March 2007, ordered that:
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> (1) The appeal be dismissed.
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> And, on 23 March 2007, further ordered that:
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> (2) The order of the Court dismissing the appeal should be confirmed."

50 The seal of the Court of Criminal Appeal was again attached, ostensibly with the same officer signing "For the Registrar". It is from this second purported order that the present appeal comes by special leave. It occasions Mr Burrell's challenge to the jurisdiction and power of the Court of Criminal Appeal to make any further order disposing of Mr Burrell's appeal to that Court, beyond that pronounced and entered on 16 March 2007.

The applicable legislation

51 *Provisions of the Act*: In *Stewart v The King*[28], this Court, for constitutional purposes[29], held that the Court of Criminal Appeal, created in accordance with the Act, was a manifestation of the Supreme Court of New South Wales. Under the Act, it is provided in s 3(1):

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28 (1921) 29 CLR 234; [1921] HCA 17.

29 See Constitution, s 73(ii); cf s 106.

> "The Supreme Court shall for the purposes of this Act be the Court of Criminal Appeal, and the court shall be constituted by such three or more judges of the Supreme Court as the Chief Justice may direct."

52 The question in *Stewart* was whether the Court of Criminal Appeal was a new and distinct statutory appellate court created by the Parliament of New South Wales or "the Supreme Court of [a] State" from which an appeal lay to this Court by s 73 of the Constitution. It was held that the Court of Criminal Appeal was a manifestation of "the Supreme Court" of the State and therefore that this Court had jurisdiction, "with such exceptions and subject to such regulations as the [Federal] Parliament prescribes", to hear and determine appeals from all judgments and orders of that Court.

53 From the establishment of this Court, appeals had been brought in criminal proceedings by special leave granted by this Court in accordance with the *Judiciary Act* 1903 (Cth)[30]. It had been assumed that such appeals continued, under such arrangements, once the Court of Criminal Appeal was created by the Act in 1912. The correctness of that assumption was confirmed by the decision in *Stewart*.

54 By s 4 of the Act, it is provided that "registrar[s] and such other officers as may be required for carrying out this Act may be employed under Chapter 2 of the *Public Sector Employment and Management Act 2002*". By s 28(1) of the Act, provision is made for the making of rules of court "for the purposes of this Act". Such Rules are to be made by a Rule Committee consisting of the Chief Justice, the President of the Court of Appeal, one other appointed Judge of Appeal, four other appointed judges and an appointed barrister and solicitor[31]. The subject matter of the Rules that may be made in this way extends to the "regulation of the practice and procedure under this Act"[32] and "[a]ny matters which in the opinion of the Rule Committee of the Supreme Court are necessary or expedient for giving effect to the purposes of this Act"[33].

55 At the time of each of the foregoing proceedings before the Court of Criminal Appeal concerning Mr Burrell, no rule was in force that purported (so

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30 s 35. The statement in [2007] NSWCCA 79 at [23] that *Grierson* was decided at a time when there was an appeal as of right to this Court was incorrect in so far as it implied that there was ever such an appeal by right in criminal matters.

31 s 123(1), *Supreme Court Act* 1970 (NSW).

32 The Act, s 28(2)(a).

33 The Act, s 28(2)(h).

far as this might be done by rule) to enlarge the jurisdiction and powers of that Court to retrieve an order entered in the court records so as to permit the Court to reconsider and (if it thought fit) amend, vary, correct or change an order earlier entered.

56 By s 12 of the Act it is provided, relevantly:

> "(1) The court may, if it thinks it necessary or expedient in the interests of justice:
>
> … exercise in relation to the proceedings of the court any other powers which may for the time being be exercised by the Supreme Court on appeals or applications in civil matters, and issue any warrant or other process necessary for enforcing the orders or sentences of the court: Provided that in no case shall any sentence be increased by reason of, or in consideration of any evidence that was not given at the trial."

57 *The Criminal Appeal Rules*: Pursuant to the power granted by s 28 of the Act, the Criminal Appeal Rules 1952 (NSW) were made. Rules 50A, 51, 52 and 53, as in force at the relevant time[34], draw a distinction between the pronouncement of the orders of the Court of Criminal Appeal, in disposing of an appeal or application, and the formal entry of those orders in accordance with that pronouncement:

> "50A Determination of appeal or application
>
> An appeal or application for leave to appeal is determined on the making of orders disposing of the appeal or application.
>
> . . .
>
> 51 Notice of determination of appeal etc
>
> The Registrar shall send a notice of the determination of any appeal, or of any application incidental thereto, to the appellant, if he was not present when the matter was determined, to the proper officer of the Court of Trial, to the Director-General of Corrective Services and to the Sheriff, if the appeal is against a conviction involving a sentence of death or is against a sentence of death.

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34 Rule 53 was repealed in 2007 after the appeals were heard in this case in the Court of Criminal Appeal.

52 Notice of orders or directions by Court

The Registrar shall also notify the proper officer of the Court of Trial of any orders or directions made or given by the Court in relation to such appeal.

53 Records of Court of Trial to be noted

(1) Such proper officer shall thereupon enter the particulars of such notification on the records of the Court of Trial.

(2) Such entry shall be made in conformity with the administration of the Court of Trial on:

(a) the indictment,

(b) the appropriate Court file, or

(c) The appropriate computer record."

58 In accordance with the foregoing rules it would appear that the Court of Criminal Appeal determined Mr Burrell's appeal and application on 16 March 2007 by making its orders disposing of them. Conventionally, this act is performed by the publication of the reasons and the handing down of the originals of those reasons by or on behalf of the judges, duly certified, ultimately to an officer of the registry of the Court of Criminal Appeal.

59 In the present case with very great speed, that officer or some other officer on behalf of the Registrar took the steps contemplated by the rules to "enter" (sometimes called "formalise" or "perfect") the particulars of such Notification in the records, as r 53(1) then provided.

60 In so far as the law draws a distinction between the oral public pronouncement of orders and the formalisation of such orders by their entry in the records of the Court of Trial, the Criminal Appeal Rules, applicable at the relevant time, reflected that distinction and formal practice. On the face of the requirements of the Rules then governing the procedures of the Court of Criminal Appeal it can be taken that the records of the Court of Trial were duly noted with the orders of the Court of Criminal Appeal on the date of their pronouncement, namely 16 March 2007. Neither party before this Court contested that fact.

61 *The Uniform Civil Procedure Rules*: So far as the powers afforded to the Court of Criminal Appeal by s 12 of the Act are concerned, at the relevant time they attracted to that Court "in relation to the proceedings of the Court" the general powers provided to the Supreme Court of New South Wales, specifically under the Uniform Civil Procedure Rules 2005 (NSW).

62 By r 36.17 of those Rules a particular provision is made for the "correction of judgment or order", otherwise known as the "slip rule":

> "If there is a clerical mistake, or an error arising from an accidental slip or omission, in a judgment or order, or in a certificate, the court, on the application of any party or of its own motion, may, at any time, correct the mistake or error".

63 No one in the present proceedings suggested (and McClellan CJ at CL during argument denied), that the "slip rule" had any application to the mistake disclosed in the reasons published in the present case. However, there is more. By r 36.15 of the Uniform Civil Procedure Rules, particular provision is made for a general power to set aside judgments or orders of the court:

> "(1) A judgment or order of the court in any proceedings may, on sufficient cause being shown, be set aside by order of the court if the judgment was given or entered, or the order was made, irregularly, illegally or against good faith.
>
> (2) A judgment or order of the court in any proceedings may be set aside by order of the court if the parties to the proceedings consent."

64 None of the circumstances disclosed in these proceedings attracts either of the powers afforded by r 36.15. The preconditions to the application of that Rule were not enlivened. Accordingly, the general power of correction afforded to the Court of Criminal Appeal by way of s 12 (assuming that section to apply outside the particular categories mentioned there) was not engaged.

65 By r 36.16 of the Uniform Civil Procedure Rules, as it then applied, a still further power was afforded to the Supreme Court to set aside, or vary, a judgment or order. Relevantly, that Rule provided[35]:

> "36.16(1) The court may set aside or vary a judgment or order if notice of motion for the setting aside or variation is filed before entry of the judgment or order.
>
> (2) The court may set aside or vary a judgment or order after it has been entered if:

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35 Rule 36.16 was amended in 2007 after the appeals were heard in this case in the Court of Criminal Appeal to insert sub-rr 3A, 3B and 3C. These sub-rules echo the current provisions under r 50C(3) of the Criminal Appeal Rules.

> (a) the judgment or order has been entered under Part 16 (Default judgment), or
>
> (b) the judgment or order has been given or made in the absence of a party …
>
> (c) in the case of proceedings for the possession of land … in the absence of a person whom the court has ordered to be added as a defendant …
>
> (3) Without limiting subrules (1) and (2), the court may set aside or vary any order … except so far as the order:
>
> (a) determines any claim for relief … or
>
> (b) dismisses proceedings;
>
> (4) Nothing in this rule affects any other power of the court to set aside or vary a judgment or order."

66 Assuming that the provisions of r 36.16 are attracted by way of s 12 of the Act to the order of the Court of Criminal Appeal entered in the records in the present case and apply to that Court, none of the provisions of that Rule was shown to apply. On the contrary, the order entered in the records of the Court of Criminal Appeal on 16 March 2007 determined Mr Burrell's claim for relief in that Court. Moreover, it dismissed his proceedings without qualification.

67 *The resulting issue*: In this way, in terms of the provisions of, or Rules made under, the statute to govern the consequences of orders of the Court of Criminal Appeal that have been "entered", that Court was driven back to the recognition, reflected in r 36.16(4) of the Uniform Civil Procedure Rules, that a residuum of powers exists in a court, including by virtue of the common law governing the "implied" or "inherent" powers of a court, to set aside or vary an order, including where that order has earlier been entered in the court records.

68 It follows that the legal question remaining in this appeal is whether (as the Court of Criminal Appeal concluded in its second decision and orders) a residual power exists in such a court to reopen, recall, reconsider and redetermine (or confirm) by fresh order, a proceeding initiated by a party (or by the Court itself) where the application to do so is promptly brought upon the discovery of a mistake in the Court's reasoning which, if allowed to stand, would occasion an injustice, or a miscarriage of justice, to a party to the earlier disposition[36].

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36 *Stephens* (1990) 48 A Crim R 323 at 326 (a case where the order had not been entered); cf *In re Harrison's Share; In re Williams' Will Trusts* [1955] Ch 260 at

(Footnote continues on next page)

Four relevant realities

69 *Divergences in judicial approach*: An analysis of the decisions of judges upon questions concerning the power of courts to repair errors and mistakes would probably disclose differing patterns of responses, even where the power in question was said to lie in a superior court, indeed in the Supreme Court of a State of the Commonwealth. Such a court is the only court specifically named as such in the Constitution,[37] apart from this Court[38] and, by description the Judicial Committee of the Privy Council.[39] By the Constitution and by relevant legal history, the Supreme Court of a State is a judicial tribunal enjoying the widest possible jurisdiction and power. Its "orders" and "judgments" have a constitutional significance, given that by s 73 of the Constitution they afford the foundation for the facility of appeal to this Court.

70 In *Aussie Vic Plant Hire v Esanda Finance Corporation*[40], in the context of explaining the broad approach that has recently been taken by this Court towards the ambit of a statutory grant of jurisdiction and power to a superior court, I identified the differing "general inclinations" exhibited by judges, including in this Court[41]:

> "… [S]ome judges incline to a narrower application of legislation so as to maximise the role of strict rules and to minimise the space for discretion that may adapt to the special demands of justice in the particular case. There are several instances where this tension has revealed itself[42]. Nevertheless, the general trend in this Court in recent years has, I believe, been to uphold the broad grant of jurisdiction and power to a court where this is afforded by legislation in terms that permit the court to soften the

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269; *In re Barrell Enterprises* [1973] 1 WLR 19 at 23-24; [1972] 3 All ER 631 at 636-637; *Pittalis v Sherefettin* [1986] QB 868 at 879, 882.

37 Constitution, s 73(ii).

38 Constitution, ss 71, 72, 73, 75, 76, 77.

39 Constitution, s 74.

40 (2008) 82 ALJR 564; 243 ALR 207; [2008] HCA 9.

41 (2008) 82 ALJR 564 at 573 [43]; 243 ALR 207 at 218.

42 See eg *Jackamarra v Krakouer* (1998) 195 CLR 516 (Brennan CJ, McHugh and Kirby JJ; Gummow and Hayne JJ dissenting); [1998] HCA 27.

> edges of overly rigid applications of procedural and other rules, and where otherwise an unyielding application of the law might defeat the attainment of justice in the particular case[43]."

71 In *Aussie Vic*, I speculated that differences of this kind might be attributed to differing judicial conceptions of "the ameliorating role of courts of justice; a recognition of (and allowance for) human frailty; or the scars of particular professional experiences"[44]. I went on to say[45]:

> "… [w]hen a choice exists in the construction of legislation, the trend of this and other courts has been to accept the need to uphold provisions that permit courts to cure particular defaults for reasons of justice".

72 Similar considerations are presented by the present case. Exceptional powers to cure errors and injustices have certainly been acknowledged by courts, including this Court, even where the formal order of a court has been duly entered or "perfected"[46]. Just as in the law, we can love truth, like all other good things, unwisely; pursue it too keenly; and be willing to pay for it too high a price[47], so we can also love finality too much. In our understandable concern to secure finality to litigation, we can fall into the error of allowing that value to swamp all other concerns that rightly agitate the courts. Such may sometimes be the case where we are asked to uphold a formal order of a superior court as "final" and unarguable, simply because it was "entered" by a mechanical, unconsidered step of non-judicial officials and although, promptly, it might be demonstrated that the entered order works an injustice which may otherwise not be capable of effective, speedy or economical repair by the normal operations of the court system.

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43 See eg *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 167-172; [1997] HCA 1.

44 cf Kirby, "Ten Parables for Freshly-minted Lawyers", (2006) 33 *University of Western Australia Law Review* 23 at 24-25.

45 (2008) 82 ALJR 564 at 573 [44]; 243 ALR 207 at 218.

46 Allars, "Perfected judgments and inherently angelical administrative decisions: The powers of courts and administrators to reopen or reconsider their decisions", (2001) 21 *Australian Bar Review* 50 at 50-51.

47 *Pearse v Pearse* (1846) 1 De G & SM 12 at 28; [63 ER 950 at 957] per Knight Bruce, VC.

73 Against these considerations (which I should say did not prevail in *Aussie Vic*[48]) countervailing considerations are arguably enlivened in the present case. Here, the proceedings are criminal in character. Mr Burrell has been sentenced to the highest punishment now known to the law. Conventional approaches demand rigorous compliance with the law in cases such as this and high accuracy in recounting the evidence relevant to the determination of his appeal. The postulate of the Act is that an appellant will have an appeal to the Court of Criminal Appeal decided accurately and not on the basis of incorrect, irrelevant or superseded facts.

74 Approaches to the powers of courts that may be read into legislation concerned with the determination of civil cases, may not so readily be accepted in the case of legislation governing criminal appeals even though the court concerned is substantially the same repository of the jurisdiction and power in question. Nevertheless, in a superior court of record, a wide power will normally be taken as "implied" or "inherent" in the general grant of jurisdiction and power, so as to permit the court in question to repair promptly, and not merely lament, mistakes and oversights occasioning injustice.

75 *Practice in courts of criminal appeal*: The mistake that occurred in the present case arose because, "as a matter of history", Mr Burrell's representatives included in material provided to the Court of Criminal Appeal a "Crown statement (tendered upon the stay application in 2003)".

76 According to Mr Burrell, this document was provided to the Court in a folder with appendices to the defence submissions. It was noted in the index to the appendices as being the Crown statement dating from 2003. It was not a Crown statement prepared for consideration and use by the Court of Criminal Appeal in the subject appeal.

77 In his written submissions, Mr Burrell is critical of the Court of Criminal Appeal for having relied as it did on the document so supplied. He points to annotations on the face of the document; the well known fact that the proceedings against him had been prolonged and extended; and the fact revealed to the Court that some matters of evidence had been determined in 2001 by Sully J; some in 2003 by Wood CJ at CL; and others in 2005 by Barr J (who adopted several of the foregoing rulings as his own in each of the two trials of Mr Burrell over which he presided). Mr Burrell is critical of the Court of

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48 *Aussie Vic Plant Hire v Esanda Finance Corp* (2008) 82 ALJR 564 at 570 [27]; 243 ALR 207 at 214; cf in the Court of Appeal of Victoria: (2007) 212 FLR 56 at 59-70 [28]-[31] and [56]-[58] per Maxwell P and Neave JA dissenting.

Criminal Appeal for treating certain grounds of appeal (grounds 3 to 7) as still alive in the appeal when they had actually been withdrawn. In support of these criticisms, he points to the fact that transcript references were not included on the face of the 2003 "Crown Statement" (as it was suggested) is normal for a concluded statement of such a kind.

78 Nevertheless, as Mr Burrell's written submissions correctly acknowledge before this Court, it has long been the practice in New South Wales for representatives of the prosecution to prepare a "Crown Case Statement". Initially, this may be done before the trial, setting out a summary of the case that the prosecution hopes to prove at trial. Such a statement is not only used in the trial but also, sometimes with necessary amendments, as a factual basis for pre-trial applications that are now so common[49]; as a foundation for sentencing proceedings[50]; and (generally with additions, amendments and transcript references) to assist the parties and the Court of Criminal Appeal in the discharge of the appellate functions. In the circumstances of the inclusion of the outdated ("historical") version of that Statement in the present appeal, I can readily understand how the errors now complained of occurred.

79 Separation of more than a decade has not caused me to forget the burdens placed upon judges in courts of criminal appeal in this country. Whereas this Court has substantial powers to control the number of appeals and applications that it will hear orally, both under statute[51] and by new Rules governing dispositions on the papers[52], courts of criminal appeal (at least in conviction appeals in New South Wales) have no such ready means of relief.

80 This is the real world in which judges, disposing of such appeals, have to perform their functions. On many days several appeals are listed for hearing, sometimes as many as (or occasionally more than) six. The Court of Criminal Appeal would not be humanly capable of disposing of such cases without the assistance of factual summaries. Such documents are quite often used as the foundation for *ex tempore* dispositions designed to promote expeditious decision-making in matters that often affect personal liberty.

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49 *R v Petroulias* (2005) 62 NSWLR 663 at 678 [56].

50 *R v MA* (2004) 145 A Crim R 434.

51 *Judiciary Act* 1903 (Cth), s 35(2).

52 High Court Rules 2004, rr 41.10.5 and 41.11.1; cf Kirby, "Maximising Special Leave Performance in the High Court of Australia", (2007) 30 *University of New South Wales Law Journal* 731 at 736-739.

81 This Court should exhibit a realistic understanding of the context in which the question of the jurisdiction and power of the Court of Criminal Appeal to correct mistakes, promptly called to notice, falls to be decided. Especially so because it is this Court that has repeatedly insisted upon the individual duties cast upon the judges constituting a court of criminal appeal to review the entirety of the evidence for themselves[53] and to decide even non-determinative grounds of appeal against the possibility that a decision on such grounds might prove important in a further appeal to this Court[54].

82 In decisions concerning the application of the "proviso", the hypothesis for the stern rule now adopted by this Court in *Weiss v The Queen*[55] is that the judges of a court of criminal appeal have had the time, opportunity and assistance, to consider thoroughly and reflect upon all of the evidence that might touch upon any propounded "miscarriage of justice" urged by an appellant[56].

83 None of the foregoing realities is mentioned to suggest that a lower standard of vigilance is required against mistakes made by courts of criminal appeal; or that material mistakes should be condoned or ignored because of the time and other pressures on such courts. Nor do I suggest that this Court should condone sloppy practices on the footing that, if mistakes are quickly pointed out, they can be quickly corrected. However, a consideration of the realities of the world in which courts of criminal appeal operate in contemporary Australia, necessitates an acknowledgment that slips and mistakes can easily occur. This is so even in the case of highly experienced and conscientious judges.

84 The foregoing considerations will inform the judgment of this Court concerning the available jurisdiction and power of the Court of Criminal Appeal, if acting promptly, to correct at least some such mistakes. And to do so notwithstanding that a clerk has (with arguably needless speed) entered the orders of the Court in court records before the parties or others have had a real

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53 In the 2006/2007 *Annual Report* of the High Court of Australia there were 106 applications for special leave to appeal in criminal matters filed and 24 grants of special leave.

54 *Jones v The Queen* (1989) 166 CLR 409 at 414-415; [1989] HCA 16; *Cornwell v The Queen* (2007) 231 CLR 260 at 303 [113]; [2007] HCA 12.

55 *Weiss v the Queen* (2005) 224 CLR 300; [2005] HCA 81.

56 cf *AK v Western Australia* (2008) 82 ALJR 534 at 540 [23]-[26] per Gleeson CJ and Kiefel J, 544-545 [52]-[56] per Gummow and Hayne JJ, 563 [115] per Heydon J; 243 ALR 409 at 415-417, 422-423, 446; [2008] HCA 8.

opportunity to note, and call to attention, any mistakes that are apparent in the reasons supporting the orders so made.

85 *Practicalities of reserved decisions*: A further reality is illustrated by the present appeal. Whereas in the not so distant past most decisions of a court of criminal appeal were given for *ex tempore* reasons pronounced at the end of oral argument, more recent appeals have been marked by much longer and more detailed written and oral submissions and extended hearings. In part, this is a consequence of the vigilance of this Court for error. In part, it reflects the greater facilities for legal aid. In part, it results from the growing body and complexity of the criminal law and the practices governing sentencing. The written submissions for Mr Burrell in the Court of Criminal Appeal were long, substantial and detailed. They stimulated similar responses from the prosecution. If that Court were not to address submissions seriously made, it would leave itself open to criticism for such default on an application for special leave to appeal to this Court.

86 The advent of obligations to provide written submissions has had a further consequence, relevant to the present appeal. The expansion of grounds of appeal has resulted in lengthier reasons, producing a heightened risk of error in describing the relevant evidence or applying material legal principles. Moreover, these developments have meant that there are many more reserved decisions including some (as in the present case) involving extensive reasons covering (as here) nearly 130 closely typed pages.

87 In earlier times *ex tempore* reasons were typically given by judges in the Court of Criminal Appeal in the presence (usually) both of the appellant and counsel who could draw any obvious judicial mistakes or misunderstandings to immediate notice so that they could be considered or cured before orders were entered. However, this is impossible where a decision is reduced to writing and provided to the parties in circumstances that effectively deny an opportunity for consideration by legal advisers prior to the entry of the resulting orders in the court records.

88 On the civil side, I have myself been persuaded by prompt intervention of the parties to withdraw reasons and, with the agreement of colleagues, to substitute differing reasons and sometimes substantially different orders[57]. In the

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57 See eg *Winrobe Pty Ltd v Sundin's Building Co Pty Ltd [No 2]* (unreported, Court of Appeal (NSW), 24 December 1992); *NSW Medical Defence Union Ltd v Crawford [No 3]* (unreported, Court of Appeal (NSW), 23 September 1994) noted in *Haig v Minister Administering the National Parks and Wildlife Act 1974* (1994) 85 LGERA 143 at 152-154 and in *DJL v Central Authority* (2000) 201 CLR 226 at 263 [91]; [2000] HCA 17.

circumstances of the Court of Criminal Appeal, in a case such as the present, such facilities for correction were effectively frustrated. Hence, the inquiry by McClellan CJ at CL as to whether (despite an intervening weekend) the parties had actually had the opportunity to read the reasons and had noticed the errors already picked up by the Court.

89 *Availability of relief in this Court*: Yet can it be said that a strict approach to finality of entered orders is supported by the availability in this Court of correction of mistakes and misunderstandings in judicial reasons of intermediate courts?

90 It may be true that there is a greater willingness today to grant special leave in such matters than there was in earlier decades[58]. However, common experience and practical realism require an acknowledgment of the very significant hurdle that such applications confront and the comparatively small number of such cases annually to which this Court affords a grant of special leave[59].

91 To sustain an unbending rule against a facility for intermediate courts to correct their orders, entered administratively, where mistakes are promptly drawn to notice, simply on the footing that this Court is always available to repair demonstrated error would be to indulge in a fiction, not actual experience. A number of recent cases in which the "proviso", in the template provisions of Australian criminal appeal statutes, has been invoked to deny the intervention of this Court, despite a clear demonstration of error below[60], suggests a need to moderate severely litigant expectations in this respect. Mr Burrell secured a grant of special leave. However, for every such grant there are very many refusals. Often they are explained by reference to the perceived lack of a "miscarriage of justice".

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58 Kirby, "Why has the High Court become more involved in criminal appeals?", (2002) 23 *Australian Bar Review* 4.

59 The grants of special leave in criminal matters in recent years have been: of 109 applications filed in 2004/2005, 15 were granted: see 2004/2005 *Annual Report* of the High Court of Australia; of 100 applications filed in 2005/2006, 8 were granted: see 2005/2006 *Annual Report* of the High Court of Australia; of 106 applications filed in 2006/2007, 24 were granted: see 2006/2007 *Annual Report* of the High Court of Australia. These figures disregard the applications now disposed of on the papers, overwhelmingly by rejection of the application for special leave.

60 See *Libke v The Queen* (2007) 230 CLR 559; [2007] HCA 30. A recent example is *CTM v The Queen* [2008] HCA 25 at [36], [195]; cf at [121].

92 There has not so far developed in this country a general prosecutorial practice, defensive against such mistakes and injustice, to support prisoner applications for special leave and to consent to corrections of the orders *a quo*, where material error is demonstrated. During more than 12 years on this Court I have seen joint support from the prosecution and the prisoner to permit the cure of an accepted mistake in the reasoning of the intermediate court but once.

93 In the present appeal, both on the relisting before the Court of Criminal Appeal and in this Court, the prosecution asserted the existence of the jurisdiction and power of the Court of Criminal Appeal to act as it did. It contested the necessity, or occasion, for this Court's intervention. In the light of the outcome of this appeal, it may be hoped that a reconsideration of prosecution practice in this regard will be one outcome. Traditionally, prosecutors for the Crown observed the highest standards as befits a model litigant. Such standards should be maintained. In light of this decision, and others, they will need to be reinforced[61].

Support for a power to reopen formalised orders

94 *The ambit of Grierson*: There is no provision in the Act, nor in the Criminal Appeal Rules, nor any other positive law drawn to notice which was in force at the relevant time, that expressly forbids the reopening of orders of the Court of Criminal Appeal, pronounced and then entered in the Court records.

95 The consequence of entry of the orders in court records therefore depends upon the principles of the common law ascertained by reference to any "implied" or "inherent" powers of the court in question. Such powers derive from the court's character, composition, history and participating members. Such principles are declared by the judges. Obviously, the principles must serve the purpose of defending the finality of court orders, in particular the finality of the orders of superior courts of record. Moreover, such principles focus the attention both of the parties and the judges upon an understanding that such dispositions are not provisional. They require the greatest possible care, attention and accuracy in their formulation and pronouncement.

96 On the other hand, common law principles exist to serve, and not to frustrate, the attainment of justice, allowing that debates and differences of opinion will often accompany the judicial identification of where a just outcome lies in the particular case.

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61 cf *Libke* (2007) 230 CLR 559 at 578 [38]-[40].

97 The principal impediment of legal authority, in the way of supporting the conclusion of the Court of Criminal Appeal in this appeal, is the decision of this Court in *Grierson v The King*[62]. That decision, written 70 years ago, addressed the very Act that is under present consideration and that is relevantly unchanged. It held that "no court [including the Court of Criminal Appeal] has authority to review its own decision pronounced upon a hearing *inter partes* after the decision has passed into a judgment formally drawn up"[63]. The foundation of this *dictum* was explained by this Court in terms of legal history, judicial authority to that time and the fact that the jurisdiction and powers of the Court had to be found in the Act itself or by necessary implication or inference from its provisions.

98 Nonetheless, the words of Dixon J in *Grierson* (with whom McTiernan J agreed) are not the same as statutory language. They have endured as a statement of general principle. Neither party to this appeal contested the accuracy of that general principle. The contest concerned the admissibility of a relevant exception. That there are some exceptions is undisputed. Indeed, in *Grierson* itself, one exception, available under the Judicature system, was acknowledged by Dixon J[64]. It was: "an action may be brought to set aside a judgment obtained by fraud" but as "an independent proceeding equitable in its origin and nature"[65].

99 In the manner of those times, there was also an acknowledgment by Dixon J that the English Court of Criminal Appeal, elaborating a statute that became the template for Australian legislation on criminal appeals, had said that it "will exercise a discretion to allow [a prisoner] to withdraw his notice of abandonment, notwithstanding that it operates as a dismissal of the appeal"[66].

100 Once exceptions and qualifications to the general principle are acknowledged, the resulting legal debate necessarily shifts to a consideration of whether a further, analogous, exception exists applicable to the present case. In expounding a common law principle in the conventional way, it would be

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62 (1938) 60 CLR 431; [1938] HCA 45.

63 (1938) 60 CLR 431 at 436 citing *In re St Nazaire Co* (1879) 12 Ch D 88.

64 (1938) 60 CLR 431 at 436.

65 *Ronald v Harper* [1913] VLR 311 at 318 per Cussen J. *Jonesco v Beard* [1930] AC 298 and *Halsbury's Laws of England*, 2nd ed, vol 19 at 266 were cited.

66 (1938) 60 CLR 431 at 437; *Halsbury's Laws of England*, 2nd ed, vol 9 at 273 and the cases cited in note o.

unworthy of this Court to approach its functions mechanically or simplistically. I do not view *Grierson* as having done so. Nor should we, 70 years later.

101 *The status of the court a quo*: In considering the possibility of a further exception along the lines of the one that, in its second hearing, the Court of Criminal Appeal upheld in this case[67] it is appropriate to start with a full appreciation of the high status and functions of the Court of Criminal Appeal and hence its substantial implied or inherent powers, as such, to do justice in the exercise of its jurisdiction and to avoid needless injustice. The court is a manifestation of the constitutional Supreme Court of a State of the Commonwealth. It comprises the highest judges of a State. Those judges are empowered by their office and appointment to do justice to all persons according to the laws and usages of the State.

102 In repeated decisions over many years[68], following earlier English authority[69], this Court has held that a grant of statutory power to a court (including the conferral of jurisdiction) especially where that court is a superior court of record, is to be construed broadly. It is not to be treated as subject to any limitation that does not appear in the express words of that grant. As Gaudron J explained in *Knight v F P Special Assets Ltd*[70]:

> "[a] grant of power should be construed in accordance with ordinary principles and, thus, the words used should be given their full meaning unless there is something to indicate to the contrary. Powers conferred on a court are powers which must be exercised judicially and in accordance with legal principle. … The necessity for the power to be exercised judicially tends in favour of the most liberal construction, for it denies the validity of considerations which might limit a grant of power to some different body, including, for example, that the power might be exercised arbitrarily or capriciously or to work oppression or abuse."

103 In the present context there is an additional, local consideration. Because, in Australia, that court is a manifestation of the constitutional Supreme Court of the State, quite apart from the statutory provisions in s 12 of the Act, to which

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67 [2007] NSWCCA 79 at [39]-[41].

68 *Knight v F P Special Assets Ltd* (1992) 174 CLR 178; [1992] HCA 28. This principle may have still wider applications in the contemporary context: see *Shi v Migration Agents Registration Authority* [2008] HCA 31.

69 For example *Hyman v Rose* [1912] AC 623 at 631.

70 *Knight* (1992) 174 CLR 178 at 205.

reference has been made, this feature of the court attracts to it the substantial implied or inherent jurisdiction of the Supreme Court of New South Wales. Historically, that jurisdiction may be traced, through imperial statutes, to the origins of such a court in the royal prerogative, continued into present times, from the Royal Charter first creating it. It means that the express statutory powers of its judges may be enhanced by implied (or possibly inherent) powers so long as these are not inconsistent with the applicable statutory or subordinate laws. In these circumstances, provisions in the Rules to regulate the practice and procedure of the Court under the Act[71] may be subject to the implied or inherent powers of the Supreme Court to ensure that those rules do not become instruments for needless injustice that can readily, quickly and economically be repaired or avoided. Especially once exceptions to a completely rigid application of the general principles stated in *Grierson* are recognised, the large powers of the Supreme Court, shared with the Court of Criminal Appeal, exist (on the face of things) to ensure that needless injustices are overcome.

104 *Already recognised exceptions*: Some exceptions to the *Grierson* principle are also created by, or recognised in, provisions made under statute. Thus the "slip rule", which would have existed anyway in the common law, is now expressed in the Uniform Civil Procedure Rules, r 36.17. That common law rule has been held applicable to court orders although the order on appeal has been formally perfected[72]. Where a source of correction is provided by or under statute, the availability of the jurisdiction and power to reopen a formalised order depends on the terms of the grant.

105 Quite apart from statute, however, this Court has, since *Grierson*, acknowledged at least one clear exception to the strictness of the general principle stated there. I refer to the recognition of the power of this Court, as the final national court of appeal, in exceptional circumstances, to repair its own mistakes and oversights that would otherwise occasion a serious and

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71 The Act, s 28(2)(a).

72 *Carrion* (2002) 128 A Crim R 29 at 32 [18]; *R v Allen* [1994] 1 Qd R 526; *AN v The Queen (No 2)* (2006) 163 A Crim R 133 at 140 [42].

irremediable injustice, despite the fact that its orders have been formalised[73]. The same power was upheld in England in the House of Lords[74].

106 Although the Court of Criminal Appeal is not, as such, a final appellate court, functionally, and for at least 98 percent of cases decided by it, its orders are final. This is the reason why this Court recognised that intermediate appellate courts in Australia must share with this Court the responsibility of declaring and developing general principles of the law[75].

107 So are the common law and statutory exceptions to the *Grierson* principle stated above an entire statement of such exceptions? Or was the Court of Criminal Appeal correct in this case to recognise, by analogical reasoning, the existence of a further such exception, applicable to the present circumstances?

108 In my respectful opinion, that question is not answered simply by pointing to the decision in *Grierson*. It remains for this Court to decide the fundamental basis of that principle; the characteristics of the non-statutory exceptions already acknowledged; and to determine whether the present case permits of the additional exception stated by the Court of Criminal Appeal in this case.

109 *Omission or failure of jurisdiction*: The second possible common law exception to the general principle in *Grierson*, expressly acknowledged by Dixon J in that case, was the discretion that the Court of Criminal Appeal in England had asserted to allow a prisoner to withdraw a notice of abandonment, notwithstanding that such notice operated, in law, as a dismissal of the appeal.

110 This second exception was qualified by the statement that "in such a case there has been no determination by the Court"[76]. Possible reservations about the

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73 *State Rail Authority of NSW v Codelfa Construction Pty Ltd* (1982) 150 CLR 29 at 38; [1982] HCA 51; *Autodesk Inc v Dyason [No 2]* (1993) 176 CLR 300 at 302-303 per Mason CJ; [1993] HCA 6; *De L v Director-General, NSW Department of Community Services (No 2)* (1997) 190 CLR 207 at 215; [1997] HCA 14.

74 *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No 2)* [2000] 1 AC 119 at 132.

75 *Nguyen v Nguyen* (1990) 169 CLR 245 at 268-269; [1990] HCA 9. See also *Ravenor Overseas Inc v Readhead* (1998) 72 ALJR 671 at 672; 152 ALR 416 at 417; [1998] HCA 17; cf *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 418 [58]; cf 403 [17]; [1998] HCA 48; *Farah Constructions Pty Ltd v Say dee Pty Ltd* (2007) 230 CLR 89 at 151-152 [135]; [2007] HCA 22.

76 (1938) 60 CLR 431 at 437 referring to Halsbury's *Laws of England*, 2nd ed, vol 9 at 273 and the cases cited in note o).

exception were hinted by Dixon J's observation that "… there is no English case in which, after such a determination, an appeal has been reopened or a fresh appeal has been entertained"[77]. However, the stated exception was not specifically disapproved. That fact has encouraged a recognition of similar exceptions both in statutory form[78] and in judicial decisions[79].

111 The foundation for any such second exception is an assumption that, in such a case, the matter that has passed into judgment (as explained by the judicial reasons) did not decide a point in contention which therefore remains outstanding and undecided. Although, in the present case, the reasons of the Court of Criminal Appeal as first published appear to have determined all of Mr Burrell's grounds of appeal (as well as some which had been withdrawn) and to have done so on the merits as found, the hypothesis is that there has been no *true* determination of the appeal because of the inclusion of incorrect or immaterial factual propositions.

112 This hypothesis shares some resonances with the postulate of "nullity" applicable to cases of jurisdictional error, as where an administrative decision-maker has failed to accord procedural fairness to a person affected by a decision[80]. Whilst this theory is inapplicable to a superior court of record, such as the Court of Criminal Appeal, the possible ingredients for a general principle to sustain exceptions to the *Grierson* principle begin to emerge.

113 Although the general principle in *Grierson* has not been doubted by this Court since it was expressed, decisions of judges of this Court, in the intervening years, have raised the possibility that an intermediate appellate court could entertain an application to remedy a denial of procedural fairness "whether or not

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77 (1938) 60 CLR 431 at 437.

78 See eg Uniform Civil Procedure Rules, rr 36.15(1), 36.16(2)(a), (b) and (c).

79 *Jones v The Queen* (1989) 166 CLR 409 at 414-415; *Lapa (No 2)* (1995) 80 A Crim R 398 at 403; *Pettigrew v The Queen* [1997] 1 Qd R 601; *Saxon* (1998) 101 A Crim R 71 at 76 per Wood J; *R v Gust* [2000] NSWCCA 287; *R v Giri [No 2]* [2001] NSWCCA 234 at [17] per Heydon JA.

80 See *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 612-613 [45]-[46] per Gummow and Gaudron JJ, 619-620 [68]-[70] per my own reasons; [2002] HCA 11. See also *Calvin v Carr* [1980] AC 574 at 589-590.

its order has been perfected"[81]. On the other hand, the most recent observations on the point by this Court in *DJL v Central Authority*[82], in the context of the Family Court of Australia (a statutory federal court), appear hostile to the power of courts of record in Australia to reopen judicial decisions that have passed into judgment.

114 It follows that the ultimate question in this appeal is therefore whether that general hostility governs the legal principle applicable to the appeal, notwithstanding the practical realities that inform the context for the decision and given the ambit of already recognised exceptions to the general principle stated in *Grierson*[83].

A further exception to *Grierson* is not recognised

115 *A further exception?*: From the foregoing analysis, it will be apparent that I do not find the issue presented by the first ground of appeal straightforward. In part, my hesitations may derive from differing conceptions of the role and functions of courts, such as the Court of Criminal Appeal; my view as to the consequential jurisdiction and powers of such courts; the large implied or inherent sources of power for those courts to do justice to cure promptly notified mistakes and oversights occasioning injustice; and the perception of rules governing the formal entering of judgments and orders as a means of *contributing* to the function of the courts of justice and not as *impeding* the correction of mistakes that may be difficult, or impossible, effectively to correct later and elsewhere.

116 Nevertheless, the issue now before this Court is not one that arises on a blank page of legal doctrine. My duty is to give effect to the better view of the presently governing law. For several reasons, I have ultimately concluded that this duty leads to the same result as that reached in the joint reasons. I will now explain why.

117 *Duration of Grierson*: The first point is that *Grierson* expresses a general principle that has endured for 70 years. It is addressed to the very statute in

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81 *Postiglione v The Queen* (1997) 189 CLR 295 at 300 per Dawson and Gaudron JJ, 327 per Gummow J, 343 of my own reasons; [1997] HCA 26.

82 (2000) 201 CLR 226; [2000] HCA 17.

83 Another possible exception has been suggested for the case of interlocutory orders: see Allars, "Perfected judgments and inherently angelical administrative decisions: The powers of courts and administrators to reopen or reconsider their decisions", (2001) 21 *Australian Bar Review* 50 at 56.

question in this appeal. Had the State Parliament considered that the Act should be changed to overcome any inflexibilities seen in the reasons in *Grierson*, for forbidding disturbance of entered orders of the Court of Criminal Appeal, it could easily have done so. No constitutional impediment stood in the way.

118 It is not difficult to imagine the reasons that would have restrained any parliamentary re-expression of the *Grierson* principle in this context. The essence of a court of record is that it takes its record seriously. Decisions that pass into judgment thereupon speak to the whole world and not simply to the parties to the litigation. Most challenges against judgments entered by the Court of Criminal Appeal are likely to be by prisoners many of whom are unwilling to accept the conclusion of their contests by the orders of that Court. As the former Criminal Appeal Rules indicate by their language, there was originally a very particular reason for finality of such orders. This was the existence of the death penalty which, once executed, could not subsequently be reversed to the benefit of the prisoner.

119 Although I accept that there have been *dicta* in this Court over the years expressing a willingness to contemplate further exceptions to the general principle in *Grierson*, I am bound to acknowledge that there have been just as many reaffirmations of that principle and of the legal policy that lies behind it. Thus, in *Pantorno v The Queen*[84], Mason CJ and Brennan J explained that a particular reason for granting special leave to address a denial of natural justice conceded by the prosecution (arising from the failure of the Court of Criminal Appeal to address a point raised by the prisoner's grounds of appeal) was "the tacit assumption that the formal order of the Court of Criminal Appeal had been perfected so that there are now no means of remedying the position save an appeal to this Court"[85].

120 The postulate of a "further application to [the Court of Criminal Appeal]" was expressed by Deane, Toohey and Gaudron JJ in that case[86]. However, in view of the shortness of the sentence being served by the applicant for special leave in that case, their Honours agreed that it would be inappropriate to relist the matter for further argument so that "the validity of the assumption (about which we express no view) that the Court of Criminal Appeal now lacks jurisdiction could be examined". In that light, special leave was granted and the remedial orders made.

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84 (1989) 166 CLR 466; [1989] HCA 18.

85 (1989) 166 CLR 466 at 474. See also *Jones* (1989) 166 CLR 409 at 415.

86 (1989) 166 CLR 466 at 484.

121 At the very least, the continued operation of an almost unqualified principle of finality for orders of the Court of Criminal Appeal, entered in court records, has been a distinctive feature of the decisions of this Court. *Grierson* was referred to in the reasons of the plurality in *DJL*[87]. The reasoning and outcome in *Grierson* obviously influenced the approach that was given effect by the Court's orders in *DJL*. Although I expressed a different view concerning the power of the Family Court, that view did not prevail. The decision in *DJL* stands for the proposition that the Full Court of the Family Court does not have the jurisdiction or power to reopen final orders after their entry in the records of that Court[88].

122 Like the Court of Criminal Appeal, the Family Court is a superior court of record. Although the Family Court is a federal court, no constitutional or federal feature was propounded to distinguish it from the operation of the principle in *Grierson*[89]. Although I adhere to my contrary view, stated in *DJL*, in a matter such as this, I am obliged to give effect to the law as expressed by the majority. It is a law that affirms a literal application of the principle in *Grierson*, without any relevant exception.

123 *Distinguishing final courts*: Despite the fact that an exception to the *Grierson* rule is now accepted for final courts, such as this Court, and although there are many practical features that equate Australia's intermediate courts, in terms of function, with the role of this Court, the decision in *DJL* rejects the proposition that the admission of an exception for a final court is applicable to the Full Court of the Family Court as an intermediate court[90]. Again, I am obliged to give effect to this majority conclusion, however much I might prefer the contrary view as more apparently realistic, just and functional[91].

124 *Rejection of a further exception*: In intermediate courts in this country too, a conflict of authority has emerged concerning the existence of an exception to permit correction of a mistake occasioning a miscarriage of justice which is brought to the notice of the intermediate court promptly. Some decisions appear

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87 (2000) 201 CLR 226 at 245-246 [40] citing *CDJ v VAJ* (1998) 197 CLR 172 at 196; [1998] HCA 67.

88 (2000) 201 CLR 226 at 248 [46]-[47].

89 (2000) 201 CLR 226 at 248 [46]-[47].

90 (2000) 201 CLR 226 at 247 [43]-[44].

91 (2000) 201 CLR 226 at 265 [96]-[97].

to uphold such a view[92], usually in *obiter dicta*. However, other decisions reach the contrary conclusion. They hold that an exception permitting reopening of formalised orders of the Court of Criminal Appeal does not exist based on a conclusion of a denial of procedural fairness. Usually this opinion is expressed *obiter*[93].

125 It cannot be said that an assumption or practice has grown up in intermediate courts, that apply the template for criminal appeals, to the effect that the exception found by the Court of Criminal Appeal in these proceedings exists by convention or common application. A denial of the exception by this Court would not, therefore, appear to change the majority practice of such intermediate courts.

126 *Statutory reform and administrative practice*: The rule in *Grierson* is, of course, liable to be reversed or qualified by laws made by or under statute. The adoption of new provisions in the Criminal Appeal Rules, following the second decision of the Court of Criminal Appeal in these proceedings[94] was designed to permit that Court to set aside or vary an order within 14 days after the order was entered. This amendment to the Rules (assuming it to be valid) arguably amounts to an express recognition by the rule-maker that, absent such a rule, the Court of Criminal Appeal lacked the power that was then provided by the amendment.

127 In any event, the basic source of the problem that arose in the present case was the over-rapid formalisation of the pronounced order dismissing Mr Burrell's appeal, by the conduct of the registry officer, on that very day, of issuing the Notification and entering the order in the way contemplated by the Criminal Appeal Rules. It was not essential, necessary or even desirable that that should be done so rapidly. Especially given the publication of extended reasons comprising nearly 130 pages and the desirable facility to parties to have an

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92 *Pettigrew* (1996) 89 A Crim R 1; *R v Gust* (2000) NSWCCA 287; *Saxon* (1998) 101 A Crim R 71 at 76.

93 *Lapa (No 2)* (1995) 80 A Crim R 398; *R v Reardon* (2004) 146 A Crim R 475 at 487 [40] per Hodgson JA, 494 [81] per Simpson J, 501 [113] per Barr J. See also *R v McNamara [No 2]* [1997] 1 VR 257.

94 Criminal Appeal Rules as amended 7 September 2007 inserting r 50C. Rule 50C(3) provides that "[w]ithin 14 days after an order is entered, the Court may of its own motion set aside or vary the order as if the order had not been entered."

opportunity to read, consider and draw any mistakes or misunderstandings to attention, there were many reasons why such an administrative practice was unsuitable.

128 In a sense, it was this practice (inferentially alterable by specific or general directions of the judges) that brought about the entering of the Court's orders. Had that course not been followed, or had the Court of Criminal Appeal itself directed a delay in the formalisation of its orders when publicly pronouncing them, many (if not all) of the problems presented by this appeal could have been avoided.

129 *Conclusion: jurisdiction unavailable*: In the result, the better view of the governing law is that there is no further exception to the principle in *Grierson*, applicable where a matter has been decided on the merits by the Court of Criminal Appeal where that decision has passed into judgment by being entered in court records in the manner contemplated by the Criminal Appeal Rules.

130 It follows that the Court of Criminal Appeal erred in rejecting the submission for Mr Burrell, when the appeal was relisted, that it had no jurisdiction or power to recall its earlier decision or to reconsider or alter the orders previously pronounced and entered. That submission should have been accepted. The Court of Criminal Appeal should then have left any correction of the orders to this Court.

131 In cases of clear mistake or oversight, at least where an arguable injustice had occurred, it might be expected in the future that the prosecution will, in proper cases, support the grant of special leave, and the making of orders setting aside the orders and judgment of the Court of Criminal Appeal and remitting the proceeding to that Court for fresh determination that can justly cure the demonstrated mistake or oversight.

132 Having reached this conclusion, it is unnecessary for me, and would be undesirable, to consider the residual arguments of Mr Burrell, both in the appeal and in the application for extension of the grounds of special leave to appeal, referred into this Court.

Orders

133 The orders proposed in the joint reasons should be made.