HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, KIRBY, HEYDON AND KIEFEL JJ

RAYMOND FREDERICK AYLES APPELLANT

AND

THE QUEEN RESPONDENT

Ayles v The Queen [2008] HCA 6
28 February 2008
A40/2007

ORDER

Appeal dismissed.

On appeal from the Supreme Court of South Australia

Representation

A L Tokley for the appellant (instructed by Townsends)

C J Kourakis QC, Solicitor-General for the State of South Australia with S A McDonald for the respondent (instructed by Director of Public Prosecutions (SA))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Ayles v The Queen

Criminal law – Practice and procedure – New statutory offence provision in period particularised on the information – Need for amendment – No formal application by prosecutor to amend.

Criminal law – Practice and procedure – Admission by accused to offence outside dates particularised on the information – Trial judge's findings follow admission.

Criminal law – Practice and procedure – Whether trial judge has power to amend statutory provision without application by parties – *Criminal Law Consolidation Act* 1935 (SA), s 281(2) – Distinct functions of judge and prosecutor – Whether amendment conformed to prosecutor's intention.

Criminal law – Practice and procedure – Procedural fairness – Whether amendment without opportunity for accused to make submissions.

Criminal law – Practice and procedure – Correct offence not noted on information – Order for amendment incompletely noted on the information – Whether affects amendment of information – Whether administrative task.

Criminal Law Consolidation Act 1935 (SA), ss 281(2) and 281(3).

1 GLEESON CJ. In accordance with the limited grant of special leave to appeal, the grounds of appeal in this matter are as follows:

1. The court below erred in law in holding that the trial judge had power pursuant to s 281 of the *Criminal Law Consolidation Act* 1935 (SA) to amend the charge in count 1 of the information.

2. The court below erred in law in holding that the trial judge had power to amend count 1 of the charge on the information because the power to lay the charge lies with the Director of Public Prosecutions under s 7 of the *Director of Public Prosecutions Act* 1991 (SA).

3. The court below erred in law in considering that the trial judge could amend the information as it is not part of the responsibility of the trial judge to determine which charge the appellant should stand trial for.

2 The relevant facts, and the events at trial, are set out in the reasons of Kiefel J, with which I agree. That the trial judge exercised, or purported to exercise, the power of amendment conferred by s 281 of the *Criminal Law Consolidation Act* 1935 (SA) is accepted in the grounds of appeal and is, in any event, clear from the record of proceedings. Sub-section (3) of s 281, in its opening words, indicates that the amendment of which the section speaks is made by the judicial order referred to in sub-s (2), not by the administrative step dictated by sub-s (3). In this case, an order for amendment having been made by the trial judge, an incomplete note of the order was endorsed on the information by the judge's associate. It is the judicial order that is the subject of the grounds of appeal. The failure to comply with sub-s (3) was not a ground of appeal, either in the Court of Criminal Appeal of South Australia (Doyle CJ, Gray and David JJ)[1] or in this Court. It was mentioned in the course of argument, but there was no application to add a further ground of appeal, which would have required leave. As Doyle CJ observed, in *Ismail*[2] the English Court of Appeal took a view inconsistent with a conclusion that, if an order is made under sub-s (2), a failure to make a note, or a complete note, of the order in accordance with sub-s (3) means that the amendment is ineffective. That reflects the statutory language.

3 The issues for decision were formulated in the appellant's written submissions thus:

"1. Whether in a trial by judge alone and after all of the evidence has been completed, the trial judge had the power pursuant to statute to

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1 *R v Ayles* (2007) 97 SASR 78.

2 (1990) 92 Cr App R 92 at 95.

substitute or add a new charge in the Information, in the absence of an explicit application by the prosecution counsel to do so.

2. Whether by substituting the new charge without giving the Appellant the opportunity to plead to the new charge there was a miscarriage of justice justifying setting aside of the conviction."

4 In essence, the argument was that, in the events that occurred, it was either beyond power (because of an alleged absence of an application by the prosecution) or unfair for the trial judge to make the order for amendment that she made. The events and circumstances are stated by Kiefel J, but there is an aspect of the case that I would emphasise by way of context. What follows is taken from the reasons of Doyle CJ.

5 The charge with which this appeal is concerned, which was the subject of count 1 in the information, related to the first occasion of sexual contact between the appellant and the complainant. That the two had a sexual relationship was not in dispute. There was, however, a dispute about when it began. The complainant could not be precise about the date. He said he was 13 or 14 years old at the time. His 13th birthday was on 2 May 1972. In evidence, the appellant admitted the incident, but said it occurred in October 1973.

6 A change in the law, by which s 69(1)(b)(iii) took the place of s 70(1)(c) of the *Criminal Law Consolidation Act* 1935 (SA) as the statutory provision relevant to such conduct, took effect on 9 November 1972. The change was not relevant to any element of the offence of indecent assault. The age of consent was altered, but not in a way that affected the complainant.

7 If an order for amendment had been made at the conclusion of the evidence, the proper order would have been to charge in the alternative, alleging a contravention of s 70(1)(c) or, alternatively, a contravention of s 69(1)(b)(iii). The function of particulars as to dates supporting those alternative charges would have been to provide fairness to the appellant, by protecting him against surprise, not to define the elements of the offence. It was because, in the events that occurred at trial, no order for amendment was made until the delivery of reasons for judgment, by which time the trial judge had decided to accept the appellant's evidence on the only matter in dispute (that is, the time when the conduct occurred), that the order for amendment took the form of a substitution for the original charge of a single new charge based on s 69(1)(b)(iii).

8 That is the context in which the issues of power and fairness raised by the appellant are to be considered. I accept that these are serious issues for determination, but their resolution turns upon the facts and circumstances of the particular case.

9 For the reasons given by Kiefel J, I agree that the appeal should be dismissed.

10 GUMMOW AND KIRBY JJ. This appeal from the Full Court of the Supreme Court of South Australia (Doyle CJ, Gray and David JJ)[3] sitting as the Court of Criminal Appeal[4] raises a substantial question concerning the proper role of judge and prosecutor, respectively, in relation to the amendment of criminal informations pursuant to powers conferred by the *Criminal Law Consolidation Act* 1935 (SA) ("the CLCA"). The epithet "technical" should not obscure the importance of this question, which goes to the conduct of trials by procedures which accord with the law and not by other procedures. In *Kotsis v Kotsis*[5] Windeyer J emphasised that, with respect to alleged merely formal defects in the court record:

> "The observance of forms and the due recording of proceedings are one of the safeguards of justice according to law."

11 When considering the statutory formalities which under English law attend the preferring of indictments, Lord Bingham of Cornhill recently remarked, in *R v Clarke*[6]:

> "Technicality is always distasteful when it appears to contradict the merits of a case. But the duty of the court is to apply the law, which is sometimes technical, and it may be thought that if the state exercises its coercive power to put a citizen on trial for serious crime a certain degree of formality is not out of place."

12 We agree. His Lordship's approach was shared, and the same conclusion reached, by each of the participating members of the House of Lords[7]. It is an approach that expresses the law of Australia, as long understood. It is the foregoing precept stated by Lord Bingham respecting the manner of exercise of the coercive power of the state which we seek to apply in what follows.

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3 *R v Ayles* (2007) 97 SASR 78.

4 See *Byrnes v The Queen* (1999) 199 CLR 1 at 12-13 [10].

5 (1970) 122 CLR 69 at 90.

6 [2008] UKHL 8 at [17].

7 [2008] UKHL 8 at [24] per Lord Scott of Foscote, [25] per Lord Rodger of Earlsferry, [38] per Lord Carswell, [43] per Lord Brown of Eaton-under-Heywood.

The trial

13 The appellant was charged with a number of sexual offences against the complainant, T, who, many years ago and while a child, attended the church of which the appellant was parish priest.

14 The appellant's trial took place in the District Court of South Australia in June 2006 before Simpson DCJ, sitting without a jury. The appellant was represented by counsel. The information presented against the appellant contained eight counts, six of indecent assault and two of buggery. The appellant pleaded guilty to counts 7 and 8 (indecent assault), but not guilty to the first six counts. Of those six counts, he was found guilty of count 1 (alleging indecent assault) but not guilty of the remaining offences. The one sentence of four years' imprisonment with a two year non-parole period was imposed with respect to the three offences of which the appellant was guilty.

15 Count 1 of the information was a charge that between 24 October 1971 and 2 May 1972 the appellant indecently assaulted T contrary to s 70(1)(c) of the CLCA. The latter date was T's 13th birthday. On the second day of the trial, apparently in response to T's evidence, the prosecutor applied to substitute 1 May 1973 for 2 May 1972, namely the day before T's 14th birthday. That amendment was unopposed by counsel for the appellant, the trial judge made an order to that effect, and a note of the order was endorsed on the information. It is the practice in South Australia for endorsements of this kind to be made by the associate of the judge, the information then being in the court file. So much appears to have accorded with s 281(3) of the CLCA, which will be set out below.

16 If matters had ended there, there could have been no cause for complaint by the appellant: a defect having been identified in the information, an amendment was sought by the prosecutor and was made by the judge. However, complications arose when the appellant gave evidence. He admitted the substance of the conduct alleged in count 1, but he said that it occurred in mid to late October 1973 and was able to relate this date to other events and records in evidence. This evidence about timing was significant because the relevant provisions of the CLCA were amended by the *Criminal Law Consolidation Act Amendment Act* 1972 (SA) with effect from 9 November 1972. After that date, the relevant offence of indecent assault was to be found in s 69(1)(b)(iii) of the CLCA, and not in s 70(1)(c) as was alleged in count 1 of the information as presented (and as amended on the second day of the trial).

17 At the trial, both the prosecutor and the judge were aware of the legislative change in 1972. Counsel for the appellant, when asked his position, said he had not yet "got to that stage". The judge asked "on what section the prosecution [was] proceeding". The prosecutor's response was that "the legislation changed, so the prosecution would have to proceed" on both s 70(1)(c) and s 69(1)(b)(iii).

Nevertheless, the prosecutor reiterated in her final address that the complainant's evidence about the timing of the offences should be believed, and she made no application for amendment.

18 In the event, the appellant's evidence about timing was accepted by the trial judge in her reasons for judgment given on 16 June 2006. As a result of that acceptance, the judge stated in her reasons for judgment that[8]:

> "For the accused to be found guilty of count 1, the particulars on the Information require further amendment, by substituting another date for 1 May 1973, a date some months later. If this were a jury trial, the jury would have to be directed that it did not matter whether the event in question took place when asserted by the prosecution or at some other date, in this case the date asserted by the accused himself. In the circumstances as I have found them, the relevant section of the *Criminal Law Consolidation Act* 1935 also requires amendment."

Her Honour continued[9]:

> "I amend count 1 on the Information as follows:
>
> Indecent Assault. (Section 69(1)(b)(iii) of the [CLCA])
>
> Particulars of Offence
>
> Raymond Frederick Ayles between the 24th day of October 1971 and the 31st day of October 1973 at Para Hills, indecently assaulted T."

19 A notation was made on the information altering the date to the "31st day of October 1973", and indicating that this had been "[a]mended by Her Honour Judge Simpson on 16 June 2006". Importantly, however, no notation was ever made regarding the relevant section of the CLCA: at all times, the information alleged an offence contrary to s 70(1)(c) of the CLCA, not s 69(1)(b)(iii).

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8 *R v Ayles* [2006] SADC 67 at [56].

9 *R v Ayles* [2006] SADC 67 at [58].

Amendment of informations

20 In South Australia, the information fulfils the same role as a presentment or indictment does in other States[10], and in South Australia the term does not exclusively connote summary proceedings. The history of the use of the information in summary proceedings to specify the alleged offence was traced by Jordan CJ in *Ex parte Walker; Re Goodfellow*[11]. The centrality of the information to criminal procedure in South Australia may be seen in s 275(1) of the CLCA:

> "Any person may be put upon his trial at any criminal sessions of the Supreme Court or District Court, for any offence, on an information presented to the Court in the name and by the authority of the Director of Public Prosecutions."

Likewise, s 284(1) of the CLCA provides that it is the *information* to which the accused pleads guilty or not guilty, thereby initiating the trial:

> "Any person arraigned on any information who pleads not guilty thereto shall, by that plea, without any further form, be taken to have put himself upon the country for trial; and the court shall, in the usual manner, proceed to the trial of that person accordingly."

That is, it is upon the information that the criminal defendant is tried, and in conjunction with the defendant's plea it delimits the area of contest at the trial.

21 The circumstances of the present case must next be seen against the background of s 277(1) of the CLCA. This provides:

> "Every information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as are necessary for giving reasonable information as to the nature of the charge."

Rule 4(3) in Sched 3 to the CLCA gives content to s 277(1) by providing that "if the offence charged is one created by statute, [the statement of offence] shall contain a reference to the section of the statute creating the offence". In the present case, however, at no time did the information ever contain a statement of

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10 cf *Criminal Procedure Act* 1986 (NSW), s 8; *Criminal Code* (Q), s 560; *Criminal Code Act* 1924 (Tas), s 7; *Crimes Act* 1958 (Vic), s 353; *Criminal Procedure Act* 2004 (WA), s 83.

11 (1944) 45 SR (NSW) 103 at 106-107.

the specific offence of which the appellant was said to be convicted, namely s 69(1)(b)(iii) of the CLCA.

22 At common law, there was no power to amend an indictment otherwise than by returning it to the grand jury that found it; by contrast, and as explained by Lord Mansfield, an information (using the term in its historical sense) could be amended more readily, being framed by an officer of the Crown and not being found upon the oath of a grand jury[12]. The inflexibility of the rules governing the technical requirements of indictments coupled with the extremely limited scope for amendment had a tendency, in the words of Sir James Fitzjames Stephen, to "mitigate, though in an irrational, capricious manner, the excessive severity of the old criminal law". Thus, prisoners might escape the consequences of their crimes by taking successful objections to the terms of the indictment presented against them[13].

23 Nineteenth century statutory reform in England to change this state of affairs culminated in the *Indictments Act* 1915 (UK)[14]. This modified the procedure for amendment of indictments. Section 5 of that Act, which is replicated in the law of each Australian State[15], found its way into the law of South Australia as s 281 of the CLCA, which is headed "Objections to informations, amendments and postponement of trial". The breadth of the range of permissible amendments under that section and its equivalents has often been emphasised in the case law. It may be accepted that an amendment to an information may add counts[16], substitute an applicable statutory offence for an inapplicable one[17], or vary the particularised dates of offending[18]. The question, in the present case, is whether any such addition or substitution has been effected according to law.

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12 *R v Wilkes* (1770) 4 Burr 2527 at 2569 [98 ER 327 at 351].

13 Stephen, *A History of the Criminal Law of England*, (1883), vol 1 at 284.

14 5 & 6 Geo 5 c 90. The earlier statutory reforms were to be found in *Criminal Law Act* 1826 (UK) 7 Geo 4 c 64; *Criminal Procedure Act* 1848 (UK) 11 & 12 Vict c 46; *Criminal Procedure Act* 1851 (UK) 14 & 15 Vict c 100.

15 cf *Criminal Procedure Act* 1986 (NSW), s 21; *Criminal Code* (Q), s 572; *Criminal Code* (Tas), s 326; *Crimes Act* 1958 (Vic), s 372; *Criminal Procedure Act* 2004 (WA), s 132.

16 *R v Johal* [1973] QB 475; *Radley* (1973) 58 Cr App R 394.

17 *Tuttle* (1929) 21 Cr App R 85; *Ciorra v Cole* (2004) 150 A Crim R 189.

18 *Dossi* (1918) 13 Cr App R 158.

24 Sub-section (2) of s 281 of the CLCA states:

> "When before trial, or at any stage of a trial, it appears to the court that any information is defective or that there is any variation between any particular stated therein and the evidence offered in proof thereof, the court shall make such order for the amendment of the information as the court thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendment cannot be made without injustice."

In the present case, the information as originally presented revealed both a "variation between any particular stated therein and the evidence offered in proof thereof", because the date of offending supported by the evidence was different from that particularised on the information, and a "defect", being the misdescription of the offence in question. The first matter was partially corrected by the amendment to the particulars made on the second day of the trial, although it remains to be seen whether the second attempt at amendment succeeded in completing the correction. Likewise, it remains to be seen whether the second matter (namely the misdescription of the offence) was effectively corrected by the purported amendment that is now in dispute on this appeal.

The absence of a notation of the substituted offence

25 The breadth of s 281 is limited in important respects, most notably by the form in which amendments must be made. Sub-section (3) states:

> "When an information is so amended, a note of the order for amendment *shall be* endorsed on the information and the information *shall be* treated, for the purposes of the trial and all proceedings in connection therewith, as having been presented in the amended form." (emphasis added)

26 Section 34 of the *Acts Interpretation Act* 1915 (SA)[19] reinforces the conclusion (contrary to the submission of the respondent) that the requirement that there shall be an endorsement of a notation is imperative, and not "directory", to use that now discarded taxonomy[20]. This imperative requirement

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19 See also the remarks of McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 389-391 [92]-[93]. These remarks commended themselves to Lord Bingham and to Lord Rodger of Earlsferry in *R v Clarke* [2008] UKHL 8 at [14], [28].

20 This provides that where in any statute the word "shall" is used in conferring a power, this implies that the power must be exercised.

must then be seen against the background of ss 275(1) and 284(1) of the CLCA, set out earlier in these reasons, which make a properly framed information essential to a successful prosecution.

27 It would seem fundamental to the criminal process that since the prosecution is commenced only by an information alleging a particular offence, a defendant cannot be convicted of an offence other than that alleged in the information. Where, as here, no notation was ever made of the correct offence on the information (whether as originally presented, or as purportedly amended), the information cannot be treated "for the purposes of the trial … as having been presented in the amended form" (s 281(3)). If the information was not presented in its amended form, it was not open to the District Court to convict the appellant of an offence contained therein. For that reason, the requirement in sub-s (3) of s 281 that there be a notation was a provision of the CLCA with a purpose "that an act done in breach of the provision should be invalid"[21].

28 In *R v Clarke*[22] the House of Lords quashed the convictions of the appellants at a trial commenced without there being a signed indictment before the Crown Court. The indictment was signed by the proper officer only during the trial and at what Lord Bingham described as "the eleventh hour", after the evidence had ended; this "somewhat adventitious addition of a signature" did not "throw a blanket of legality over the invalid proceedings already conducted"[23].

29 The legislation considered in *Clarke*[24] abolished the preferring of indictments by grand juries and provided that a bill of indictment signed as now provided by the statute "shall thereupon become an indictment". The reasoning of the House of Lords was that the step of signing the bill being indispensable to the preferring of the indictment and the indictment being the foundation of the record in the trial, absent that indictment there could be no trial.

30 A view contrary to the tenor of the opinions in *Clarke*, and to the approach that we take in these reasons, apparently was taken by the English Court of Appeal in the reasons of Lord Lane CJ in *Ismail*[25]. His Lordship said:

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21 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390 [93].

22 [2008] UKHL 8.

23 [2008] UKHL 8 at [21].

24 Sections 1 and 2 of the *Administration of Justice (Miscellaneous Provisions) Act* 1933 (UK).

25 (1990) 92 Cr App R 92 at 95.

> "It is true that that step was not taken as it should have been. It is suggested by counsel for the appellants that that indicates that this was not an amendment, but was a fresh indictment. We do not take that view. We take the view that that was an oversight on the part of the staff. It certainly is not an oversight which in itself invalidates the amendment which we find to have been made."

Whatever may be the authoritative force of that statement in England, it does not control the outcome of the present appeal in this Court and should not be followed in Australia.

31 Sub-section (3) of s 281 is not without its other difficulties. Some of these were raised in argument on the present appeal. One is when "for the purposes of the trial" is the information to be treated as "having been presented in the amended form"? Since no notation had been made of the critical offence, it is not necessary to address such questions.

The absence of an application for amendment

32 The absence of an appropriate notation of the amendment to the information was not the only deficiency in the process followed at the appellant's trial. The other defect was that no application for amendment of the information had been made by counsel before Simpson DCJ made her order. The transcript indicates that the prosecution and trial judge were alive to the changed statutory provisions and the defence thus became alive to the point. However, the first indication of any proposed amendment arose not during the course of the trial, but rather in her Honour's reasons delivered immediately after the verdict. Apparently contradictory views were taken by the Full Court that such an application was[26] and was not[27] made, and, if not made, then at least "foreshadowed". But what is presently significant is that the most that was advanced by the respondent in this Court was that such an application was *implicitly* made in the statement by the prosecutor that both sections were relied upon.

33 To the extent that such a statement implies that any amendment was sought (or foreshadowed) at all, it cannot have implied that the count should be amended in the manner undertaken by the trial judge. Since the prosecutor made it clear that she relied on both sections, the amendment made by the trial judge

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26 (2007) 97 SASR 78 at 85.

27 (2007) 97 SASR 78 at 86.

(substituting one section for the other) may not have been in accordance with the prosecutor's wishes. An amendment that was consonant with the prosecutor's wishes would have required the addition of a new and alternative count, such that one count would allege an offence contrary to s 69(1)(b)(iii) and another would allege an offence contrary to s 70(1)(c), with appropriately particularised dates for each count.

34 Was it necessary for there to be an application before the information could be amended? On its terms, s 281 of the CLCA does not provide an explicit answer. While sub-s (1) refers to an application to quash an information before trial (leaving implicit the court's power to order such a quashing), sub-s (2) refers only to the making of an order by the court (leaving implicit any antecedent need for an application for that order). The answer is found through consideration of the distinct functions of judge and prosecutor.

35 In the Full Court, Doyle CJ (with whom Gray and David JJ agreed) came to the view, upon such a consideration, that such an application was unnecessary. His Honour stated that the trial judge had a responsibility for the regular conduct of proceedings[28]:

> "A trial judge has a responsibility for the regularity of proceedings, and authority to act to ensure that they are regular: see *R v West*[29]. A judge who takes the initiative in this way should, of course, give counsel an opportunity to put submissions before exercising the power to amend. But the important point is that the judge is not obliged to stand by and take no remedial action unless and until counsel makes an application for an amendment.
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> There is no intrusion on the role of the Director of Public Prosecutions by the judge taking the initiative in this way, and making an order (if called for) after hearing submissions from counsel. There is no such intrusion because of the judge's authority over and responsibility for the correct state of the pleadings."

True it is that the judge has a responsibility for the regular conduct of proceedings, but that responsibility does not provide an answer to the question of whether an application to amend is necessary.

36 All the provisions of the CLCA, including s 281, must be viewed in the context of the division of functions between prosecutor and judge in the

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28 (2007) 97 SASR 78 at 86-87.

29 [1948] 1 KB 709 at 717.

adversarial system of criminal justice. In *Director of Public Prosecutions (SA) v B*, Gaudron, Gummow and Hayne JJ remarked that[30]:

> "The line between, on the one hand, the decisions whether to institute or continue criminal proceedings (which are decisions the province of the executive) and on the other, decisions directed to ensuring a fair trial of an accused and the prevention of abuse of the court's processes (which are the province of the courts) is of fundamental importance."

Their Honours went on to quote from the reasons for judgment of Gaudron and Gummow JJ in *Maxwell v The Queen*, in which it was said that[31]:

> "It ought now be accepted, in our view, that certain decisions involved in the prosecution process are, of their nature, insusceptible of judicial review. They include decisions whether or not to prosecute, to enter a nolle prosequi, to proceed ex officio, whether or not to present evidence and, which is usually an aspect of one or other of those decisions, decisions as to the particular charge to be laid or prosecuted. The integrity of the judicial process – particularly, its independence and impartiality and the public perception thereof – would be compromised if the courts were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what." (footnotes omitted)

37 The last-quoted sentence is of fundamental importance. It affords a most important principle that lies at the head of the resolution of this appeal. A decision to amend an information so as to add or substitute a new charge is plainly a decision about the particular charge to be laid or prosecuted, yet any suggestion that a court could – let alone should – decide for itself the offences with which a defendant is to be charged would be inimical to the judicial process. It also may well raise concerns about the institutional integrity of the courts in the manner discussed in *Kable v Director of Public Prosecutions (NSW)*[32].

38 In this Court, as in the Full Court, it was argued that the trial judge's actions were not open to objection as her Honour acted with reference to the prosecutor's intentions, and thus did not usurp the role of prosecutor. This, however, is a circumstance that tends against, not towards, the propriety of those actions. In every case, it may be inferred that the prosecutor wishes to see the

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30 (1998) 194 CLR 566 at 579 [21].

31 (1996) 184 CLR 501 at 534.

32 (1996) 189 CLR 51.

defendant convicted of some charge or another. If, however, the evidence shows that the defendant is not guilty of the charged offence, the proper conduct of proceedings requires that a verdict of not guilty be entered. It is no part of the judicial function to attempt to salvage the prosecution's case.

39 Quite aside from these concerns about institutional integrity and the distinct role of prosecutor and judge, the requirements of procedural fairness apply no less to the amendment of informations than to any other aspect of the criminal trial[33]. Where the judge realises that there is a defect in the information, the proper course is to draw the defect to the parties' attention and to indicate that it is for the prosecutor to apply for an order that the information be amended. Such a course would allow the prosecutor to seek the amendment should she or he so wish, and would allow the defence to raise any submissions about the injustice or otherwise of the amendment. In this way, the requirements of procedural fairness and institutional integrity would be upheld. This procedure was not adopted in the appellant's trial.

Conclusions

40 The purported amendment made by the trial judge was defective in two respects: first, because her Honour had no power to make it as no application had been made by counsel; and secondly, in the case of the statement of the offence (but not the particulars), because there was no notation of the purported amendment on the information itself. Because the trial judge misconstrued her powers of amendment, the appellant's conviction was therefore attended by a "wrong decision on [a] question of law" within the meaning of sub-s (1) of s 353 of the CLCA, and subject to consideration of the proviso his appeal should be allowed.

41 The precise significance of the defective amendment caused some confusion in the submissions to this Court. On the one hand, the appellant submitted that, being an order of a superior court of record[34], the order for amendment made by the trial judge (or the appellant's conviction of the count as amended) stood unless and until set aside. However, while its status as an order of a superior court would bind an inferior court and also preserve the order from attack in collateral proceedings, the order was liable to be set aside, and could be so set aside in appellate proceedings. The applicable principles were detailed by McHugh J in *Ousley v The Queen*[35].

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33 cf *R v West* [1948] 1 KB 709 at 717.

34 *District Court Act* 1991 (SA), s 5.

35 (1997) 192 CLR 69 at 99.

42 For that reason, the respondent properly and correctly submitted that if (as has turned out to be the case) the judge's order was made without power, the appellant stood convicted of count 1 as amended on the second day of trial and not otherwise. That is to say, he was convicted of indecent assault contrary to s 70(1)(c) of the CLCA between 24 October 1971 and 1 May 1973. Accordingly, the appellant was convicted of an offence that was not known to the law at the time he was found to have committed it, namely in October 1973.

The proviso

43 The respondent submitted that notwithstanding these irregularities in the appellant's trial no miscarriage of justice occurred in the particular circumstances of the case, as the appellant was convicted upon his own testimony for an offence the substance of which he admitted. The respondent pointed to *R v DD*[36] as a case in which, notwithstanding the accused had been convicted of a statutory offence that was not in force at the time of the alleged offending, the Victorian Court of Appeal held that no substantial miscarriage of justice had occurred. This was said to be so because an equivalent offence continued to exist at common law and "no prejudice in the form of misinformation, lack of information or embarrassment in presentation of defence accrued" to the accused by reason of the misdescribed offence[37]. In the present case, a substantial miscarriage of justice was also said by the respondent to be absent on like grounds, and in addition because the appellant never denied his guilt and was convicted upon his own testimony.

44 In *Weiss v The Queen*, this Court left open the question[38]:

> "whether some errors or miscarriages of justice occurring in the course of a criminal trial may amount to such a serious breach of the presuppositions of the trial as to deny the application of the common form criminal appeal provision with its proviso".

The reasons of the Court in *Weiss* referred to the earlier decision of this Court in *Wilde v The Queen*, in which Brennan, Dawson and Toohey JJ stated that[39]:

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36 (2002) 5 VR 243.

37 (2002) 5 VR 243 at 254.

38 (2005) 224 CLR 300 at 317 [46].

39 (1988) 164 CLR 365 at 373.

> "The proviso has no application where an irregularity has occurred which is such a departure from the essential requirements of the law that it goes to the root of the proceedings. If that has occurred, then it can be said, without considering the effect of the irregularity upon the jury's verdict, that the accused has not had a proper trial and that there has been a substantial miscarriage of justice. Errors of that kind may be so radical or fundamental that by their very nature they exclude the application of the proviso".

Their Honours referred to *R v Hildebrandt*[40], *R v Henderson*[41], and *Couper*[42].

45 There could hardly be more fundamental presuppositions of a trial than that an accused be convicted only of those offences with which he or she is charged, and that those offences must be known to the law. Substantive defects in an information of the kind identified in this appeal therefore go to the root of the proceedings in the truest sense because – as has been explained above – a properly framed information as alleged by the prosecution authorities is the foundation of the criminal process against the accused as that process is observed in this country. The argument for the application of the proviso should be rejected.

Orders

46 The appeal should be allowed, and the orders of the Full Court made on 8 March 2007 should be set aside[43]. In their place, the appellant's conviction on count 1 should be quashed.

47 Since the information presented against the appellant was never effectively amended so as to charge the appellant with an offence contrary to s 69(1)(b)(iii) of the CLCA, the appellant was never in jeopardy of conviction for that offence[44]. It will be for the Director of Public Prosecutions to decide whether to lay a fresh information. Should that occur, it will then be for the defence to take any objection to that new information that may arise out of the circumstances of the first trial.

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40 (1963) 81 WN (Pt 1) (NSW) 143.

41 [1966] VR 41.

42 (1985) 18 A Crim R 1.

43 Although the Full Court ordered that the appellant's appeal against conviction be dismissed, no order to that effect appears to have been perfected.

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

48 The appeal to this Court was against conviction only, but the successful appeal against conviction requires attention to one aspect of the sentence imposed on the appellant at trial. The appellant was convicted of three offences and, pursuant to s 18A of the *Criminal Law (Sentencing) Act* 1988 (SA)[45], a single sentence was imposed on him with respect to those three offences. One of those convictions now having been quashed, the appellant's sentence should be set aside, and the matter should be remitted to the Full Court for resentencing[46].

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45 This provides that "[i]f a person is found guilty by a court of a number of offences, the court may sentence the person to the one penalty for all or some of those offences, but the sentence cannot exceed the total of the maximum penalties that could be imposed in respect of each of the offences to which the sentence relates".

46 Sub-section (1) of s 354 of the CLCA provides that "[i]f it appears to the Full Court that an appellant, although not properly convicted on some count or part of the information, has been properly convicted on some other count or part of the information, the Court may either affirm the sentence passed on the appellant at the trial or pass such sentence in substitution therefor as it thinks proper and as may be warranted in law by the verdict on the count or part of the information on which the Court considers that the appellant has been properly convicted".

49 HEYDON J. I agree generally with Kiefel J.

50 In relation to the issues underlying the grounds of appeal, I agree with the order proposed by Kiefel J on grounds which can be summarised as follows.

(a) It is not a statutory pre-condition to exercise of the power to amend granted by s 281(2) of the *Criminal Law Consolidation Act* 1935 (SA) ("the Act") that the prosecutor apply for an amendment.

(b) It is within the power of prosecutors to decide what charges should be brought and continued, and, independently of s 281(2), the law makes that power exclusive. But in this case the prosecutor did decide what charge she wished to bring and what charge she wished to continue with in relation to the first item of misconduct alleged by the complainant against the appellant. Depending on the date of that misconduct, the prosecutor desired to continue with the charge alleging that that conduct constituted either the offence created by s 70(1)(c) of the Act or the offence created by s 69(1)(b)(iii) of the Act. Just before the close of the prosecution case, she communicated that desire to the trial judge and counsel for the defence in open court.

(c) The amendment to the information concerning the statutory provision allegedly contravened which the trial judge ordered in her reasons for judgment reflected her finding that the misconduct took place after 9 November 1972, the day on which s 70(1)(c) ceased to have effect and s 69(1)(b)(iii) came into effect.

(d) The amendment which the trial judge ordered did not literally correspond with the prosecutor's desire to make an allegation in the alternative (i.e. that the misconduct contravened either s 70(1)(c) or s 69(1)(b)(iii)). But it would not have been useful to order an amendment literally corresponding with that desire. The prosecutor's desire to make an allegation in the alternative was stimulated only by the need to cover all possible findings for the date of the misconduct. Once the trial judge found that the misconduct took place on a day after 9 November 1972, it became pointless to make an amendment so as to permit allegations of a contravention of s 70(1)(c) *or* s 69(1)(b)(iii): the only material provision, in the events which had happened, was the latter. In substance, therefore, the amendment corresponded with the prosecutor's desire so far as that desire retained materiality.

(e) While, as Kiefel J indicates, more regard to formal regularity would have been preferable, there was no unfairness to the appellant in the course which the trial took, and in particular no unfairness in the amendment order which the trial judge made in her reasons for judgment. Counsel for the appellant was well aware of the controversy about the date of the

misconduct alleged and the significance that date had in relation to the provision allegedly contravened. Counsel for the appellant had an opportunity to object to the prosecution's desire to rely on s 69(1)(b)(iii). There was no objection.

51 The absence of any note on the information reflecting the trial judge's order amending it so as to allege a contravention of s 69(1)(b)(iii) cannot affect the validity of the amendment ordered. Compliance with s 281(3) of the Act is not a pre-condition to the validity of the amendment. The statutory pre-conditions to validity are found exhaustively in s 281(2).

52 KIEFEL J. The appellant was charged with six counts of indecent assault and two counts of buggery under the *Criminal Law Consolidation Act* 1935 (SA) ("the CLCA"). The first two counts of charges were stated in the information of the Director of Public Prosecutions in terms:

"Statement of Offence

Indecent Assault. (Section 70(1)(c) of the Criminal Law Consolidation Act, 1935).

Particulars of Offence

Raymond Frederick Ayles between the 24th day of October 1971 and the 2nd day of May 1972 at Para Hills, indecently assaulted [T]."

53 The appellant pleaded guilty to two charges of indecent assault occurring at a later time and not guilty to all other charges. The charges were heard by Simpson DCJ, sitting without a jury, following the appellant's election of that course[47]. The date marking the conclusion of the period within which the offences were alleged to have occurred was amended during the course of the trial. Following the hearing, and before verdict, her Honour further ordered that the information be amended so as to refer to another, later, date and to the statutory provision which replaced s 70(1)(c). The extended period allowed for the approximate date upon which the appellant admitted the circumstances giving rise to the offence had occurred. The orders for amendment were made in the absence of an application by the prosecutor. The appellant's contention is that her Honour lacked the power to make the amendments. More particularly it is contended that the making of the orders involved the Court in decision-making reserved to the prosecution.

54 The appellant was a priest at a church at Para Hills in South Australia of which the complainant and his family were parishioners. In the opening for the prosecution it was said that counts 1 and 2 related to the first occasion that the complainant recalled conduct of a sexual nature occurring between the appellant and him. The appellant had asked the complainant to clean his house, in exchange for pocket money. He was at the appellant's house for this purpose when the appellant approached him, touched his penis and encouraged him to do likewise to the appellant. Count 1 related to the firstmentioned act and count 2 to the invitation to touch the appellant indecently. The prosecutor said that the complainant fixed the date of the offence by reference to a short period when his parents were separated, which occurred at about the time he was undertaking an

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47 *Juries Act* 1927 (SA), s 7.

entry exam for high school. On this account the complainant would have been 12 years of age, his date of birth being 2 May 1959.

55 After the complainant's evidence-in-chief, and before cross-examination, the prosecutor applied to amend the particulars of counts 1 and 2 by changing the date marking the end of the period in which the offences occurred to "the 1st day of May 1973". The basis for the application was that the complainant had given evidence that he believed that he was 13 years of age at the time of the offences and had just started high school. The prosecutor also sought to amend the concluding date of the periods particularised in other counts, for similar reasons. No objection was taken by the appellant's counsel and her Honour the trial judge ordered the amendments. Particulars of the offences were amended, in handwriting, on the information, presumably by the judge's associate.

56 Section 70(1)(c) of the CLCA provided that any person who indecently assaulted any male person was guilty of a misdemeanour and liable to be imprisoned for a term not exceeding 7 years. Section 70, together with ss 69 and 71, was repealed by the *Criminal Law Consolidation Act Amendment Act* 1972 (SA) ("the 1972 Amendment Act") and one section, s 69, enacted in their place. The repeal and enactment occurred on 9 November 1972. Sub-section (1)(b)(iii) of that section also provided that any person who indecently assaults any male person is guilty of a misdemeanour and liable to be imprisoned for a term not exceeding 7 years. The only change made by the 1972 Amendment Act, in relation to this offence, was to the age at which a male person could be considered capable of consenting to an indecent assault upon his person. Section 70(2) had provided that no male person under the age of 17 years could be deemed capable of consenting to any indecent assault; s 69(2) provided that a male person could not be considered capable of consenting to an indecent assault by a male person unless he had attained the age of 21 years.

57 When her Honour ordered the amendments to the dates in counts 1 and 2 she was not made aware of the coming into effect of the 1972 Amendment Act and the need, therefore, to identify the offences in the period up to 9 November 1972 by reference to s 70(1)(c) and thereafter by reference to s 69(1)(b)(iii).

58 Before the close of the prosecution case her Honour asked the prosecutor to identify the statutory provisions which were relied upon. By this time it is apparent that the fact of the statutory amendment was known to her Honour. A discussion took place between her Honour and the prosecutor as to the changes effected by the amendments to s 69 with respect to other offences charged. With respect to counts 1 and 2 the prosecutor advised her Honour that "it is the same situation; that the legislation changed, so the prosecution would have to proceed on s 70(1)(c) or s 69B(3)". This latter transcript reference was no doubt to s 69(1)(b)(iii). Defence counsel was asked by her Honour whether the change of section for the offences created any difficulty. Counsel advised that he would consider the matter overnight.

59 The following morning defence counsel made no mention of the matter and called the appellant, who gave evidence. The appellant admitted that the "first incident" referred to by the complainant, which was described as "mutual masturbation", occurred. That first act occurred after the complainant had started house-cleaning for the appellant. The appellant gave as the date for the "first incident" "about October 1973". On this account the complainant would have been 14.

60 The date given by the appellant with respect to the offences in question was generally adopted by the prosecutor in cross-examination of him, although at one point it was suggested to him that the first time he had a physical encounter with the complainant was when the complainant was 13 years of age. The appellant denied this. The matter of the complainant's age, at the time of the offences in question, was not put to the appellant again. The complainant's age was not material to the commission of an offence. It might have had some relevance to sentence.

61 In her address the prosecutor conceded that not all of the elements necessary to establish an indecent assault with respect to count 2 were present. A conviction with respect to count 1 was, however, pursued. The prosecutor observed that the appellant admitted the occasion but he had placed it at a time later than the complainant. There was some discussion between the prosecutor and her Honour about whether this was in fact the first occasion of indecent touching, on the complainant's evidence. His evidence at trial, that most of the offences occurred at a later date than had been particularised in the information, left one occasion, that relating to count 6, as occurring at a time earlier than he had given for the "first incident". This may have affected her Honour's view of the reliability of the complainant's evidence. Nothing turns upon it for the purposes of the appeal. The timing of the offences was a matter to be resolved by her Honour. The prosecutor conceded that the complainant might be wrong about his earlier dates. Earlier in her address she had impressed upon her Honour that it was the occasion, and not the date of the offence, which must be proved and that the appellant had admitted the occasion, although he had put it at a date later than appeared in the information.

62 Her Honour adjourned the trial to allow for further submissions. On the further hearing, and in the course of discussing the inapplicability of the defence of consent, the prosecutor referred to the statutory provisions which did not allow for the consent of a male under 17 years and/or under 21 years to the indecent assault. This was clearly a reference to each of ss 70 and 69.

63 Her Honour's reasons for her verdicts were given in writing. On the occasion of their delivery her Honour said that, "for the reasons which I now publish", she found the appellant guilty on count 1 "as amended" and not guilty with respect to the remaining charges as to which the appellant had pleaded not

guilty. Her Honour found that the first occasion when the appellant invited sexual contact was, on his admission, shortly after 6 October 1973 and not as charged in the particulars. She noted the Crown's submission, that the offence was identified by reference to the event itself rather than the particular dates alleged, which in any event covered a lengthy period of time. The date was not critical, either to the prosecution case or to the defence of the appellant, her Honour held. There was no dispute about the events which had occurred. The date of the first incident, when sexual relations may have occurred, might be relevant to the complainant's age and the length of time over which the relationship was maintained, and therefore to sentence. The date of the offence was not, however, material to the charge, in her Honour's view. The incident was properly identified, the appellant knew the incident to which the charge related and the appellant was not at risk of conviction of another offence altogether. Her Honour then said[48]:

> "For the accused to be found guilty of count 1, the particulars on the Information require further amendment, by substituting another date for 1 May 1973, a date some months later. If this were a jury trial, the jury would have to be directed that it did not matter whether the event in question took place when asserted by the prosecution or at some other date, in this case the date asserted by the accused himself. In the circumstances as I have found them, the relevant section of the *Criminal Law Consolidation Act 1935* also requires amendment."

64 After referring to s 69, her Honour ordered[49]:

> "I amend count 1 on the Information as follows:
>
> Indecent Assault. (Section 69(1)(b)(iii) of the *Criminal Law Consolidation Act 1935*)
>
> Particulars of Offence
>
> Raymond Frederick Ayles between the 24th day of October 1971 and the 31st day of October 1973 at Para Hills, indecently assaulted T."

Her Honour proceeded to find the appellant guilty on the information as amended[50].

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48 *R v Ayles* [2006] SADC 67 at [56].

49 [2006] SADC 67 at [58].

50 [2006] SADC 67 at [59].

65 Section 281 of the CLCA, in relevant part, provides:

"**Objections to informations, amendments and postponement of trial**

…

(2) When before trial, or at any stage of a trial, it appears to the court that any information is defective or that there is any variation between any particular stated therein and the evidence offered in proof thereof, the court shall make such order for the amendment of the information as the court thinks necessary to meet the circumstances of the case unless, having regard to the merits of the case, the required amendment cannot be made without injustice.

(3) When an information is so amended, a note of the order for amendment shall be endorsed on the information and the information shall be treated, for the purposes of the trial and all proceedings in connection therewith, as having been presented in the amended form."

66 In the Court of Criminal Appeal of the Supreme Court of South Australia it was submitted that the section did not provide the Court with power to make the amendment without an application having first been made by the prosecutor. Further, the effect of the amendment was to substitute a new charge and this went beyond the power of amendment.

67 Doyle CJ, with whom Gray and David JJ agreed, held that the prosecutor had made an application[51]. Later, his Honour considered that when the prosecutor identified the provisions relied upon, at the close of the prosecution case, she should have applied for an order amending the information. It was clear, however, that the prosecutor wished to have the information amended as may be required to accommodate the trial judge's findings of fact. The prosecutor could therefore be taken to have foreshadowed an application to amend[52]. The order was later made on that foreshadowed application[53].

68 Doyle CJ held that there was an additional basis upon which the Court could exercise its powers. It was not necessary for the trial judge to wait for an application from the prosecutor[54]. In his Honour's view a trial judge has a

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51 *R v Ayles* (2007) 97 SASR 78 at 85 [40].

52 (2007) 97 SASR 78 at 86 [44], [45].

53 (2007) 97 SASR 78 at 86 [48].

54 (2007) 97 SASR 78 at 86 [49].

responsibility for the regularity of proceedings. There was no intrusion into the role of the prosecution by the judge making an order, because it was the judge's responsibility to correct the pleadings[55]. His Honour observed that it would have been desirable for the trial judge to hear submissions before making the order. In the circumstances of the case there was, however, no miscarriage of justice[56].

69 On the appeal it was not argued that an amendment of the kind ordered was not contemplated by s 281 of the CLCA. Doyle CJ dealt with this matter in his reasons for judgment[57]. His Honour observed that both English cases[58] and Australian cases[59] recognise that the power of amendment given by s 5 of the *Indictments Act* 1915 (UK), and State and Territory equivalent provisions, permits the addition of a new charge, so long as no injustice is caused. In the present case the reference to the subsequent statutory provision introduced no new allegations. The scope of the defence of consent varied as between ss 70 and 69, but the availability of the defence was never in issue in the case[60]. His Honour also referred[61] to the decision in *Maher v The Queen*[62]. It was there held that a further count could not be added to an indictment once the jury had been sworn. The principle stated by the Court[63] was that the jury was sworn to try only the issues on the counts appearing on the indictment. As Doyle CJ observed[64], the statutory provisions in question, those then in force in Queensland, did not permit the addition of another count on an indictment. To these observations may be added that of Hunt CJ at CL in *R v Stolpe*[65], that the decision in *Maher v The Queen* is restricted to jury trials.

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55 (2007) 97 SASR 78 at 86-87 [48]-[50].

56 (2007) 97 SASR 78 at 87 [53].

57 (2007) 97 SASR 78 at 84-85 [31]-[39], 88-89 [62]-[67].

58 *R v Johal* [1973] QB 475; *Radley* (1973) 58 Cr App R 394.

59 *Go v The Queen* (1990) 73 NTR 1; *R v B* [1999] SASC 403.

60 (2007) 97 SASR 78 at 88 [58].

61 (2007) 97 SASR 78 at 83 [27], 89 [66], [67].

62 (1987) 163 CLR 221.

63 (1987) 163 CLR 221 at 234.

64 (2007) 97 SASR 78 at 88-89 [65]-[66].

65 Unreported, Court of Criminal Appeal of the Supreme Court of New South Wales, 30 October 1996 at 7.

70 The appellant's principal contention concerns the maintenance of the separate functions of the executive and of the courts. The appellant's contention is that it is no part of the judicial function to determine what charges are to be brought or proceeded with against an accused. This may also be expressed as a judge lacking the relevant power to make such a decision. A reference to the *Director of Public Prosecutions Act* 1991 (SA) and other provisions of the CLCA confirms that this is a matter solely for the Director. The contention is clearly correct. Further, the power of amendment given by s 281 does not alter the division of functions.

71 In *Director of Public Prosecutions (SA) v B*[66] Gaudron, Gummow and Hayne JJ referred to the fundamental importance of the line drawn between the decision whether to institute or continue criminal proceedings, the province of the executive, and decisions directed to ensuring a fair trial and the prevention of abuse of the court's processes, the province of the courts. In *Maxwell v The Queen*[67] Dawson and McHugh JJ pointed out that, save where it is necessary to a fair trial or the prevention of abuse, courts in Australia do not purport to exercise control over the institution and continuation of criminal proceedings[68]. In *Barton v The Queen*[69] it was said that it ought now be accepted that certain decisions involved in the prosecution process are insusceptible of judicial review. They include the decision whether to lay or prosecute a particular charge. In *Maxwell v The Queen* the refusal of the trial judge to accept a plea, which the prosecution would accept, was considered to be of the nature of a review[70].

72 Had the trial judge's order of amendment of the information amounted to the addition of a new charge without the prosecution having determined upon that course of action, there can be little doubt that the appeal should succeed on the ground stated. There would be no occasion for the power given by s 281(2) to be exercised. The sequence of events at trial and statements made by the prosecution do not, however, suggest that the trial judge acted without reference

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66 (1998) 194 CLR 566 at 579 [21].

67 (1996) 184 CLR 501.

68 (1996) 184 CLR 501 at 512, see also at 534 per Gaudron and Gummow JJ; and see *Chow v Director of Public Prosecutions* (1992) 28 NSWLR 593 at 604-605 per Kirby P.

69 (1980) 147 CLR 75 at 90-91, 96 per Gibbs ACJ and Mason J.

70 (1996) 184 CLR 501 at 534-535 per Gaudron and Gummow JJ; followed *Director of Public Prosecutions (SA) v B* (1998) 194 CLR 566 at 579-580 [21]-[22] per Gaudron, Gummow and Hayne JJ.

to the prosecution's intentions. The question as to the function undertaken by her Honour, in making the amendments, is one to be determined by reference to, although not exclusively to, the course of the trial and exchanges which took place.

73 The starting point is what was required to be contained in the information. Rule 4(3) in Sched 3 to the CLCA provides that the statement of offence in an information shall describe the offence shortly, in ordinary language, and if the offence charged is one created by statute, shall contain a reference to the section creating the offence. The language of the Rule is one of obligation.

74 The offence originally charged in count 1 was properly stated as arising under s 70 of the CLCA. The situation which later confronted the trial judge commenced with the complainant's evidence, of a date later than 9 November 1972, as that when the offence was committed. An order was sought, and obtained, to amend the period shown upon the information as extending to 1 May 1973. The only statutory offence of indecent assault after 9 November 1972 arose under s 69(1)(b)(iii), pursuant to the 1972 Amendment Act. When the information was amended to extend the date to 1 May 1973 it became defective. This was the view of Doyle CJ[71]. It referred to an offence being committed at a time when the statute identified, in accordance with the Rule, had ceased to have operation. An indictment which refers to a statute which has not come into effect or one which had been repealed is plainly defective: *Tuttle*[72] is an example of the former; and *Meek v Powell*[73] of the latter. It is, however, capable of amendment.

75 The position of the prosecution, with respect to reliance upon the two statutory provisions, was not stated at this point in the trial. It was made clear by the statements made at the close of its case, in answer to her Honour's enquiry. It is to be inferred that the Director of Public Prosecutions, or the prosecutor acting on behalf of the Director[74], had made a decision to seek a conviction on count 1 of an offence under either s 70 or s 69. Although not relevant for present purposes, it may be observed that it is unlikely that any argument of substance could have been raised against an amendment at this point. That may explain, in part, why no response was forthcoming by defence counsel to her Honour's enquiry as to whether reliance upon the two provisions caused any difficulty.

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71 (2007) 97 SASR 78 at 86 [43].

72 (1929) 21 Cr App R 85.

73 [1952] 1 KB 164.

74 See *Director of Public Prosecutions Act* 1991 (SA), s 7(7) and s 6A.

76 It is not apparent why amendment of the information was not sought. It may be inferred from what the prosecutor said in her address that she did not consider the identification, with more precision, of the date of the offence to be necessary. Certainly the date was not an essential element of the offence. It did not therefore need to be further particularised[75]. It is difficult to accept, however, that the prosecutor did not appreciate that the Rule required that the correct statutory provision creating the offence be stated. It may be that she assumed that it would follow, as a matter of course, upon the making of the earlier order of amendment, which took the offence into the sphere of s 69. This is conjecture, for nothing was said at the time to indicate whether the prosecutor was aware of the 1972 Amendment Act. However, a lack of understanding, as to why the critical amendment was not pursued, does not detract from the clarity of the prosecution's stated intention. Importantly, the prosecutor made it known to the trial judge that the prosecution relied upon the two sections as alternative bases for conviction. A failure to amend in this regard was, clearly enough, an oversight.

77 It follows that when her Honour came to order the amendments, prior to delivery of her verdict, she was not deciding for herself whether to add a charge under s 69. Her Honour was giving effect to the prosecution's stated intention. Whilst her Honour did not give complete effect to the prosecution's position, by maintaining the reference to s 70, it cannot be said that, in giving limited effect to it, she usurped the prosecutorial discretion[76]. On this approach the appellant's argument may be seen to depend upon her Honour's amendment of the concluding date for the period, extending it to 31 October 1973 to take account of the appellant's admission. This might be thought to come closer to an assumption of decision-making, or a review of what might be inferred to be the prosecutor's decision. It cannot be said that, in making this amendment, her Honour was giving effect to an expressed intention on the part of the prosecution.

78 The prosecution had disclaimed reliance on any particular date as necessary to its case. So long as the offence was found by her Honour to have occurred, the date was not essential. Her Honour agreed with this view in her reasons[77]. The amendment in this regard simply reflected her Honour's findings with respect to the occasion. It may have been an unwarranted amendment, but it was also unnecessary. It does not affect the critical amendment of the count in the information, to refer to s 69(1)(b)(iii). That amendment cured the defect in the information.

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75 *Dossi* (1918) 13 Cr App R 158 at 159-160.

76 *Maxwell v The Queen* (1996) 184 CLR 501 at 534 per Gaudron and Gummow JJ.

77 [2006] SADC 67 at [54].

79 A question may be thought to remain concerning the absence of an application, on the part of the prosecutor, for the amendment. In many cases it will follow from the making of orders, without application having been made for them, that there has been an assumption of the prosecutor's role. So much was accepted at the outset of these reasons, in connection with the appellant's argument. It is not for a judge to speculate about what course a party might take. And as Hayne J reminded in *Libke v The Queen*[78], it is not for a judge to attempt to remedy the deficiencies of a party's case. As his Honour said, it is for the judge to hold the balance between the contending parties and to ensure that the trial is conducted fairly. In the circumstances of this case, however, the making of the orders for amendment did not breach those obligations. There was no misunderstanding about the basis upon which the prosecutor's case was put. The appellant's counsel was given the opportunity to raise any objections to the prosecution's reliance upon s 69. The absence of an application for amendment does not characterise what was undertaken by the Court as non-judicial.

80 Any denial of the trial judge's power to make the orders of amendment, in the absence of an application, must therefore arise from s 281. There is nothing in the language of the section which conditions the exercise of the power to the making of an application. It does not speak of the power being invoked by that means. The lack of a stated qualification, other than that there be no injustice in the making of an order, might give rise to questions about the extent of the court's power and the circumstances in which it can be exercised. It does not, however, warrant the implication of a requirement that an application be made in every case. It suggests to the contrary.

81 The foregoing is not intended as an encouragement for courts to assume an active role in amendments of informations or indictments. It is to be expected that in most cases an application will be made. A trial judge should be alert to any deficiencies in an information, or any variations between the particulars contained in the information and the evidence, and bring these matters to the attention of the parties. An obligation remains on the prosecution to seek such orders as are necessary with respect to the information or indictment, to cure any deficiencies.

82 It is regrettable that a situation was created in which the role of the prosecution and the Court in the amendment process appeared unclear. Any uncertainty or misunderstanding could have been dispelled had the matter been re-listed for mention or further submissions when the trial judge became aware of the deficiency in the information. That is not to say that there was anything present in the circumstances at the time of the order for amendment which

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78 (2007) 81 ALJR 1309 at 1325 [72]; 235 ALR 517 at 537.

prevented her Honour's exercise of the power to amend under s 281. There was no speculation necessary as to the prosecution's intention. No procedural fairness was denied the appellant. His counsel had an opportunity to raise any concerns about her Honour proceeding to a verdict on the basis of the alternative statutory provisions, and did not do so. The point is that discussion about the Court's intended course of action would have made these matters obvious.

83 It was suggested, in submissions on the appeal, that an injustice may have been worked against the appellant. He might have chosen to plead to a lesser common law offence of an act of gross indecency, had he been given the opportunity to do so. It is not obvious that the amendment necessitated re-arraignment. Re-arraignment is usually required where the amendment is of real significance to an accused[79], not where the new charge is essentially the same[80]. And as Doyle CJ observed[81], speculation about the theoretical possibility that the appellant may have so pleaded and that the prosecution may have accepted such a plea, is not a sufficient basis for a conclusion of injustice, assuming the plea to be available.

84 In the course of argument on the appeal it was pointed out that no note of her Honour's order, with respect to s 69, appears to have been made on the face of the information. The practice of making notes on an information or indictment is of long standing[82]. It does not constitute the record of the District Court of South Australia[83]. The view which has been expressed with respect to the English provision[84] is that an oversight of staff, to make a note, cannot invalidate the amendment ordered[85]. Doyle CJ considered the act of noting required by s 281(3) to be an administrative one, which could still be performed[86]. That view is borne out by reference to the section. It is the order made by the court under sub-s (2) which effects the amendment referred to in sub-s (3). The note to be made is of the order; it does not effect the amendment. The reference which follows – "and the information shall be treated … as having

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79 *Radley* (1973) 58 Cr App R 394.

80 *R v B* [1999] SASC 403 at [121].

81 (2007) 97 SASR 78 at 87 [55].

82 *Halsbury's Laws of England*, 1st ed, vol 9 at 377 [736].

83 *R v Nam and Sansbury* [1968] SASR 107 at 114-115.

84 *Indictments Act*, s 5(2).

85 *Ismail* (1990) 92 Cr App R 92 at 95; *R v Palmer* [2002] EWCA Crim 892.

86 (2007) 97 SASR 78 at 89 [70].

been presented in the amended form" – is to the form the information should take consequent upon the order of amendment, not upon the notation.

85 In the recent English decision of *R v Clarke*[87] it was held that the absence of a signature upon an indictment when the trial began invalidated the proceedings. The provisions there concerned[88] made the presence of a signature essential to an indictment before it could be proceeded with. Here the information was not void of effect. The defect which arose, by reference to the evidence upon which the prosecution intended to rely, was capable of correction by amendment, pursuant to s 281. The statutory scheme, and the purpose of the power of amendment, do not suggest that proceedings were intended to be vitiated by the absence of a note of an order for amendment.

86 If the appellant made out a ground of appeal questions may arise as to the orders which could be made. Any order for a retrial would be upon an information which is absent reference to the offence which is the subject of his admission. Such an order might be made upon the assumption that an application for amendment would be made, to accord with the appellant's admission. In that event conviction would almost certainly follow, but only if a further trial were held. It may be inferred that the purpose of the appeal is to provide the appellant with something of a bargaining position. This prospect would not prevent the Court making an order for a retrial. It is, in any event, not necessary to further consider this question. In my view the appeal should be dismissed.

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87 [2008] UKHL 8.

88 *Administration of Justice (Miscellaneous Provisions) Act* 1933 (UK), ss 1 and 2.