HIGH COURT OF AUSTRALIA

GLEESON CJ,
GUMMOW, HAYNE, HEYDON AND KIEFEL JJ

AK APPELLANT

AND

THE STATE OF WESTERN AUSTRALIA RESPONDENT

AK v The State of Western Australia [2008] HCA 8
26 March 2008
P27/2007

ORDER

1. Appeal allowed.

2. Set aside the order of the Court of Appeal of the Supreme Court of Western Australia made on 17 November 2006 and in its place order that:

(a) the appeal to that Court be allowed,

(b) the appellant's convictions be quashed, and

(c) there be a new trial.

On appeal from the Supreme Court of Western Australia

Representation

R W Richardson for the appellant (instructed by Aboriginal Legal Service of Western Australia (Inc))

B Fiannaca SC with D A Lima for the respondent (instructed by Director of Public Prosecutions for Western Australia)

CATCHWORDS

AK v The State of Western Australia

Criminal law – Appeals – Application of the proviso – Statutory requirement that reasons for judgment include the principles of law applied and the findings of fact relied upon – Failure to give reasons meeting statutory requirements in respect of central issue at trial – Failure to comply with statutory requirements an error of law – Appeal against conviction to be allowed unless Court of Appeal satisfied that no substantial miscarriage of justice had occurred – Whether no substantial miscarriage of justice had occurred.

Criminal law – Evidence – Identification – Complainant indecently dealt with by one of two males with whom she and her sister were sharing a bed – Complainant unable to identify the perpetrator by visual or aural means – Complainant adamant that the appellant was responsible – Whether identification warning needed – Whether finding of guilt unreasonable or not supported by evidence.

Criminal Appeals Act 2004 (WA), s 30.
Criminal Procedure Act 2004 (WA), ss 119, 120.

1 GLEESON CJ AND KIEFEL J. This is an appeal from the Court of Appeal of Western Australia, which heard a criminal appeal from a judge sitting without a jury. It is common ground that the primary judge erred in law by failing to give adequate reasons for his decision to convict the appellant. All three members of the Court of Appeal (Roberts-Smith, Pullin and Buss JJA) rejected a ground of appeal that the verdict of guilty was unreasonable and could not be supported by the evidence. All three accepted the possibility of application of s 30(4) of the *Criminal Appeals Act* 2004 (WA), which empowers the Court of Appeal, having upheld a ground of appeal, to dismiss the appeal if it considers that no substantial miscarriage of justice has occurred ("the proviso"). The Court divided on whether the proviso should be applied.

2 There are three grounds of appeal to this Court:

> "2.1. The Court of Appeal erred, having found that the learned trial judge had failed to provide adequate reasons, in finding that the proviso ... had any application.
>
> 2.2 Alternatively, the Court of Appeal erred in concluding, on the whole of the evidence, that the evidence from the record established that the appellant was guilty beyond reasonable doubt, and dismissing the appeal pursuant to s 30(4) of the *Criminal Appeals Act*.
>
> 2.3 The Court of Appeal erred in failing to find that the verdict of guilty was unreasonable or could not be supported by the evidence."

The charges and their background

3 The complainant, a female, and the appellant, a male, are first cousins. They had known one another during the whole of their respective lives, and had lived near one another for much of that time. In February 2002, the complainant was aged 15 and the appellant was aged 13. In March 2003, following some sexual activity between the complainant and the appellant, the complainant fell pregnant. She told a female cousin, other members of her family, and the police, that the appellant was the father. She was ashamed, for reasons that included reasons of culture. She had an abortion. She told the authorities that she had not consented to the intercourse in consequence of which she became pregnant. It is evident from the charges that she also told of an occasion of alleged sexual contact between her and the appellant in February 2002. It seems probable that she said this was the first occasion of such a nature.

4 In October 2004, the appellant was charged as follows: first, there were three counts of indecent dealing with a child between the ages of 13 and 16,

relating to three separate aspects of the incident in February 2002; secondly, there was a charge of sexual penetration without consent on 30 March 2003; thirdly, there was a charge of indecent assault without consent on 25 April 2003.

5 The appellant was convicted on the three counts of indecent dealing in February 2002, and received a non-custodial sentence (a supervision order). Consent was not an answer to those charges. The appellant was acquitted of the alleged offences of March and April 2003. In each case, the basis of the acquittal was that the State had failed to negative an honest and reasonable mistaken belief as to consent.

6 It is the alleged indecent dealings in February 2002 that are the subject of the present appeal. In understanding the evidence, and the course of the trial, in relation to those offences it is necessary to keep in mind that it was not disputed that there were sexual relations between the complainant and the appellant in 2003, although the defence case was that they were consensual. According to a version of an act of sexual intercourse put to the complainant in cross-examination by counsel for the appellant, the complainant not only consented but in fact initiated the activity. She denied that allegation. It was put to the complainant that she was making up the story that she was an unwilling partner, partly because of shame at her pregnancy, and partly because she knew that if she, when over 16 (as she was in 2003), had sex with a boy of the appellant's age, she herself would have been committing an offence.

The trial

7 The trial was conducted, before Judge Wisbey, sitting without a jury, pursuant to the provisions of the *Children's Court of Western Australia Act* 1988 (WA), the appellant not having elected to be tried on indictment by the Supreme Court or the District Court. It is common ground that provisions of the *Criminal Procedure Act* 2004 (WA) ("the Criminal Procedure Act"), including ss 119(3) and 120(2), applied.

8 There were only three witnesses: the complainant; a female cousin, who gave brief and unchallenged evidence that in April 2003 the complainant told her she was pregnant and that the appellant was the father; and the complainant's older sister, who was present, with the appellant and the complainant, on the occasion of the February 2002 incident, but who slept through it. The appellant did not give evidence. It may be that no decision was made about whether the appellant would give evidence until the end of the prosecution case. This is consistent with the lines of questioning taken in cross-examination of the complainant, which appear to have been designed to test the complainant's evidence, without confronting the complainant with any specific contrary version of events to which the appellant might be confined if he decided to give evidence.

9 A large part of the complainant's evidence in chief and cross-examination related to the alleged offences of 2003. Enough has already been said about those issues to explain the background to the February 2002 allegations. The whole matter came to light, not because of any complaint in the colloquial sense, but because of the complainant's pregnancy, her identification of the appellant as the person responsible, her allegation of lack of consent, and investigation of the history of her sexual relations with her younger cousin. Part of the cross-examination about the events of 2002 seems to have been directed towards a suggestion that the occasion she described occurred later in that year; a possibility that may have been of significance in relation to her age at the relevant time. However, she was adamant that it was in February, and in that respect she was corroborated by her older sister. Since the suggestion made in cross-examination was not supported by evidence from the appellant or anyone else, the point was not pursued in final address.

10 The complainant's evidence in chief was as follows. In February 2002, the complainant was living with her mother, sister and younger brother in Geraldton. The complainant's aunt, along with three of her children, including the appellant and the appellant's brother, visited Geraldton. The appellant was on his way to a boarding school at Tardun. The whole group decided to travel to Tardun and spend the night there in a caravan. Four of the children went to bed on a double bed mattress: the complainant, the complainant's sister, the appellant and the appellant's brother. The complainant said that she and the appellant were lying together with their heads at one end of the bed and her sister and the appellant's brother were lying with their heads at the other end of the bed. The complainant said that the appellant, early in the night, indecently touched her in three ways, including fondling her breasts and placing her hand on his penis. Repeatedly, the complainant in her evidence in chief described these events by saying "[the appellant] did this" or "[the appellant] did that". She said she had gone to sleep with the appellant next to her, and she was woken up by the appellant touching her. She then described his actions. Following these actions, according to the complainant, the complainant's aunt entered the caravan and the sleeping arrangements were altered. The complainant was not asked, in chief, how she knew the person touching her was the appellant. It was obviously a male; there were only two males in the bed, that is, her two cousins. The appellant, at least by 2003, undoubtedly had a sexual interest in the complainant. It is, perhaps, theoretically possible that such interest was awakened some time later than February 2002 and before April 2003. However, it was never suggested to the complainant that the other male (the appellant's brother) ever showed any sexual interest in her, or that there had ever been any sexual activity between them. Implicit in a suggestion that the person who was touching the complainant might not have been the appellant is, of course, the suggestion that it was the appellant's brother. Unless the complainant was inventing the entire incident, there was no one else it could have been.

11 A number of questions put to the complainant in cross-examination expressly accepted that there was an occasion, in 2002, at Tardun, when the complainant, the appellant, the appellant's brother and the complainant's sister, were sharing a bed. The complainant was asked whether she told her mother, or her aunt, at the time what the appellant had done and she said she had not. It was put to her that "nothing happened" and she said "Definitely something happened". She was asked whether it could have been the appellant's brother who touched her, and she said: "I know it wasn't [the brother]."

12 Pressed in cross-examination on the matter of identification, the complainant said that she did not look at the person who was touching her indecently, but she was adamant that she knew it was the appellant. She said the two brothers did not look alike. She also said she knew it was not the appellant's brother because of where people in the bed were sleeping. The complainant was cross-examined about a statement she made to police in May 2003, in which what she said about the position of the children in the bed was different from what she said in court. The statement was not tendered in evidence, so that the full extent of the inconsistency is unclear; but the complainant continued to maintain, in evidence, that it was the appellant, not the appellant's brother, who was lying next to her.

13 It was the primary judge's manner of dealing with the issue of identification that involved what is accepted to have been a failure to give sufficient reasons for his decision.

14 The trial was short. Addresses followed immediately upon the evidence, and the oral reasons for decision were given immediately following addresses. The reasons concerning the charges on which the appellant was acquitted (which were the more serious charges, involving alleged rape) were quite detailed. The reasons relating to the February 2002 incident were brief. Before they are set out, it should be noted that, in the course of the address of defence counsel, which immediately preceded the reasons for decision, the trial judge engaged squarely the issue of identification, and expressed his tentative views for counsel's comment. He asked whether, if the events described happened, it could have been anyone other than the appellant. He asked counsel why the evidence of later sexual penetration did not provide circumstantial support for the conclusion that "it was him on this occasion". He said: "[I]f [the appellant] had a sexual interest in her, that adds support to her evidence that he was the person alongside her and that he was the person who touched her". He referred to the complainant's evidence about the sleeping arrangements in the bed. If the learned judge had included in his reasons for his decision the matters that he put to counsel in the course of argument, there would have been no ground for complaint about the adequacy of his reasons. Regrettably, he did not do so.

15 In his reasons, the judge began by setting out, adequately, for his own instruction, the elements of the offences charged. He then said:

> "Dealing with the first ... or perhaps before dealing specifically with the incidents, whilst talking generally about the complainant's evidence, it is to be observed that she did not make a complaint to anyone about any of these matters until it was ascertained that she was pregnant and required a therapeutic termination, and it was at that stage and only at that stage that she brought these matters to the attention of anyone. The fact that she had not complained earlier does not of course mean that these events did not occur, but the lack of prompt complaint is a matter the court must take into account in assessing her credibility generally.
>
> The impression I got from the complainant's evidence and the manner in which she gave it was that she is indeed terribly embarrassed about the situation here and for the reasons that she outlined, which in summary are that at her age, to be engaged in any sexual activity was inappropriate and the more so having regard to the relationship between herself and the [appellant] and the cultural issues involved.
>
> I am satisfied beyond reasonable doubt that the three dealings alleged in the first incident occurred and in the manner described by the complainant. I'm satisfied that ... those dealings occurred in the early part of the year 2002 when the complainant was under the age of 16 years. I am satisfied that the dealings were initiated by the [appellant] and although not invited and, one suspects, not appreciated by the complainant, she did nothing to desist. That is not to the point, since to engage in sexual activity with a person under the age of 16 years, consensual or otherwise, is an offence and I am satisfied beyond reasonable doubt on the evidence that the [appellant] indecently dealt with the complainant in the three ways alleged. That is that he placed his hand on her breast, that he touched her vagina and that he placed her hand on his penis.
>
> And the [appellant] will be convicted as charged in respect of each count of indecent dealing in the complaints before the court."

The insufficiency of reasons

16 Section 120(2) of the Criminal Procedure Act provides that the judgment of the judge in a trial by judge alone must include the principles of law that he or she has applied and the findings of fact on which he or she has relied. The effect of such a statutory requirement was considered by this Court in *Fleming v The*

Queen[1]. All the members of the Court of Appeal agreed that the trial judge did not state his reasons for rejecting the appellant's arguments on identification. That he considered such arguments, and that he presented counsel, for comment, with substantial reasons why they may not be accepted, appears from the record of his exchanges with counsel in the course of address. However, such exchanges do not form part of a statement of the reasons for decision, and, in his stated reasons, the judge simply did not address the arguments of counsel at any level either of specificity or generality. He may well have thought that it was a fairly hopeless point, but it was seriously put and was not entirely lacking in substance. It was not sufficient to point out its weaknesses in the course of address; it had to be dealt with (although not necessarily at great length) in the reasons for decision. There being a question of identification raised, the judge was obliged to say why, and how, he resolved it in favour of the prosecution.

17 This part of the appellant's argument has been made out. There was also an argument, based on s 119(3) of the Criminal Procedure Act that the judge should have given himself certain identification warnings. Having regard to the nature of the evidence in this case, it is hard to see exactly what warnings might have been apt. At all events, the complaint under s 120(2) being made out, error is shown, as all members of the Court of Appeal held.

The reasonableness of the decision

18 It is convenient to deal first with the appellant's third ground of appeal, which raises an argument that was considered and rejected by all members of the Court of Appeal. The ground (ground three) in the Court of Appeal was that "[t]he verdicts were unsafe and unsatisfactory … and have occasioned a miscarriage of justice in that a Jury properly instructed could not be satisfied beyond reasonable doubt that it was the Appellant who committed the offence." If the appellant were to succeed on this ground, he would be entitled, not to an order for a retrial, but to an acquittal. It is, therefore, necessary to decide whether it should be upheld. The leading judgment on the point was that of Pullin JA, who discussed a number of decisions of this Court on the application of the proviso, including *M v The Queen*[2] and *Weiss v The Queen*[3], and referred in detail to the evidence in chief and cross-examination of the complainant, which he analysed carefully. He considered the inconsistencies, said to have been revealed in cross-examination, between the complainant's evidence and what she

---

1 (1998) 197 CLR 250 at 262-263 [28]; [1998] HCA 68.

2 (1994) 181 CLR 487; [1994] HCA 63.

3 (2005) 224 CLR 300; [2005] HCA 81.

had said to the police about the location of people in the bed. He discussed the topic of the dangers of identification evidence, and the nature of the identification evidence in this case. He concluded that a reading of the whole of the evidence left him in no doubt that it was the appellant who touched the complainant.

19 Roberts-Smith JA, who agreed with the reasons of Pullin JA, pointed out that the complainant had known the appellant all his life; that it was accepted that she had sexual relations with him at a time after February 2002; that he had a sexual interest in the complainant; and that there was no suggestion in the evidence that the only other male person in the bed, the appellant's brother, had ever shown any sexual interest in the complainant. The complainant adhered to her evidence that it was the appellant, not the appellant's brother, who lay alongside her. She had never expressed any uncertainty about who it was who touched her.

20 Buss JA concluded that ground three had not been made out. He said that it had not been established that the nature and quality of the evidence at the trial was such that, acting reasonably, the trial judge ought to have had a doubt as to guilt. As will appear, his Honour would not have applied the proviso because the failure of the trial judge to make findings bearing on the reliability (as distinct from honesty) of the complainant made it impossible for an appellate court, with only the written record before it, to be satisfied beyond reasonable doubt that it was the appellant who indecently dealt with the complainant. This is a matter to which it will be necessary to return.

21 Identification of the kind made by the complainant is not a process of logical reasoning. It is a form of perception based upon a combination of sensory experiences and perhaps intuition. Of course, honest but mistaken identification is commonplace. Here, however, there were only two possibilities, one of which was supported by the complainant's testimony and by circumstantial evidence. The alternative hypothesis was supported by nothing except a process of elimination. If the complainant was wrong in her perception that the person touching her was the appellant, then it must have been the appellant's brother.

22 We agree with the conclusion of the Court of Appeal. Ground 2.3 in this Court has not been made out.

The application of the proviso

23 It was submitted on behalf of the appellant that some errors are so fundamental or involve such a departure from the essential requirements of a fair trial that they exclude the operation of the proviso, irrespective of the strength of the prosecution case, or the appellate court's view as to the guilt of the accused.

Reference was made to *Fleming v The Queen*[4]. Furthermore, it was said, the proviso cannot be applied where the error at trial denies or substantially frustrates the capacity of an appellate court to decide whether a conviction is just[5]. As a matter of principle, these propositions are correct. The area of dispute is their application to the error in this case. The point of departure between the majority in the Court of Appeal and Buss JA concerned the application to the present case of the second proposition.

24 It has already been noted that Buss JA rejected an argument that the nature and quality of the evidence at trial was such that the trial judge ought to have had a doubt as to the appellant's guilt. Hence, he would have quashed the conviction but would have ordered a retrial. However, in refusing to apply the proviso, after analysing the evidence of the complainant, he said:

> "In my opinion, s 30(4) of the *Criminal Appeals Act* should not be applied in this appeal. The identification of the appellant as the offender depended upon an assessment of the complainant's credit and reliability. Although, as I have mentioned, the learned Judge found that the complainant was 'generally a thoughtful and truthful witness as to the events about which she has spoken', his Honour did not evaluate her evidence in relation to identification and he did not make any findings as to her reliability. A witness who is honest is not necessarily reliable. I have examined the record of the trial, but I am unable to conclude that a verdict of guilty was the only verdict reasonably open on the evidence. The 'natural limitations' that exist in the case of an appellate court proceeding wholly or substantially on the record preclude my being satisfied beyond reasonable doubt that it was the appellant who indecently dealt with the complainant, and that no substantial miscarriage of justice has occurred in consequence of his conviction. In particular, I am unable satisfactorily to determine the reliability of the complainant from the transcript. Also, without seeing and hearing the complainant, I am unable to decide whether the manner in which she gave her evidence bore upon that issue. There is no basis upon which her demeanour can be dismissed as an irrelevant consideration. The complainant gave evidence at the trial on closed circuit television, but her evidence was not recorded on videotape."

---

4 (1998) 197 CLR 250.

5 *Nudd v The Queen* (2006) 80 ALJR 614 at 618 [7]; 225 ALR 161 at 164; [2006] HCA 9.

25 The trial judge did not merely say that he found the complainant to be honest. He said that she was "terribly embarrassed", but also "thoughtful". What else he might have said about her demeanour that would assist an appellate court is not clear. There were grave deficiencies in his statement of his reasons, resulting partly from his failure to repeat in his reasons the observations he made in the course of argument, but failure to give a further and better description of the complainant's demeanour was not one of them. Rather, we would take Buss JA to have been saying that, in the absence of a statement of the trial judge's reasons for accepting the complainant on the matter of identity, it was not possible for an appellate court, on the written record, to make the decision necessary for the application of the proviso. His reference to "natural limitations" was a reference to a passage in the decision of this Court in *Weiss*[6].

26 There is force in the concerns of Buss JA as to the position in which the trial judge's failure to give reasons left the Court of Appeal. It is not to be doubted that there will be cases in which a failure to give reasons will leave an appellate court in no position to apply the proviso. At the same time, it should be remembered that the most common case, in practice, for the application of the proviso is a case of trial by jury, where there are no reasons for decision and, obviously, no findings upon or descriptions of demeanour. The "natural limitations" referred to in *Weiss* may apply, but if absence of reasons for a guilty verdict were conclusive then the proviso could never apply to trial by jury.

27 We have referred above to the reasoning of Pullin JA and Roberts-Smith JA on the third ground of appeal. It is unnecessary to repeat it. We see no answer to a point that weighed heavily with the majority: the fact that the only competing possibility was that the complainant was indecently dealt with by the appellant's brother. All three members of the Court of Appeal accepted that somebody had indecently dealt with the complainant on the occasion she described; that it was a male; and that it could only have been either the appellant or his brother. The complainant's certainty that it was the appellant was obviously based partly upon a rejection of the idea that it was the brother. By the time she gave her evidence, she had been through a sexual association with the appellant; an association that, for her, had very serious consequences. There was nothing to suggest that the brother had ever been, or wanted to be, sexually involved with her. Circumstantial evidence is sometimes spoken of as though it were inherently less compelling than direct testimony. Often, especially in identification cases, the truth is the opposite. Undisputed objective circumstances may be more reliable than direct testimony. Here, the direct testimony of the complainant was supported by circumstantial evidence. There was no conflict of evidence between the complainant and some other witness.

---

6 (2005) 224 CLR 300 at 316 [41].

An evaluation of the complainant's uncontradicted testimony, supported as it is by undisputed circumstantial evidence, was possible on the basis of the written record of the proceedings.

28 The reasoning of the majority of the Court of Appeal appears to us to be well-founded and the conclusion correct.

Conclusion

29 The appeal should be dismissed.

30 GUMMOW AND HAYNE JJ. In October 2004, the appellant, then aged 15, was charged in the Children's Court of Western Australia with three counts of indecent dealing with a child contrary to s 321(4) of *The Criminal Code* (WA). These offences were alleged to have occurred in February 2002 at Geraldton. At that time the appellant was aged 13 and the complainant 15. The appellant was also charged with two further offences which it was alleged he had committed against the complainant: one count of sexual penetration without consent and one count of indecent assault. These further offences were alleged to have occurred in March 2003 and April 2003 respectively.

31 All the offences charged were indictable offences. The appellant did not elect[7] to be tried on indictment in the Supreme Court or the District Court. Section 19 of the *Children's Court of Western Australia Act* 1988 (WA) ("the Children's Court Act") gave the Children's Court jurisdiction to hear the offences charged even though they were indictable offences. The appellant was tried in the Children's Court by judge alone (Judge Wisbey).

32 The appellant was acquitted of the counts of sexual penetration without consent and indecent assault but convicted of the three counts of indecent dealing. He was sentenced to an intensive youth supervision order[8]. That order has long since expired, but the *Community Protection (Offender Reporting) Act* 2004 (WA) imposes on a child convicted of the offences of indecent dealing of which the appellant was convicted certain obligations which continue for at least seven and a half years[9].

33 The offences of indecent dealing were alleged to have occurred in a caravan, at night. Four children – the appellant, the complainant, the complainant's sister (aged about 16) and the appellant's brother (aged about 14) – were put to bed in the caravan. All were to sleep on the one bed. At the appellant's trial, the complainant said that she had gone to sleep with the appellant on one side of her, and her sister on the other. During the night she was woken by someone touching her. The person touched her breasts and her vagina and then took her hand and put it on his penis.

34 The complainant gave her evidence in a way that revealed no doubt in her mind that it was the appellant who had done this. She was pressed in cross-examination to explain how she knew it was him. She said that she knew it

---

7 *Children's Court of Western Australia Act* 1988 (WA), s 19B.

8 *Young Offenders Act* 1994 (WA), s 98.

9 *Community Protection (Offender Reporting) Act* 2004 (WA), ss 46-47.

was him "[b]ecause it ... he was laying next to me and I knew it was him". But further cross-examination elicited evidence to the effect that she had not looked at who it was who was touching her, either during or after the incident, and she agreed that the caravan was "[d]ark enough so that you couldn't see other people".

35 Section 37(2)(a) of the Children's Court Act provided that, subject to some exceptions that are not now relevant, the practice and procedure of the Court when exercising the jurisdiction conferred by s 19(1) "shall be that provided by the *Criminal Procedure Act* 2004" (WA). Section 120 of the latter Act provided:

> "(1) In a trial by a judge alone –
>
> (a) the judge may make any findings and give any verdict that a jury could have made or given if the trial had been before a jury; and
>
> (b) any finding or verdict of the judge has, for all purposes, the same effect as a finding or verdict of a jury.
>
> (2) The judgment of the judge in a trial by a judge alone must include the principles of law that he or she has applied and the findings of fact on which he or she has relied.
>
> (3) The validity of a trial judge's judgment is not affected by a failure to comply with subsection (2)."

The trial judge was thus bound by s 120(2) to provide reasons that included the principles of law that were applied and the findings of fact on which the judge relied.

36 In his reasons for judgment, delivered ex tempore, the trial judge stated his conclusion that he "thought that the complainant was generally a thoughtful and truthful witness as to the events about which she has spoken". But apart from noticing some concessions the complainant made in cross-examination and the absence of any prompt complaint about the events the subject of the charges of indecent dealing, the trial judge did no more than state his satisfaction, beyond reasonable doubt, that each of the elements of the offences had been established. The reasoning which led to that conclusion was not stated.

37 The appellant appealed to the Court of Appeal of the Supreme Court of Western Australia against his convictions. That Court (Roberts-Smith and Pullin JJA, Buss JA dissenting) dismissed[10] the appeal. The appellant's ground

---

10 *AK v The State of Western Australia* [2006] WASCA 245.

of appeal alleging that the convictions were "unsafe and unsatisfactory", in the sense that it was not open to the tribunal of fact to conclude that the appellant's guilt had been established beyond reasonable doubt, was rejected. All members of the Court of Appeal accepted[11], however, that the trial judge had not given reasons that complied with the requirements of s 120(2) of the *Criminal Procedure Act* 2004 (WA) ("the Criminal Procedure Act"). The Court of Appeal divided about whether, notwithstanding this error, the appeal to that Court should nonetheless be dismissed on the basis that no substantial miscarriage of justice had occurred. By special leave, the appellant appeals to this Court.

38 For the reasons given by Heydon J, the appellant's argument in this Court that the Court of Appeal should have held the verdicts of guilty to be unreasonable or such as could not be supported by the evidence should be rejected. The Court of Appeal's conclusion that the trial judge did not give reasons that complied with s 120(2) of the Criminal Procedure Act was not challenged in this Court. But whether the Court of Appeal was right to conclude (as the majority in that Court did) that no substantial miscarriage of justice had occurred was in issue, and these reasons will show that the Court of Appeal erred in deciding that there had been no substantial miscarriage of justice.

39 The principal provision of the *Criminal Appeals Act* 2004 (WA) ("the Criminal Appeals Act") which governed the disposition of the appellant's appeal against his convictions was s 30(3). It provides that the Court of Appeal must allow an appeal against conviction if, in its opinion, any of three kinds of ground is made out. The first relates to setting aside a verdict of guilty "because, having regard to the evidence, it is unreasonable or cannot be supported". It is this ground that the appellant sought to engage with the argument that the convictions were unsafe and unsatisfactory. It need not be further examined in this appeal. The second kind of ground for which s 30(3) provides is that there was "a wrong decision on a question of law by the judge"; the third is that "there was a miscarriage of justice". Both of these grounds were said to be engaged in the present matter.

40 Section 30(4) of the Criminal Appeals Act stands in essentially the same relationship with the provisions of s 30(3) as the proviso has to the common form appellate provisions derived from the *Criminal Appeal Act* 1907 (UK). Section 30(4) provides that:

---

11 [2006] WASCA 245 at [1] per Roberts-Smith JA, [31]-[35] per Pullin JA, [66]-[70] per Buss JA.

> "Despite subsection (3), even if a ground of appeal might be decided in favour of the offender, the Court of Appeal may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred."

41 The focus of attention in the Court of Appeal in the present matter was whether that Court should be satisfied on the record of the trial that the evidence led at the appellant's trial proved beyond reasonable doubt his guilt of the three counts of indecent dealing. Two members of the Court (Roberts-Smith and Pullin JJA) concluded that a reading of the whole of the evidence led at trial left no doubt that it was the appellant who touched the complainant and committed the offences[12] and, that being so, that s 30(4) was engaged. The third member of the Court (Buss JA) was "unable to conclude that a verdict of guilty was the only verdict reasonably open on the evidence"[13].

42 The Court of Appeal was wrong to focus only upon whether that Court could conclude from the written record of the evidence properly admitted at trial that the appellant was proved beyond reasonable doubt to be guilty of the offences charged. To approach the matter in that way paid insufficient regard to the error of law or miscarriage of justice which, by operation of s 30(3), otherwise required the Court to allow the appeal.

43 To explain further why that approach was erroneous it is necessary to begin by saying something more about the ground of appeal that was made out in the Court of Appeal: that the trial judge did not give reasons that complied with s 120(2) of the Criminal Procedure Act.

44 Section 120(2) requires that the judge's reasons include the principles of law that he or she has applied. The principles of law that are relevant will be identified by reference to the issues in the case. Usually, then, a trial judge will be obliged to identify and record in the reasons what are the elements of the offence in question and which of those elements were in issue. Resolution of the issues in the case will then require not only statement in the reasons of both the principles of law that are applied and the findings of fact the judge makes, but also statement of "the reasoning process linking them and justifying the [findings of fact] and, ultimately, the verdict that is reached"[14].

45 In the present case, the trial judge made several references to the relevant standard of proof. To that extent the trial judge's reasons stated an applicable

---

12 [2006] WASCA 245 at [7] per Roberts-Smith JA, [50] per Pullin JA.

13 [2006] WASCA 245 at [85].

14 *Fleming v The Queen* (1998) 197 CLR 250 at 263 [28]; [1998] HCA 68.

legal principle. But nowhere in the reasons for judgment did the trial judge articulate how the link was made between the legal principle requiring proof beyond reasonable doubt and the findings of fact that the appellant had touched the complainant in the manner alleged.

46 The issue at the trial was who had touched the complainant. The trial judge accepted that the complainant *believed* that it was the appellant who had done that. But the sincerity of the complainant's belief in that regard was not the central issue at the trial. The central issue was whether her belief was accurate. And although the trial judge expressed himself to be satisfied beyond reasonable doubt that the appellant had touched the complainant in the manner alleged, the trial judge did not say by what process of reasoning that conclusion was reached.

47 The significance of this omission is to be assessed in the manner described by this Court in *Fleming v The Queen*[15]. There the Court considered the application of provisions of the *Criminal Procedure Act* 1986 (NSW) which, in relevant respects, are substantially the same as the provisions of s 120 of the Criminal Procedure Act in issue in the present matter. In particular, the Court in *Fleming* was required to consider the New South Wales provision[16] requiring that "[a] judgment by a Judge in [a criminal proceeding tried without a jury] must include the principles of law applied by the Judge and the findings of fact on which the Judge relied". Failure to comply with these requirements was held[17] to be a wrong decision on a question of law and it was accepted that it may also mean that justice had miscarried.

48 As the Court's reasons in *Fleming* explained[18], if a judgment fails to show that the judge applied a relevant principle of law, two possibilities are presented. One possibility is that, notwithstanding the failure, the principle was applied. Adapting what was said in *Fleming* to the applicable Western Australian provisions, if that is so, there has been a breach of s 120(2) of the Criminal Procedure Act by reason of the omission from the judgment. The other possibility is that the principle was not applied, with the result that, independently of the question of breach of s 120(2), there has been an error of law which would attract at least s 30(3)(b) of the Criminal Appeals Act (wrong decision on a question of law) or, we would add, s 30(3)(c) (miscarriage of

---

15 (1998) 197 CLR 250.

16 *Criminal Procedure Act* 1986 (NSW), s 33(2).

17 *Fleming* (1998) 197 CLR 250 at 262 [27].

18 (1998) 197 CLR 250 at 263 [30].

justice). And as the Court went on to say[19], "[u]nless the judgment shows expressly or by implication that the principle was applied, it should be taken that the principle was not applied, rather than applied but not recorded".

49 All three members of the Court of Appeal concluded that the trial judge's reasons were deficient. Pullin JA, with whose reasons Roberts-Smith JA generally agreed, considered[20] that it was necessary in this case for the trial judge "to identify the fact that there was an issue about identification" and to refer to the case which the prosecution and the appellant had each sought to make at trial. The prosecution case was said[21] by Pullin JA to be founded in "the complainant's express statement that she perceived the appellant as being the person who touched her, the circumstantial evidence arising from the later sexual interest the appellant showed in the complainant, the lack of any interest shown by the other boy [and] the position of the people on the mattress". (The reference to "later sexual interest" included reference to the events which founded the fourth and fifth counts against the appellant. These events had occurred about 14 months after the alleged indecent dealings in the caravan.) The defence case was identified[22] as being "that the complainant's evidence was unreliable, that her sense of touch did not enable her to identify the appellant and that she could not by visual or aural means identify the appellant".

50 The third member of the Court of Appeal, Buss JA, expressed the deficiencies in the trial judge's reasons in different terms. He noted[23] that the trial judge had not referred to any of the complainant's evidence relating to who had touched her and, in particular, did not mention any of the uncertainties or inconsistencies in that evidence. Further, as Buss JA pointed out[24], the trial judge "did not explain why he found that it was the appellant (and not his brother) who had indecently dealt with her". Failure to evaluate and make findings about the reliability of the complainant's evidence in the context of the circumstances of the alleged offences and the complainant's evidence as a whole was held[25] to constitute an error of law.

---

19 (1998) 197 CLR 250 at 263 [30].

20 [2006] WASCA 245 at [31].

21 [2006] WASCA 245 at [31].

22 [2006] WASCA 245 at [31].

23 [2006] WASCA 245 at [69].

24 [2006] WASCA 245 at [69].

25 [2006] WASCA 245 at [69].

51 The conclusion that the trial judge had thus committed an error of law of the kind identified in *Fleming* required that the appellant's appeal to the Court of Appeal be allowed unless the provision equivalent to the proviso to the common form criminal appeal statute (s 30(4) of the Criminal Appeals Act) was engaged.

52 In *Weiss v The Queen*[26], the Court emphasised the need when applying a statutory provision to look to the language of the statute rather than secondary sources or materials. With respect to the proviso to the common form criminal appeal statute the Court said[27]:

> "It is neither right nor useful to attempt to lay down absolute rules or singular tests that are to be applied by an appellate court where it examines the record for itself, beyond the three fundamental propositions mentioned earlier. (The appellate court must itself decide whether a substantial miscarriage of justice has actually occurred; the task is an objective task not materially different from other appellate tasks; the standard of proof is the criminal standard.) It is not right to attempt to formulate other rules or tests in so far as they distract attention from the statutory test. It is not useful to attempt that task because to do so would likely fail to take proper account of the very wide diversity of circumstances in which the proviso falls for consideration."

53 In *Weiss*, the Court identified one circumstance in which the proviso to the common form criminal appeal statute *cannot* be engaged. The Court said[28] that the proviso cannot be engaged "unless the appellate court is persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict of guilty". This negative proposition (about when the proviso *cannot* be engaged) must not be treated as if it states what suffices to show that no substantial miscarriage has occurred. To treat the negative proposition in this way would be to commit the very same error which *Weiss* sought to correct, namely, taking judicial statements about aspects of the operation of statutory provisions as substitutes for the statutory language.

54 Likewise, what was said in *Wilde v The Queen*[29] about the possibility that some errors or miscarriages of justice occurring in the course of a criminal trial

---

26 (2005) 224 CLR 300 at 312-313 [31]-[33]; [2005] HCA 81.

27 (2005) 224 CLR 300 at 316 [42].

28 (2005) 224 CLR 300 at 317 [44].

29 (1988) 164 CLR 365 at 373; [1988] HCA 6.

may amount to such a serious breach of the presupposition of the trial as to deny the application of the proviso is not to be taken as if it were a judicially determined exception grafted upon the otherwise general words of the relevant statute. Rather, as both *Wilde* and *Weiss* acknowledged, the operation of the proviso in the common form criminal appeal statute will fall for consideration in a very wide variety of circumstances. What was said in *Wilde* did no more than advert to a particular class of such circumstances in which the error or errors at trial are properly seen as radical.

55 In every case it will be necessary to consider the application of the proviso (and here s 30(4)) taking proper account of the ground or grounds of appeal that have been made out and which, but for the engagement of the proviso, would require the appellate court to allow the appeal. In the present case there were two features of the error identified as occurring at trial which are important in deciding whether the Court of Appeal could conclude "that no substantial miscarriage of justice has occurred"[30]. First, s 120(2) of the Criminal Procedure Act *required* the reasons to articulate the connection identified between the relevant legal principle (in this case, proof beyond reasonable doubt) and the relevant findings of fact. Second, the particular failure that was identified related to the central issue in the appellant's trial on the counts of indecent dealing and was constituted by the complete failure to articulate any of the reasoning by which the trial judge reached the ultimate conclusion that the appellant was guilty of each of those charges.

56 Complete failure to meet the mandatory requirements of s 120(2) of the Criminal Procedure Act with respect to the central issue in the appellant's trial was a substantial miscarriage of justice. It was a substantial miscarriage because the Criminal Procedure Act required that the trial of the appellant yield a reasoned decision that met the criteria stated in the statute. This trial did not, and it did not in respect of the central issue that was tried.

57 Section 120(3) provides that "[t]he validity of a trial judge's judgment is not affected by a failure to comply" with the requirements of s 120(2). But that provision addresses only the question of validity of the orders made, a question which was once answered by reference to a distinction between directory and mandatory requirements[31]. Failure to comply with s 120(2) does not render void the court's orders convicting and sentencing an offender. It was not, and could not be suggested, however, that s 120(3) denies that a failure to comply with

---

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

31 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 388-391 [91]-[93] per McHugh, Gummow, Kirby and Hayne JJ; [1998] HCA 28.

s 120(2) is an error of law. And when read as a whole, s 120 makes plain that the result of trial by judge alone must be a reasoned decision that complies with s 120(2).

58 Once it is recognised that the Criminal Procedure Act requires that a trial by judge alone is to be concluded in this way, it is evident that to examine, as the Court of Appeal did, whether a chain of reasoning could be articulated that would support, even require, the verdict that was reached at trial was not to the point in deciding whether there was a substantial miscarriage of justice. It was not to the point because the relevant error or miscarriage which is the premise for consideration of the proviso is an error or miscarriage constituted by a failure to provide, as s 120(2) required, a reasoned decision about the central issue that was tried. The appellant was not tried in accordance with the requirements of s 120.

59 When there has been a trial by jury, and an appellate court concludes that the trial judge made a wrong decision on a question of law or that there was some other miscarriage of justice, deciding whether there has been no substantial miscarriage of justice necessarily invites attention to whether the jury's verdict might have been different if the identified error had not occurred. That is why, if the appellate court is not persuaded beyond reasonable doubt of the appellant's guilt it cannot be said that there was no substantial miscarriage of justice. But just as persuasion of the appellate court of the accused's guilt does not in every case conclude the enquiry about the proviso's application in appellate review of a jury trial, enquiring about the weight of the evidence led at a trial by judge alone does not determine whether there was a substantial miscarriage of justice. In a case, like the present, where the Criminal Procedure Act required that the trial yield a reasoned decision, but no reasons were given for the determination of the central issue tried, it cannot be said that there was no substantial miscarriage of justice.

60 The appeal to this Court should be allowed. The order of the Court of Appeal of the Supreme Court of Western Australia made on 17 November 2006 should be set aside and in its place there should be orders that the appeal to that Court is allowed and the appellant's convictions are quashed. There should be a direction for a new trial. Whether that trial occurs is a matter for the prosecuting authorities.

61 HEYDON J. The background is set out by Gleeson CJ and Kiefel J[32].

Statutory provisions

62 The statutory provisions relating to trial by judge alone in Western Australia are to be found in the *Criminal Procedure Act* 2004 (WA) ("the Criminal Procedure Act")[33]. Section 118 provides:

> "(1) If an accused is committed on a charge to a superior court or indicted in a superior court on a charge, the prosecutor or the accused may apply to the court for an order that the trial of the charge be by a judge alone without a jury.
>
> (2) Any such application must be made before the identity of the trial judge is known to the parties.
>
> (3) On such an application, the court may inform itself in any way it thinks fit.
>
> (4) On such an application the court may make the order if it considers it is in the interests of justice to do so but, on an application by the prosecutor, must not do so unless the accused consents.

---

32 At [1]-[15].

33 There have been similar but not identical provisions since 1985 in South Australia (*Juries Act* 1927, s 7), since 1991 in New South Wales (*Criminal Procedure Act* 1986, ss 132-133) and since 1993 in the Australian Capital Territory (*Supreme Court Act* 1933, ss 68B-68C). These provisions are inconsistent with s 80 of the Constitution so far as proceedings for Commonwealth offences are concerned, since s 80 rights cannot be waived: *Brown v The Queen* (1986) 160 CLR 171. In the United Kingdom, limited provision for trial by judge alone on indictable offences was introduced in 2003 by the *Criminal Justice Act*, s 43 (not yet in force – complex fraud cases) and s 44 (danger of jury tampering); s 48(5)(a) obliges the judge sitting alone to give a judgment stating the reasons for the conviction. In New Zealand, since 1979 ss 361B and 361C of the *Crimes Act* 1961 have permitted trial by judge alone; although there is no statutory duty to give reasons, the courts have created one: *R v Connell* [1985] 2 NZLR 233 at 237-238; *R v Eide (Note)* [2005] 2 NZLR 504. In Canada, ss 469, 473, 536, 561, 568 and 569 of the *Criminal Code* provide for trial by judge alone in certain circumstances. In the United States, r 23(a) of the Federal Rules of Criminal Procedure for the United States District Courts permits trial by judge alone if the defendant waives a jury trial in writing, the government consents and the court approves; for the history, see *Singer v United States* 380 US 24 (1965).

(5) Without limiting subsection (4), the court may make the order if it considers –

(a) that the trial, due to its complexity or length or both, is likely to be unreasonably burdensome to a jury; or

(b) that it is likely that acts that may constitute an offence under *The Criminal Code* section 123 would be committed in respect of a member of a jury.

(6) Without limiting subsection (4), the court may refuse to make the order if it considers the trial will involve a factual issue that requires the application of objective community standards such as an issue of reasonableness, negligence, indecency, obscenity or dangerousness.

(7) If an accused is charged with 2 or more charges that are to be tried together, the court must not make such an order in respect of one of the charges unless the court also makes such an order in respect of each other charge.

(8) If 2 or more accused are to be tried together, the court must not make such an order in respect of one of the accused unless the court also makes such an order in respect of each other accused.

(9) If such an order is made, the court cannot cancel the order after the identity of the trial judge is known to the parties."

Section 119 provides:

"(1) In a trial by a judge alone, the judge must apply, so far as is practicable, the same principles of law and procedure as would be applied in a trial before a jury.

(2) In a trial by a judge alone, the judge may view a place or thing.

(3) If any written or other law –

(a) requires information or a warning or instruction to be given to the jury in certain circumstances; or

(b) prohibits a warning from being given to a jury in certain circumstances,

the judge in a trial by a judge alone must take the requirement or prohibition into account if those circumstances arise in the course of the trial."

Section 120 provides:

> "(1) In a trial by a judge alone –
>
> (a) the judge may make any findings and give any verdict that a jury could have made or given if the trial had been before a jury; and
>
> (b) any finding or verdict of the judge has, for all purposes, the same effect as a finding or verdict of a jury.
>
> (2) The judgment of the judge in a trial by a judge alone must include the principles of law that he or she has applied and the findings of fact on which he or she has relied.
>
> (3) The validity of a trial judge's judgment is not affected by a failure to comply with subsection (2)."[34]

63 It is desirable also to set out the provisions of s 30(1)-(4) of the *Criminal Appeals Act* 2004 (WA) ("the Criminal Appeals Act"):

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

---

34 No argument in relation to s 120(3) was advanced.

64 Below the application of s 30(4) will be described as "applying the proviso". In addition, s 24(2)(e)(ii) of the Criminal Appeals Act provides:

> "The prosecutor may also appeal to the Court of Appeal against any one or more of the following decisions by a judge of a superior court in relation to a charge of an indictable offence –
>
> ...
>
> (e) a judgment of acquittal (other than a judgment of acquittal on account of unsoundness of mind) –
>
> ...
>
> (ii) entered in a trial by the judge alone."[35]

Sections 24(2)(e)(ii) and 30 of the Criminal Appeals Act and ss 118-120 of the Criminal Procedure Act were all introduced on 2 May 2005.

Ground 3: failure to find that the verdict was unreasonable or not supported by evidence

65 Ground 3 contended that the Court of Appeal erred in failing to find that the verdict of guilty was unreasonable or could not be supported by the evidence. If made out, ground 3 would result in an order of acquittal, for it would not ordinarily be right to order a new trial so that the prosecution could attempt to improve its evidence on a future occasion[36]. If either ground 1 or ground 2 were made out, the result would ordinarily be only an order for a new trial. Thus success on ground 1 or ground 2 is a less satisfactory outcome for the appellant than success on ground 3. It is thus necessary to deal with ground 3 and it is desirable to do so at the outset, for, if ground 3 is made out, it is unnecessary to deal with the other two grounds.

66 *How did the complainant identify the accused?* One main issue at the trial was identification: whether the accused was the person who behaved in the manner complained of by the complainant. The most common form of identification evidence is evidence of visual identification. A less common, but fairly standard, form is identification by sound (by voice, or by distinctive coughing or breathing, for example) – aural identification[37]. A possible, though

---

35 See also *Crimes (Appeal and Review) Act* 2001 (NSW), s 107(1)(b); *Criminal Law Consolidation Act* 1935 (SA), s 352(1)(ab).

36 *R v Taufahema* (2007) 228 CLR 232 at 256 [52]; [2007] HCA 11.

37 *Bulejcik v The Queen* (1996) 185 CLR 375; [1995] HCA 54.

rarer, form of identification is identification by touch, as where the person identified has some peculiar feature – for example, some corrugation or deformity or texture of the skin. Identification by smell or taste is likely to be even rarer, at least in relation to the identification of human beings as distinct from things[38], but it is possible.

67 Where a witness gives direct evidence of personal experience, generally that evidence can only be given as a result of experience through one of the five senses in the manner just indicated[39]. It was a central aspect of the appellant's argument in relation to ground 3 that the complainant did not do this in relation to the first three charges.

68 Thus she did not give any evidence that she identified the offender as the accused by reason of smell or taste. She gave no evidence that the offender spoke or emitted any sound; in fact she denied that he spoke. The complainant excluded the possibility of identification by sight: she said that it was too dark to see and she also said that she did not see or look at the offender[40]. In this respect her evidence contrasted with her positive visual identification of the accused in relation to the 30 March 2003 charge by reason of his height, his body shape and his curly hair which she "could see ... when the light came shining through the door". The only evidence relating to the sense of touch given by the complainant was that the offender tickled her back to wake her up, pulled her right leg over so she could lie on her back, placed his hands on her breasts for three to five minutes, touched her stomach and vagina, grabbed her hand and placed her hand on his penis. But, as will be discussed more fully below[41], the complainant did not say that she identified the offender by her sense of touch.

69 How, then, did she conclude that the appellant was the offender, apart from inferring from the circumstance, if it was a circumstance, that when the children lay down to sleep she was next to the appellant, not the other boy ("R")? She denied "presuming" – that is, "surmising or guessing" – that the accused was the offender. She repeatedly said that she "knew" that the offender was the accused. But she also said that she "assumed" the offender was the accused. In re-examination counsel for the prosecution returned to the subject:

---

38 *Union v State* 66 SE 24 (Ga App, 1909) ("the liquid ... smelled like whisky"); *Sherrard v Jacob* [1965] NILR 151 at 160 ("felt and smelt") (quoting *Attorney-General (Ruddy) v Kenny* (1960) 94 ILTR 185 at 191 per Kingsmill Moore J); *R v Farr* (2001) 118 A Crim R 399 (odour of cannabis on accused's breath).

39 *Ogden v People* 25 NE 755 (Ill, 1890).

40 This retracted an earlier answer to the contrary.

41 At [73]-[75].

"How do you know it was him who touched you?

Because I know for a fact. Like, I just know it was [the appellant]. It wouldn't – it wasn't [R] and it –

And why do you say it wasn't [R]?

I don't know. Like, [R] – I don't know, it's just [R] was different."

70 No objection was taken to the form of the complainant's evidence of identification. Particularly in cross-examination, the questions sought to elicit conclusions based on inferential reasoning. The admissibility of the complainant's evidence is highly questionable, but let it be assumed either that it was admissible or that, though technically inadmissible, it can now be relied on because of the absence of objection. The question arises: How could it rationally establish that the appellant was the offender? Counsel for the appellant in his address to the trial judge criticised its capacity to do this on the ground of circularity. This may have been going too far, but in truth the only reason capable of being extracted from her evidence for her belief that the appellant was the offender was her contention that when the children lay down to sleep the appellant was next to her.

71 In the Court of Appeal, Pullin JA considered that a matter establishing the reasonableness and supportability of the verdict was "that, despite the determined efforts made in cross-examination to throw doubt on the complainant's identification of the appellant, the complainant never wavered in her evidence that it was the appellant who touched her" and that it was "entirely unshaken"[42]. She "steadfastly held" to it, and there was "certainty [in] her evidence"[43]. However, the probative value of evidence which a witness has "never wavered" about and is "entirely unshaken" about has to be assessed rationally, however "steadfastly" the witness holds to it and however much "certainty" the witness expresses. The complainant gave no reason why the evidence had any probative value which was distinct from her evidence about where the children were when they went to sleep.

72 Pullin JA treated the complainant's evidence as being evidence that she identified the appellant by touch. He said[44]: "[T]he complainant gave evidence that she identified the offender as the appellant via her sense of touch." He

---

42 *AK v The State of Western Australia* [2006] WASCA 245 at [42].

43 *AK v The State of Western Australia* [2006] WASCA 245 at [48].

44 *AK v The State of Western Australia* [2006] WASCA 245 at [28]. See also at [29].

discussed cases on visual and voice identification, and said the same considerations applied to identification by touching[45]. He then said[46]:

> "[T]he complainant gave evidence she had known the appellant for all her life. They were cousins and had close contact with each other. She was also familiar with the appellant's brother. The appellant was later intimately involved with the complainant. This later evidence of sexual activity and touching is relevant retrospectant evidence, just as in the case of voice identification where a witness may acquire knowledge of the accused's voice after the event in issue."

73 There is no doubt that if one accepts the complainant's evidence, she had at least four opportunities, apart from the incidents underlying the first three charges, to become familiar, in a sexual context, with the sensations of touching the appellant's skin and being touched by it: they were opportunities connected with the event underlying the fourth charge, the event underlying the fifth charge, an uncharged act of which she gave evidence without prior warning and some other sexual contacts. It is also probable that she had touched her cousin in non-sexual contexts during the years they had known each other. But there could not in this case be evidence of "identification by touch" unless the complainant explained, however briefly, what it was about touching the appellant that made identification of him possible – some peculiar mark, wart, growth, scarring or deformity, some unusual softness or roughness or scaliness or moistness or dryness or oiliness of skin. The form in which identification evidence is given in chief has some importance as a matter of fairness to cross-examiners. The complainant's evidence that she was woken by the appellant "touching" her did not explain how the touching enabled her to identify him. The evidence of the dealings between the appellant and the complainant in 2003 was not relied on to establish that she then noticed features of the appellant's skin which enabled her to identify him as the assailant in 2002: it was only relied on to support a circumstantial inference that he had a motive – sexual attraction – for his conduct in 2002 which was observable in 2003. It is not correct to describe her, on the strength of that testimony, as having given "evidence that she identified the offender as the appellant via her sense of touch"[47]. Thus Buss JA was, with respect, correct to say that the complainant's evidence that she was woken by the appellant "touching me"[48]:

---

45 *AK v The State of Western Australia* [2006] WASCA 245 at [43]-[46].

46 *AK v The State of Western Australia* [2006] WASCA 245 at [47].

47 *AK v The State of Western Australia* [2006] WASCA 245 at [28].

48 *AK v The State of Western Australia* [2006] WASCA 245 at [82].

> "does not constitute a satisfactory basis for concluding that the complainant identified the appellant as the offender from the manner in which she was touched. The basis for her assertion that it was the appellant who touched her was not explained or explored at the trial. For example, the complainant did not say that her evidence that she was woken up by '[the appellant] touching me' was based upon her experience, either before or after the occurrence of the relevant events, of being touched by the appellant. None of the complainant's other evidence established that she identified the appellant as the offender 'via her sense of touch'."

And Roberts-Smith JA, too, correctly said[49]:

> "[T]he complainant was not purporting to identify the appellant as the person [sexually] interfering with her in the bed that night by her sense of touch (in that she was saying she was able to do so by some tactile characteristic which she recognised)".

74 Pullin JA conceded that "the complainant had difficulty in articulating the propositions involved in her evidence that it was the appellant who touched her". He said that this was "not at all surprising"[50]. He referred to the remarks of O'Brien CJ Cr Div in *R v E J Smith*[51] in relation to voice identification, which he summarised thus[52]:

> "[W]hile many features of a person which are visually noticeable are fairly readily capable of description so as to give reasonable reproduction in every day vocabulary, the features of a voice are not by any means as readily capable of verbal description. The Chief [Judge] gave an example of the fact that a person will readily recognise the voice of a political figure heard regularly on the electronic media, but will be quite unable to convey by words the impression of that voice to one who has not heard it. The same comments apply to the fact that a person may become familiar with a person's touch. On the two occasions when the complainant was asked (ie by the police in 2003 and then at trial) about who touched her in February 2002 it was after the complainant had experienced other occasions when she had been touched in a sexual way by the appellant."

---

49 *AK v The State of Western Australia* [2006] WASCA 245 at [5].

50 *AK v The State of Western Australia* [2006] WASCA 245 at [48].

51 [1984] 1 NSWLR 462 at 478.

52 *AK v The State of Western Australia* [2006] WASCA 245 at [48].

This does not overcome the difficulty under discussion. While it may be hard (although it is not impossible) to isolate some of those aspects of touching which enable identification by touch, the fact remains that the complainant never sought to say that her identification was based on touching. And if the complainant's confidence that it was the appellant who touched her was a form of perception based on a combination of sensory experiences and intuition, she did not identify what the sensory experiences were, or, even assuming that "intuition" can be admissible, what the basis for the intuition was.

75 Hence the complainant's evidence cannot be rendered either admissible or of probative value by seeking to explain her inarticulateness on the ground of the inherent difficulty of explaining an intuition, nor on the ground of her claims to be embarrassed or to be experiencing shame, nor by the repeated claim of prosecution counsel, strenuously denied by defence counsel, that she was not "a particularly sophisticated person". Similarly, while Roberts-Smith JA said that the complainant "was familiar with [the appellant's] presence and identified him in that way"[53], she never specified which features of the appellant's "presence" she employed to identify him.

76 *The evidence other than the "identification" evidence.* The appellant submitted in this Court that given the lack of probative value of the complainant's identification evidence there was a real and substantial possibility that the appellant was innocent[54]. In considering that submission, the complainant's identification evidence should be excluded from consideration on the ground that, even if it was admissible or capable of being treated as admissible, it is lacking in any probative value. However, even if that evidence is left out of consideration, and even if another trier of fact sitting in the trial judge's position might have reached a different conclusion, it cannot be said that his verdict should be set aside "because, having regard to the evidence, it is unreasonable or cannot be supported"[55]. That is because of the evidence other than the complainant's identification evidence in the case.

77 The complainant gave admissible evidence of two groups of relevant circumstances. One concerned the fact that she went to sleep next to the accused. This was inconsistent with what she said in a signed statement provided to the police on 14 May 2003, at a time when she admitted her recollection was probably better. The other concerned what happened to her on awakening. A

---

53 *AK v The State of Western Australia* [2006] WASCA 245 at [5].

54 Citing *M v The Queen* (1994) 181 CLR 487 at 494; [1994] HCA 63.

55 Criminal Appeals Act, s 30(3)(a).

conclusion that the appellant was the offender, not the other boy in the bed, would have to rest on the following propositions:

(a) That the complainant's testimony three and a half years after the incident that the appellant went to bed next to her was to be preferred to her previous statement, made 15 months after the incident, that the appellant did not go to bed next to her; that in turn would have to rest on an explanation of why the testimony was to be preferred.

(b) That the appellant and R did not change places in the night.

(c) That the sexual interest shown by the appellant in the complainant in the events in 2003 underlying the fourth and fifth charges, the uncharged act of sexual intercourse, and other sexual incidents made it likely that he had the same interest in February 2002.

78 Reliance was placed by Pullin JA[56], but not by the prosecution in this Court, on the proposition that the only other possible offender, R, had never shown any sexual interest in the complainant. It is true that there was no evidence that R had shown any sexual interest in the complainant, either before or after the 2002 incident. But this does not establish that he had none, and it was for the prosecution to prove that he had none if that circumstance were to be relied on.

79 In relation to proposition (a), the complainant was closely cross-examined, and the trial judge formed a generally favourable view of her credibility and reliability. She had opportunities to consider the detail of her evidence carefully in the period before trial, and during that cross-examination, which entitled the trial judge to accept her testimony over her previous inconsistent statement.

80 In relation to proposition (b), there was no evidence that the appellant and R had changed places. Any change would have been likely to disturb the other two occupants of the bed, which in turn might have attracted the attention of the complainant's aunt or sister in the next room. The only relevant witness other than the complainant, her sister, said she was a heavy sleeper and slept through the night.

81 In relation to proposition (c), it is questionable whether the evidence of the appellant on the fourth and fifth charges was cross-admissible on the first three

---

56 *AK v The State of Western Australia* [2006] WASCA 245 at [29].

charges without satisfying s 31A of the *Evidence Act* 1906 (WA)[57]. So far as the transcript shows, there was no objection to its cross-admissibility and no contention that it was inadmissible was advanced in this Court. It may therefore be taken to be admissible. Defence counsel suggested to the complainant that no intercourse took place on the occasion the subject of the fourth charge and that no indecent touching took place on the occasion the subject of the fifth charge. But there was no evidence contradicting that of the complainant. In addition, there was a concession by the defence that the appellant had intercourse with the complainant at her father's house on an occasion not the subject of any charge. The defence made no objection to the evidence and indeed elicited it by means of a leading question. Defence counsel put to the complainant that it was consensual, which she denied. But the admitted fact of sexual intercourse in 2003 supports at least a motive to commit acts of indecent dealing in 2002, and possibly a disposition to do so. The same is true, to a lesser degree, of the complainant's very vague evidence that she had been touched by the appellant in a manner which she said was less serious than the conduct underlying the first three charges.

82 The transcript of the complainant's evidence reveals that she was vague about dates and other details, that she did not make speedy complaint, and that there was an inconsistency between her previous statement to the police and her testimony. A skilful defence cross-examination elicited, or at least plausibly suggested, various motives for lying on her part. But the trial judge said in argument that the complainant was "quite a credible witness" – "quite an impressive young lady" as a witness, who endeavoured to "visualise" past events so that she "brought the situation back into her mind" and employed "considerable care" in giving her testimony. He accepted that the conduct of which the complainant complained took place not only in relation to counts 1-3, but also counts 4 and 5. It is necessary to make "full allowance for the

---

57 Section 31A(2) provides:

> "(2) Propensity evidence or relationship evidence is admissible in proceedings for an offence if the court considers –
>
> (a) that the evidence would, either by itself or having regard to other evidence adduced or to be adduced, have significant probative value; and
>
> (b) that the probative value of the evidence compared to the degree of risk of an unfair trial, is such that fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial."

advantages enjoyed" by the trial judge[58]. Making that allowance, the "discrepancies" and "inadequacies" of the complainant's testimony do not suggest a significant possibility that the appellant was an innocent person who has been convicted.

83 Accordingly, ground 3 fails.

Ground 1: failure to state findings of fact relied on

84 *Questions of degree in relation to s 120(2).* In many cases the question of whether there has been compliance with the duty imposed by s 120(2) of the Criminal Procedure Act will raise questions of degree. Those questions will arise where a trial judge has stated various principles of law but has failed to state another, although it has obviously been assumed. They may arise where a judge has stated that numerous facts have been found, but has omitted to state a particular finding of fact. In many cases the question of whether there has been compliance with s 120(2) will also raise difficulties of distinguishing between, on the one hand, a defective statement of legal principle, an unconvincing factual finding, an invalid inference or a questionable application of principle to fact and, on the other hand, a failure to state a principle of law, make a finding of fact or expose the "reasoning process linking"[59] the principles of law to the findings of fact. Sometimes the statement of positive propositions coupled with the non-statement of others can satisfy s 120(2) because it amounts to a statement of the principles of law actually applied or the findings of fact actually relied on even though the omission reveals error in what was said; sometimes, on the other hand, the statement will not satisfy s 120(2). To record various legal principles which a judge said were applied may be to comply with s 120(2), but the process of recording them may reveal errors in their statement or application which disclose "a wrong decision on a question of law" within the meaning of s 30(3)(b) of the Criminal Appeals Act or a miscarriage of justice within the meaning of s 30(3)(c). And to record various findings of fact which a judge said were relied on may be to expose errors of reasoning which reveal that the verdict of guilty on which the conviction is based should be set aside because, having regard to the evidence misapplied by that judge, it is unreasonable or cannot be supported within the meaning of s 30(3)(a), or there was a miscarriage of justice within s 30(3)(c). Further, to make a statement of all relevant principles of law or of all relevant findings of fact but also to state some irrelevant ones may raise questions under s 30(3)(b) and (c) of the Criminal Appeals Act.

---

58 *M v The Queen* (1994) 181 CLR 487 at 494.

59 *Fleming v The Queen* (1998) 197 CLR 250 at 263 [28] per Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ; [1998] HCA 68.

85 *Substantial failure to comply with s 120(2).* However, none of these problems arise here. It is common ground between the parties in the Court of Appeal and in this Court, and among the judges in the Court of Appeal, that the trial judge failed to comply with s 120(2) of the Criminal Procedure Act. The failure was almost as complete a failure as could be imagined, for apart from stating that the complainant was "generally a thoughtful and truthful witness", noting the absence of prompt complaint, recording his conclusion that the events she described took place, and recording that the appellant was responsible for them, he said nothing more about any findings of fact he relied on. The appellant submitted correctly that the obligation created by s 120(2) is not "satisfied merely by a bare statement of the principles of law that the judge has applied and the findings of fact that the judge has made. Rather, there must be exposed the reasoning process linking them and justifying the latter and, ultimately, the verdict."[60] It is clear from the trial judge's interventions in argument that he was attracted towards a particular reasoning process; the problem is that he did not state it in his judgment. In the circumstances it is not necessary to elaborate on the various ways in which the trial judge might have fulfilled the s 120(2) obligation, beyond the following. Ordinarily it would be necessary for a trial judge to summarise the crucial arguments of the parties, to formulate the issues for decision, to resolve any issues of law[61] and fact which needed to be determined before the verdict could be arrived at, in the course of that resolution to explain how competing arguments of the parties were to be dealt with and why

---

60 *Fleming v The Queen* (1998) 197 CLR 250 at 262-263 [28] per Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ.

61 The charges against the accused to which the present appeal relates were charges that he "indecently dealt" with the complainant contrary to s 321(4) of the *Criminal Code* (WA). Section 321(4) provides:

> "A person who indecently deals with a child is guilty of a crime and is liable to the punishment in subsection (8)."

The trial judge did not state "the principles of law that he ... applied" in relation to s 321(4). This failure is of no significance. The defence took no point, and no point could be taken if the complainant's account of what happened to her in the relevant period of up to half an hour was accepted, that the incidents were accidental, and that the supposed offender did what was done momentarily in his sleep. Indeed the defence conceded in address that the complainant's evidence of what was done to her (as distinct from who did it) was likely to be accepted: she was "clear", was not "swayed" and "stuck" to her "story". Although defence counsel had suggested to the complainant that the events she complained of had not taken place, the defence did not specifically argue that the trial judge should make that finding: its position was that while if they took place, they were indecent, the appellant was not the person responsible for them.

the resolution arrived at was arrived at, to apply the law found to the facts found, and to explain how the verdict followed. Here the trial judge did not isolate, in particular, the issue of whether the accused was the offender, did not record the arguments of the parties on that question, and did not record the analysis of the complainant's evidence which must have underlain his conclusion that the appellant was the offender. The statement that the "complainant was generally a thoughtful and truthful witness" did not carry out these functions, particularly because of the form of her evidence, which averred certainty of belief without testifying to any grounds for that belief and which in turn prevented the trial judge from finding any. If the statement were to be treated as complying with s 120(2), our law would have adopted a form of unilateral compurgation as a means of proof centuries after the demise of multilateral compurgation. The appellant correctly submitted that the trial judge's "reasons constituted a manifest and substantial (as opposed to trivial) departure from the statutory imperative".

86 It is thus clear that, to use the language of s 30(3)(b) and (c) of the Criminal Appeals Act, there has been a wrong decision on a question of law by the judge and a miscarriage of justice. The point of ground 1 is to challenge the Court of Appeal's conclusion, after considering the evidence, that no substantial miscarriage of justice had occurred and that the proviso should be applied.

87 *Instances of where the proviso will not be applied.* The Court of Appeal[62] noted that in *Weiss v The Queen* this Court said that there may be cases where it would be proper to allow an appeal and order a new trial without applying the proviso. In that case this Court gave two categories of example. The first included cases "where there has been a significant denial of procedural fairness at trial"[63]. The second included cases where the "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"[64]. The Court in *Weiss v The Queen* referred in the latter respect to *Wilde v The Queen*[65], and in this case the Court of Appeal referred to the passages in that case in which Brennan, Dawson and

---

62 On this issue Pullin JA set out the reasoning of the majority: *AK v The State of Western Australia* [2006] WASCA 245 at [52]-[56]. Roberts-Smith JA concurred at [1]. Buss JA decided that the proviso should not be applied, but for reasons different from those urged by the appellant in relation to ground 1: at [85].

63 (2005) 224 CLR 300 at 317 [45] per Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ; [2005] HCA 81.

64 (2005) 224 CLR 300 at 317 [46] per Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ.

65 (1988) 164 CLR 365 at 373; [1988] HCA 6.

Toohey JJ said that the proviso was not intended to apply "when the proceedings before the primary court have so far miscarried as hardly to be a trial at all" and that it does not apply "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", so that "the accused has not had a proper trial and ... there has been a substantial miscarriage of justice"[66]. The Court of Appeal held that the present case fell outside these criteria. It said that the irregularities in the trial judge's judgment "did not affect the evidence which was led"[67]. It also said[68]:

> "The irregularities which occurred were not in the conduct of the trial itself. The irregularities were in the articulation of the trial Judge's reasons for decision. The irregularities did not go to the root of the proceedings."

88 In assessing these conclusions it is desirable to remember that the partial abandonment of trial by jury on charges triable by indictment in the circumstances set out in s 118 of the Criminal Procedure Act, with its correlative, the introduction of a right of prosecution appeal against acquittal conferred by s 24(2)(e)(ii) of the Criminal Appeals Act, was a radical departure from the tradition of centuries[69].

89 *The importance of judicial reasons for decision.* The duty of judges to give reasons for their decisions after trials and in important interlocutory proceedings is well-established. The objectives underlying that duty have been summarised as follows[70]:

> "First, the existence of an obligation to give reasons promotes good decision making. As a general rule, people who know that their decisions are open to scrutiny, and who are obliged to explain them, are more likely to make reasonable decisions. Second, the general acceptability of

---

66 *AK v The State of Western Australia* [2006] WASCA 245 at [55], referring to *Wilde v The Queen* (1988) 164 CLR 365 at 373.

67 *AK v The State of Western Australia* [2006] WASCA 245 at [52].

68 *AK v The State of Western Australia* [2006] WASCA 245 at [56].

69 Below some of the arguments for and against trial by jury are referred to. The discussion is not intended to criticise the legislature's decision to introduce ss 118-120: the merits of the decision are a matter for the legislature and the public, not the courts. The discussion is simply intended to reveal the novelty and significance of the change.

70 Gleeson, "Judicial Accountability", (1995) 2 *The Judicial Review* 117 at 122.

> judicial decisions is promoted by the obligation to explain them. Third, it is consistent with the idea of democratic institutional responsibility to the public that those who are entrusted with the power to make decisions, affecting the lives and property of their fellow citizens, should be required to give, in public, an account of the reasoning by which they came to those decisions."

But the duty to give reasons has even greater significance where it is created by a provision like s 120(2), enacted as part of a particular statutory scheme of a novel and radical character regulating the substitution of trial by judge alone for trial by jury.

90 *Advantages of jury trial.* Lord Devlin described trial by jury as "the lamp that shows that freedom lives"[71]. He also said[72]:

> "Trial by jury means a compounding of the legal mind with the lay. The prescription for this compound has been one of the greatest achievements of the common law."

Trial by jury was so greatly valued by the framers of the United States Constitution that it was guaranteed by the Sixth Amendment[73]. Section 80 of our own Constitution provides that trials on indictment of any offence against any law of the Commonwealth shall be by jury.

91 Not everyone admires jury trial[74]. It may certainly be accepted that there are "irrational" aspects of trial by jury in criminal cases. The selection of 12 as the number of jurors has never been satisfactorily explained. Jurors are expected

---

71 Lord Devlin, *Trial by Jury*, (rev ed) (1966) at 164. This work collects the Hamlyn Lectures delivered by the author in 1956. Despite updating in 1966, it is significantly out of date, and not sharply focused on the Australian position. To some extent it reflects excessively Miss Hamlyn's desire that lecturers cause "the Common People of the United Kingdom [to] realise the privileges which in law and custom they enjoy in comparison with other European Peoples" (at vi). However, it remains full of extremely thoughtful points reflecting the common professional understanding of jury trial.

72 Lord Devlin, *Trial by Jury*, (rev ed) (1966) at 120.

73 "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed". See also Art III, s 2(3).

74 See the opinions collected by Baldwin and McConville, *Jury Trials*, (1979) at 2 and 4. See also Williams, *The Proof of Guilt*, 3rd (1963), Ch 10.

to understand, remember – on occasions for months – and weigh evidence, which is sometimes not given clearly or is complicated in character, often without ever having done this before. They are expected to grasp and apply sometimes complex propositions of law, almost always without any prior experience of or training in this activity. Many jurors were and are "unaccustomed to severe intellectual exercise or to protracted thought"[75]. The development of jury trial has been "irrational" in the sense that the jury began, against the background of irrational modes of trial like trial by ordeal and trial by battle, as a body selected for the very reason that the jurors, men of the neighbourhood, had knowledge of the facts relating to the dispute. In this respect it was superior to those rival modes of trial shortly to be forbidden by the Fourth Lateran Council in 1215. But now persons who have any prior knowledge of the dispute or the protagonists in it are likely to be excluded from the jury. The jury is now a body which knows nothing, beyond the teachings of common experience and what may be judicially noticed, except what witnesses tell it or supply to it. It began in order to serve one function; it came to serve another; and its role in performing that latter function has been deliberately preserved.

92 Despite these "irrational" characteristics, and this wholesale revolution in function, the jury has been thought to possess many qualities which have favoured its long survival in serious criminal cases. Lord Devlin, for example, saw five advantages in trial by jury.

93 First, Lord Devlin thought juries were superior to judges in assessing defence points: "the hope of the defence very often lies in impalpabilities – the

---

75 Second Report of HM Commissioners for Inquiring into the Process, Practice, and System of Pleading in the Superior Courts of Common Law, Parliamentary Papers 1853 [1626] vol 40 at 6. The complete passage reads:

> "[W]e are not at all blind to the fact that in many instances juries are not so constituted as to ensure such an average amount of intelligence as might be desired. A jury of London or Liverpool merchants may be, as we believe them to be, an excellent tribunal to try a commercial cause, or a jury of country gentlemen to try a question relating to a watercourse or the boundaries of an estate; but it must be admitted that in the agricultural districts the common juries are sometimes composed of a class of persons whose intelligence by no means qualifies them for the due discharge of judicial functions. Such persons, unaccustomed to severe intellectual exercise or to protracted thought, and used to an active life and out-door employment, when shut up for hours in a jury-box, bewildered by law terms, by conflicting evidence, and the disputations of contending advocates, will appeal to their prejudices, sometimes pronounce verdicts which bring the institution of juries into disrepute."

willingness to make allowances for muddle-headedness, illogicalities and unreasonableness – impalpabilities that are less appealing to the legal mind than to the lay"[76]. He said[77]: "[I]t is an essential part of the system that the law should recognise that there are cases in which such factors should be dominating."

94 Secondly, Lord Devlin also saw juries as being superior to judges in assessing credibility[78]:

> "[T]he jury is the best instrument for deciding upon the credibility or reliability of a witness and so for determining the primary facts. Whether a person is telling the truth, when it has to be judged, as so often it has, simply from the demeanour of the witness and his manner of telling it, is a matter about which it is easy for a single mind to be fallible. The impression that a witness makes depends upon reception as well as transmission and may be affected by the idiosyncrasies of the receiving mind; the impression made upon a mind of twelve is more reliable. Moreover, the judge, who naturally by his training regards so much as simple that to the ordinary man may be difficult, may fail to make enough allowance for the behaviour of the stupid. The jury hear the witness as one who is as ignorant as they are of lawyers' ways of thought; that is the great advantage to a man of judgment by his peers."

95 Lord Devlin also saw a third advantage in trial by jury[79]:

> "[M]inisters of justice have to serve two mistresses – the law and the *aequum et bonum* or the equity of the case. Their constant endeavour is to please both. That is why the just decision fluctuates ... between two points. In most systems the just decision is tied pretty closely to the law; the law may be made as flexible as possible, but the justice of the case cannot go beyond the furthest point to which the law can be stretched. Trial by jury is a unique institution, devised deliberately or accidentally – that is, its origin is accidental and its retention deliberate – to enable justice to go beyond that point."

He considered that trial by jury had a "unique merit" in "that it allows a decision near to the *aequum et bonum* to be given without injuring the fabric of the law,

---

76 Lord Devlin, *Trial by Jury*, (rev ed) (1966) at 122.

77 Lord Devlin, *Trial by Jury*, (rev ed) (1966) at 123.

78 Lord Devlin, *Trial by Jury*, (rev ed) (1966) at 140. See also at 149.

79 Lord Devlin, *Trial by Jury*, (rev ed) (1966) at 154.

for the verdict of a jury can make no impact on the law"[80]. Thus Lord Devlin saw the jury as being for some purposes "the best judicial instrument"[81]. A clear illustration of this role of the jury is seen when the jury decides whether the facts it finds answer certain legal criteria. That phenomenon is recognised by s 118(6) of the Criminal Procedure Act[82], for the court may refuse to order trial by judge alone "if it considers the trial will involve a factual issue that requires the application of objective community standards such as an issue of reasonableness, negligence, indecency, obscenity or dangerousness". Other examples of factual issues requiring the application of "objective community standards" include whether behaviour was "threatening, abusive or insulting"[83]; whether conduct was "dishonest", a matter to be decided by the jury "according to the ordinary standards of reasonable and honest people"[84]; whether an assault is "indecent"[85]; and whether an accused person had a particular intention[86].

96 Lord Devlin saw a fourth advantage of jury trial which was "of great importance in the constitution. The ... existence of trial by jury helps to ensure the independence and quality of the judges."[87]

97 A fifth advantage detected by Lord Devlin was[88]:

> "[T]rial by jury ... gives protection against laws which the ordinary man may regard as harsh and oppressive. I do not mean by that no more than that it is a protection against tyranny. It is that: but it is also an insurance

---

80 Lord Devlin, *Trial by Jury*, (rev ed) (1966) at 157.

81 Lord Devlin, *Trial by Jury*, (rev ed) (1966) at 158.

82 See above at [88].

83 *Brutus v Cozens* [1973] AC 854 at 861-862 per Lord Reid, 865-866 per Viscount Dilhorne, 866-867 per Lord Kilbrandon.

84 *R v Ghosh* [1982] QB 1053 at 1064 per Lord Lane CJ, Lloyd and Eastham JJ.

85 *R v Court* [1989] AC 28 at 34.

86 Buxton, "Some Simple Thoughts on Intention", [1988] *Criminal Law Review* 484 at 495: "[R]ecourse to shared values and assumptions about the implications of actions and the circumstances in which those actions occur may be a safer guide to culpability than analytical deductions from a generalised verbal definition".

87 Lord Devlin, *Trial by Jury*, (rev ed) (1966) at 158-159.

88 Lord Devlin, *Trial by Jury*, (rev ed) (1966) at 160.

> that the criminal law will conform to the ordinary man's idea of what is fair and just. If it does not, the jury will not be a party to its enforcement. They have in the past used their power of acquittal to defeat the full operation of laws which they thought to be too hard."

In this respect, an accused person who is tried by judge alone is in a very different position from one tried by jury. A jury may have no right to acquit in the face of evidence, but, unlike a judge sitting alone, it has a power to do so, and a power which it is impossible to control on appeal because of traditional limitations on the capacity of the prosecution to appeal from acquittals[89]. In *R v Shipley*, Lord Mansfield CJ said[90]:

> "It is the duty of the Judge, in all cases of general justice, to tell the jury how to do right, though they have it in their power to do wrong, which is a matter entirely between God and their own consciences."

As Lord Goddard CJ told the House of Lords in 1955, "no one has yet been able to find a way of depriving a British jury of its privilege of returning a perverse verdict"[91]. A judge cannot tell a jury to convict, for that would be to make the judge "decide the case and not the jury, which is not the common law"[92]. The Criminal Procedure Act has gone a step further from the common law by making

---

89 Pratt CJ stated the common law rule: "[I]t was never yet known, that a verdict was set aside by which the defendant was acquitted in any case whatsoever upon a criminal prosecution": *R v Jones* (1724) 8 Mod 201 at 208 [88 ER 146 at 149]. Where criminal charges are tried by jury, there is usually no general provision for any right to appeal from an acquittal. In Western Australia, before ss 118-120 of the Criminal Procedure Act were introduced, the only courses open to the prosecution after an acquittal were limited rights of appeal under s 688(2)(b) and (ba) of the *Criminal Code* – the right to appeal against a directed verdict of acquittal, to appeal against acquittal by a judge sitting alone on any ground of appeal involving a question of law alone or to appeal against acquittal by a judge alone on any other ground if leave was granted. These provisions were repealed by the *Criminal Procedure and Appeals (Consequential and Other Provisions) Act* 2004 (WA) with effect from 2005 when s 24(2)(e)(ii) of the Criminal Appeals Act, giving the prosecution a capacity to appeal against acquittals by a judge sitting alone, was introduced.

90 (1784) 4 Doug 73 at 170 [99 ER 774 at 824]. At 178 [828], Ashurst J admitted the jury's power, but denied their right, so to act.

91 191 HL Deb 85, 15 February 1955.

92 *Woolmington v Director of Public Prosecutions* [1935] AC 462 at 480 per Viscount Sankey LC.

the judge decide the case without any jury being present at all. The fact-finding procedures of juries thus can be marked by a kind of benign irrationality, for it is open to juries to acquit in the face of very strong evidence merely because they dislike some aspect of the law being enforced, or the behaviour of the police, or the testimony of prosecution witnesses or the conduct of the judge. A judge sitting alone, however, is expected to conform in all respects with rational criteria – the criteria commanded by applicable rules of law, and the criteria imposed by the "logical faculty"[93] – in assessing the credibility of witnesses, in weighing the probabilities of particular events having happened and in drawing inferences from primary facts.

98 To depart from a system centred on lay fact-finding which many think has the virtues ascribed to it by Lord Devlin is to take a step which calls for close scrutiny of the safeguards the legislature has provided. One of these is s 120(2).

99 *Judges, juries and the duty to give reasons.* In civil jury cases, and non-jury criminal cases, it is customary for judges to give reasons for their final judgments and in considerable measure for their interlocutory judgments. It may have been thought impracticable for juries to do this, but for whatever reason, they do not do so and they are not permitted to do so. They may not be questioned about the reasons for their verdicts. Even the limited light which could be thrown on the jury's reasoning processes by a special verdict is blocked out by two factors. The first is that special verdicts are only to be requested in the most exceptional circumstances[94]. The second is that even if a special verdict is requested, the jury can insist on its right to deliver a general verdict only[95]. Indeed so strict was the practice of jury silence that at common law silence must be preserved after verdict about what discussions took place in the jury room, to the extent that evidence will not be received about those discussions[96].

100 Because the jury gives no reasons and because it is difficult to appeal against a jury conviction on purely factual grounds, the jury has very great

---

93 Thayer, *A Preliminary Treatise on Evidence at the Common Law*, (1898) at 314 (n 1).

94 *R v Bourne* (1952) 36 Cr App R 125.

95 Blackstone, *Commentaries on the Laws of England*, (1966) vol 3 at 377-378; *The Mayor and Burgesses of Devizes v Clark* (1835) 3 Ad & El 506 [111 ER 506]; *R v Jameson* (1896) 12 TLR 551 at 593.

96 *Ellis v Deheer* [1922] 2 KB 113 at 117-118; *R v Gough* [1993] AC 646 at 659; *Roylance v General Medical Council (No 2)* [2000] 1 AC 311 at 324; *R v Mirza* [2004] 1 AC 1118 at 1156 [95]; *R v Smith* [2005] 1 WLR 704 at 712-713 [16]; [2005] 2 All ER 29 at 38-39.

independence in relation to the facts. It is true that even the most neutral and self-effacing of judges will have much influence over how the jury proceeds by his or her presentation of the parties' cases, selection of the evidence to be referred to, marshalling of the factual material, and identification of the key questions. It is also true that skilful judges can exercise considerable influence over how juries approach factual questions – just as unskilful ones, by conveying a perception of bias or unfairness, can involuntarily exercise considerable negative influence by causing juries to react strongly against any attempted influence. It is further true that to a limited extent the trial judge can take factual issues from the jury – by ruling at the end of the prosecution case that there is no evidence on which a jury could lawfully convict[97]; or by taking the exceptional course of inviting the jury, then or at any later time, to stop the trial if the evidence seems to them to furnish an unsafe foundation for a conviction[98]. But in most respects the jury has much autonomy in its decision-making – its finding of the facts and application to them of the law.

101 *Consequences of differences between judge and jury.* The difference between jury trial presided over by a judge and trial by judge alone has significant consequences. Trial by jury is trial by a tribunal which "consists of a comparatively large body of men who have to do justice in only a few cases once or twice in their lives, to whom the law means something but not everything, who are anonymous and who give their decision in a word and without a reason"[99]. Trial by judge alone is trial by a tribunal consisting of one person who is not randomly selected from society; who has to do justice in hundreds or thousands of cases heard on most working days of a large part of his or her life; to whom, while that role is being carried out, the law means almost everything; who is well-known to the profession and sometimes to parts of the wider public, and who does not return after the trial to the anonymity from whence jurors came; who, by force of legal obligation and professional custom, gives reasons, sometimes very elaborate ones, for every significant decision; and who is accustomed to organise his or her approach to the entire judicial task by reference to that necessity. Where trial is by jury, the judge may have vast experience, at the Bar and on the bench, of trials relating to the type of conduct alleged. Jurors will often have none, and at most very little. The vast experience which a judge sitting alone may have of the weaknesses of human nature, and the repetitive conduct they engender, can breed a perception that the judge may fail to attend closely to the details of a particular case. The perception is not so much that the

---

97 *May v O'Sullivan* (1955) 92 CLR 654; [1955] HCA 38.

98 Glass, "The Insufficiency of Evidence to Raise a Case to Answer", (1981) 55 *Australian Law Journal* 842 at 845.

99 Lord Devlin, *Trial by Jury*, (rev ed) (1966) at 154.

judge may assume that the police always get the right man[100], but that once the prosecution has tendered enough evidence to make out a case to answer, the possible answers to that case which may be derived from the prosecution evidence and any evidence which the defence calls are not attended to sufficiently closely, because the judge has rejected those explanations in so many earlier cases. The perception is likely to be that when it comes to criminal defences, judges feel that they have heard it all before – the thing that hath been is that which shall be, and that which hath been done is that which shall be done, and there is no new thing under the sun. The perception may be that experienced judges tend to assume that the accused on trial probably behaved in the same way on the occasion to which the charge relates as innumerable guilty predecessors in the dock. Where trial is by jury, these perceptions do not matter: for factual findings are for the jury alone, the judge's role, while not limited to giving directions of law, centre on that task, and the correctness of those directions is minutely and jealously scrutinised both by the counsel who conduct criminal appeals and the courts which hear them. Where trial is by judge alone, s 120(2) can be seen as a mechanism for nullifying the dangers recognised by those perceptions.

102 *Safeguards for the accused.* There are two principal safeguards for the accused in a criminal trial. One is the criminal burden and standard of proof. The other is the requirement either that the verdict be unanimous (as in Queensland[101] and the Australian Capital Territory[102]) or that it be the result of a very substantial majority (as in other jurisdictions[103]).

---

100 Darling, *Scintillae Juris*, 6th ed (1914) at 33-34 said:

> "The truth is, that, although the law pays a prisoner the compliment of supposing him to be wrongly accused, it, nevertheless, knows very well that the probabilities are in favour of the prosecutor's accusation being well founded ...
>
> No defendant [in civil proceedings] is brought up through a hole in the floor; he is not surrounded by a barrier, nor guarded by a keeper of thieves; he is not made to stand up alone while his actions are being judged; and his latest address is not presumably the gaol of his county."

101 *Jury Act* 1995 (Qd), s 59.

102 *Juries Act* 1967 (ACT), s 38.

103 Section 114 of the Criminal Procedure Act provides:

> "(1) Subject to this section, the verdict of a jury must be the unanimous verdict of its members.

(Footnote continues on next page)

103 "One is enough". It is common in our society for decisions made by bare majority to prevail – decisions by electors, legislators, cabinets, committees and human groupings of all kinds – public, commercial or domestic, secular or ecclesiastical, and indeed judicial and quasi-judicial tribunals, particularly appellate courts. The common law, however, required jury unanimity, and the inroads made on this by legislation extend only so far as permitting no more than two dissenters. Given that the robust pressures for agreement employed in former times have lost favour, given that not every jury will have dominant spirits, capable of readily persuading others to their view, and remembering the constraints which exist on judicial exhortations to unanimity or majority[104],

---

(2) If a jury trying a charge has retired to consider its verdict and, having deliberated for at least 3 hours, has not arrived at a unanimous verdict, the decision of 10 or more of the jurors shall be taken as the verdict on the charge.

(3) If a jury trying a charge has retired to consider its verdict and, having deliberated for at least 3 hours, 10 or more of the jurors have not agreed on a verdict, the judge may discharge the jury from giving its verdict on the charge.

(4) Subsections (2) and (3) do not apply to a charge of wilful murder or murder.

(5) Subsections (2) and (3) do not prevent a judge from requiring a jury to deliberate for more than 3 hours."

A similar provision was first introduced in 1960. See also *Jury Act* 1977 (NSW), s 55F (first introduced in 2006); *Juries Act* 2000 (Vic), s 46 (first introduced in 1994); *Juries Act* 2003 (Tas), s 43 (first introduced in 1936); *Juries Act* 1927 (SA), s 57 (first introduced in 1928); *Criminal Code Act* (NT), s 368. These provisions are inconsistent with s 80 of the Constitution in their applications to trials for Commonwealth offences: *Cheatle v The Queen* (1993) 177 CLR 541 at 552-554; [1993] HCA 44. There Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ saw two fundamental differences between unanimous verdicts and majority verdicts. The first was that unanimous verdicts better secure the goal of ensuring that convictions are only arrived at when there is no reasonable doubt. The second was that while majority verdicts permit the overriding of dissent, the need for unanimity promotes deliberation and provides some insurance that the opinions of each of the jurors would be heard and discussed, reducing the danger of hasty and unjust verdicts. The fact remains that the requirement that at least 10 jurors agree in a verdict is a significant hurdle for the prosecution and a strong safeguard for the accused. See also *Juries Act* 1974 (UK), s 17 (first introduced in 1967).

104 See *Black v The Queen* (1993) 179 CLR 44; [1993] HCA 71.

unanimity, or a very high majority in favour of guilt, can be hard to achieve. It cannot be easy to obtain unanimity or a high majority amongst quite a large number of decision-makers reflecting the diversity of the sections of the community they belong to, the diversity of human personality and the diversity of human experience. The process must tend to generate its own discipline – cause a careful scrutiny of the evidence, a dilution and sloughing away of individual prejudices, a pooling and sharing of human experience, a solemnity of decision-making.

104 The criminal burden of proof and the criminal standard of proof survive abolition of jury trial. The need for jury unanimity or near unanimity does not. The discipline that need generates cannot be compensated for directly. But by an indirect route the duty to give reasons can operate to safeguard the interests of the accused and the public interest generally. That is because a move to trial by judge alone causes appeals to operate in a radically different way. It is much easier for an appellate court to detect appellable error where reasons for the verdict at trial must be provided than it is when the appellate court is limited only to the record of the proceedings before a jury. When a trial judge directs the jury on the law, it will be clear what was said. If nothing is said, or something erroneous is said, about decisive questions of law, an appeal will lie. Those possibilities are complete checks against judicial error in propounding the law. The substitution of judge for jury as trier of fact would leave open the risk of judicial errors as to the law unless there were a requirement that the judge state the principles of law being applied, and s 120(2) creates this requirement. Just as a jury trial without a judicial summing up would not really be a trial, a trial by judge alone without a s 120(2) statement of the applicable legal principles would not really be a trial. In this respect s 120(2) preserves an aspect of jury trial; it does not reject it.

105 But s 120(2) goes beyond requiring a statement of legal principle; it requires that the findings of fact relied on be stated. That requirement has two consequences. It permits close appellate supervision of the trial judge's factual reasoning. And it creates the need for the trial judge to submit to a demanding discipline.

106 *Interaction between trial judges and appellate courts.* The years in which trial by jury in England began its movement towards almost total disappearance in civil cases – the years 1854 to 1883[105] – marked a period in the course of

---

105 In 1854 the *Common Law Procedure Act*, s 1, provided for trial by judge alone with the consent of the parties, and s 3 gave judges the power to refer matters of account to referees. In 1873 the *Judicature Act*, s 57, extended the latter power to a "matter requiring any prolonged examination of documents or accounts, or any scientific or local investigation". In 1883 O 36 of the Rules of the Supreme Court made trial by judge alone the rule, in the sense that jury trial had to be specially

(Footnote continues on next page)

which the Court of Appeal was created, in 1873, and developed[106]. The result of that process led Lord Devlin to the following conclusions[107]:

> "Trial by a judge alone might with some exaggeration be described as trial by a judge and three lords justices. It is potentially a combined operation. Trial by jury combines the work of judge and jury; in a simple case it will be mainly the work of the jury and in a complicated case the judge will contribute a great deal. Trial by judge alone becomes a combined operation only in a minority of cases. But I called it potentially that because the delivery of a reasoned judgment is an essential part of the process and enables the defeated party to make up his mind whether he wants to proceed to the second part of the operation. If he does, the judgment of fact that emerges at the end is the joint work ... of the trial judge and the appellate judges in much the same way as the verdict is the joint work of judge and jury."

By "combined operation" Lord Devlin meant the following[108]:

> "In the Court of Appeal the work of the judge below is not discarded. His finding of the primary facts is the raw material on which the court works. Because he has had the advantage of seeing the witnesses, he is accepted as the better tribunal for the determination of the primary facts; but the appellate court has a complementary advantage, which makes it the better tribunal – at any rate in a case of any length or complexity – for the determination of the secondary evidence, that is, the drawing of inferences. Throughout the trial the case is alive and kicking: when it gets to the Court of Appeal it is dead. Issues change and develop as the trial proceeds and as witnesses tell their different, and sometimes unexpected, stories; points that left the starting-post apparent winners fall out of the race and dark horses take up the running. Even a short case can be full of surprises. It is not always easy for a judge, who has been in the thick of the thing from the beginning, to select at the end of it the best viewpoint for the case as a whole, especially if he follows the traditional practice of delivering whenever possible an unreserved and extempore judgment simply on the basis of his own note. In the Court of Appeal the

---

requested, in all cases save those of libel, slander, malicious prosecution, false imprisonment, seduction and breach of promise of marriage, where the right to trial by jury survived.

106 *Judicature Act* 1873, s 4.

107 Lord Devlin, *Trial by Jury*, (rev ed) (1966) at 134-135.

108 Lord Devlin, *Trial by Jury*, (rev ed) (1966) at 138-139.

> material is fixed. Counsel on both sides, having now, as they had not at the trial, the advantage of knowing what evidence the judge has believed and what rejected, can sort out the material at leisure, disregarding the bad points and making the most of the good ones. Little bits of evidence that passed unnoticed at the time are seen in the light of a new definition of issues to become greatly significant. Thus the Court of Appeal is much better equipped than the trial judge for the ascertainment of the secondary facts; the case is, as it were, laid out flat before them and three minds consult together on the right conclusions to be drawn. The joint work to which I referred is the work of the trial judge in determining the primary facts combined with the work of the appellate judges in determining the secondary facts."

107 The move to trial by judge alone in criminal cases marks the abandonment of a model resting on joint work between judge and jury. It adopts a model resting on joint work between trial judge and appellate court. This move has similar problems to those created in earlier times by the move to trial by judge alone in civil cases. Underlying s 120(2) is a perception of the extreme importance, from this point of view, of the trial judge's reasons for judgment. For plainly the combined operation which takes place between a judge trying a case without a jury and an appellate court hearing an appeal from that judge's orders will not work unless the trial judge has supplied detailed reasons for judgment. In *R v Keyte*[109], Doyle CJ explained why. He accepted that reasons were not necessary in order to determine whether it was open to the judge, "on the available evidence", to be satisfied of guilt beyond reasonable doubt – ie to determine the issues arising under the equivalent of s 30(3)(a) of the Criminal Appeals Act. That is because the appellate court could examine the evidence for itself. But he identified, non-exhaustively, four respects in which the "scrutiny of a trial" by an appellate court would be "substantially contracted" if a failure to give reasons meant that other grounds of appeal could not be examined by an appellate court[110]. One was that the appellate court[111]:

> "will have no ability to determine whether the judge has correctly applied the relevant rules of law. Absent reasons from the trial judge, the ability to correct a verdict affected by 'a wrong decision on any question of law' will be confined to errors made in the course of the trial itself, and to situations in which it can be said that, as a matter of law, it was not open to the judge to convict. Cases in the latter category would be relatively rare."

---

109 (2000) 78 SASR 68 at 76 [39].

110 (2000) 78 SASR 68 at 76 [38].

111 (2000) 78 SASR 68 at 76 [38].

Another was that[112]:

> "in those cases in which the correct use of the evidence is affected by rules of law, there will be no means of determining whether the judge identified and correctly applied the relevant rules".

A third, of particular relevance in the present appeal, was that[113]:

> "in cases in which the circumstances call for particular care, such as cases involving identification evidence, there will be no means of knowing whether and how the judge dealt with the matter requiring particular care".

A fourth was that the appellate court[114]:

> "would be deprived of the ability to decide whether there has been a miscarriage of justice as a result of the manner in which the conclusion of guilt was reached".

In short, the cooperative enterprise or combined operation between a judge sitting without a jury and a court of criminal appeal, analogous to that which Lord Devlin saw as taking place between a judge sitting without a jury in civil cases and a court of appeal, cannot take place if the judge sitting alone has given no reasons.

108 *The discipline of giving reasons.* Section 120(2) of the Criminal Procedure Act does not serve only the purpose of enabling the accused to know why there was a conviction, or the prosecution to know why there was an acquittal. The facility it offers for close appellate scrutiny of the trial judge means that it creates an essential discipline. The process of having to state judicial reasoning in terms sufficiently clear, exact and convincing to pass muster in the eyes of an appellate court listening to the sometimes hypercritical submissions of counsel entails a need to be very precise in working that reasoning out. The discipline stems from the fact that the process of stating reasoning often reveals its fallacies: in the course of composing reasons for judgment directed to supporting a conclusion which seemed clear, judges often find that the opinion "won't write", and that a different conclusion develops. There is a legislative assumption that compliance with that discipline is not only more likely to produce justice according to law, but is a necessary precondition for that outcome. The abolition of jury trial entails removal of the safeguard to

---

112 (2000) 78 SASR 68 at 76 [38].

113 (2000) 78 SASR 68 at 76 [38].

114 (2000) 78 SASR 68 at 76 [38].

be found in the peculiar discipline of jury trial[115]. The new safeguard, to be found in the discipline of having to give reasons, is a vital technique for ensuring accurate fact finding, correct inferential reasoning and sound application of the law to the facts. Section 120(2), construed against the background described above, requires strict compliance with the duty to state the principles of law applied and the findings of fact relied on is to be a fundamental part of the new regime of trial without jury. The safeguards which accompany the adoption of trial by judge alone for indictable offences must be seen as vital elements of the statutory scheme which effected that change. But those safeguards are not limited to those stated in ss 118 and 119(1) and (3). A fundamental safeguard is also to be found in s 120(2). As the Court said in *Fleming v The Queen*[116] of the New South Wales equivalent to ss 119(3) and 120(2), a legislative concern is evinced "that, in the operation of the new regime ... whereby trial by jury is replaced in certain circumstances by trial by judge sitting alone, justice must not only be done but also be seen to be done". Non-compliance with s 120(2), at least in non-trivial respects, is a departure from an essential legal requirement going to the root of the proceedings and from a fundamental assumption on which this hitherto unusual form of criminal justice in serious cases rests.

109 *The s 120(2) duty in the present case.* Just as the importance of s 120(2) is very great, so the extent of non-compliance with it in this case was extreme. The non-compliances cannot be described as constituting mere "irregularities"[117]. It is not material that those non-compliances "did not affect the evidence which was led"[118]. Nor is it correct to see the non-compliances as not having been "in the conduct of the trial itself"[119], any more than the addresses of counsel or the summing up in a trial by jury can be said not to be in the conduct of the trial itself. The duty to comply with s 120(2) is an essential means of securing the fair and just conduct of the trial, and is also an essential means of revealing any deficiencies in the trial as a whole.

---

115 See above at [102].

116 (1998) 197 CLR 250 at 260 [22] per Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ.

117 As it was called in the Court of Appeal: *AK v The State of Western Australia* [2006] WASCA 245 at [52].

118 See *AK v The State of Western Australia* [2006] WASCA 245 at [52].

119 See *AK v The State of Western Australia* [2006] WASCA 245 at [56].

110 In *Fleming v The Queen*[120] it was said that there may be cases where the failure to satisfy the requirements of the then New South Wales equivalent to s 119(3) "involves errors that are so trivial that the Court of Criminal Appeal may conclude that there has been a trial according to law, notwithstanding that failure". So too a failure to satisfy the requirements of s 120(2) may involve omissions to include principles of law or findings of fact which are so trivial that it is open to conclude that there has been a trial according to law notwithstanding those omissions. But in *Fleming v The Queen*, given the importance of the subject-matter of the warning about the need to assess the relevant witness's reliability in the light of her age, emotional instability and infatuation with the appellant in that case, the miscarriage of justice was a substantial one, and the proviso was not applied. Here too, given the importance of the requirement of a statement of findings in a factually unusual and puzzling case, and the extent of the breach of that requirement, the proviso should not be applied. The error was one which was a sufficiently "serious breach of the presuppositions of the trial"[121] to go to "the root of the proceedings"[122].

111 *The trial judge's observations in argument.* This conclusion should not be drawn, according to the prosecution argument in this Court, because of the trial judge's observations in argument – made in a trial which lasted a day and a half, much of it being taken up by cross-examination of the complainant. This is one of many areas in which there is a fundamental difference between the significance of what judges say in argument and the significance of what they say in actually deciding cases. What the trial judge said in argument, taken with the record of the oral evidence, certainly reveals that there was no flaw in the conduct of the trial until the moment when the trial judge came to explain why the appellate was guilty on the first three charges. But the mere fact that the trial judge's interventions in argument reveal that he was attending to the issues in a careful and dedicated way cannot fill the gaps in the reasons for judgment. The process of testing propositions and floating ideas in argument is a radically different process from stating the findings of fact relied on, for the latter fulfils functions and serves purposes which the former does not. The former process does not form part of the judgment; statements made during it are not findings. The duty to make statements in the judge's reasons for judgment is not, contrary to what the prosecution called it, merely "technical". Section 120(2) requires the latter process to be complied with at one particular time and in a formal way. Its requirements cannot be met by things done at some other time and in some other

---

120 (1998) 197 CLR 250 at 265 [39] per Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ.

121 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [46].

122 *Wilde v The Queen* (1988) 164 CLR 365 at 373.

way[123]. Nor, contrary to what the prosecution submitted, did the judge's remarks in argument indicate that he was conclusively relying on them as part of his reasoning process. In *Fleming v The Queen* the Court said, speaking of principles of law relevant to a particular trial[124]:

> "Unless the judgment shows expressly or by implication that the principle was applied, it should be taken that the principle was not applied, rather than applied but not recorded."

The same is true of findings of fact.

112 *Significant denial of procedural fairness?* The appellant also argued that the proviso could not be employed where the relevant error of law or irregularity was "a significant denial of procedural fairness"[125] in that it substantially frustrated the exercise of a convicted person's appellate rights. There is no doubt that a miscarriage of justice can take place where its consequence is that "it is impossible for an appellate court to decide whether a conviction is just"[126]. From that point of view the presence of a miscarriage of justice is much starker, because the absence of the factual findings in relation to the reasoning which led to the verdict made it hard to assess whether those aspects of the evidence underlying that reasoning rendered the conviction just. However, it is not necessary to decide whether the proposition on which the appellant relied – that the proviso could never be employed where the appellable error substantially frustrated the exercise of a convicted person's appellable rights – is correct. The error in this case had that consequence, but that is simply a reflection of the seriousness of the failure to comply with s 120(2) and the importance of doing so.

Ground 1: failure to give identification warning, contrary to s 119(3)

113 The appellant submitted that the trial judge had failed to comply with s 119(3)(a) of the Criminal Procedure Act in not taking into account the

---

123 For an analogy, see *Subramaniam v The Queen* (2004) 79 ALJR 116 at 126 [44] per Gleeson CJ, McHugh, Kirby, Hayne and Callinan JJ; 211 ALR 1 at 14; [2004] HCA 51.

124 (1998) 197 CLR 250 at 263 [30] per Gleeson CJ, McHugh, Gummow, Kirby and Callinan JJ.

125 *Weiss v The Queen* (2005) 224 CLR 300 at 317 [45].

126 *Nudd v The Queen* (2006) 80 ALJR 614 at 618 [7] per Gleeson CJ; 225 ALR 161 at 164; [2006] HCA 9.

requirement that a jury be warned of the dangers of acting on identification evidence. In particular, it was said that the trial judge "failed to identify and give a warning required by law in relation to identification or recognition evidence". The language of ground 1 of the Notice of Appeal does not capture the point. The appellant attempted to bring it within the language of ground 1 by contending that the trial judge had "failed to identify any matter in the evidence which could have reasonably been regarded as undermining the reliability of the identification or recognition evidence", "failed to specify that he had regard for and acted upon an identification warning", and "failed to explain how, notwithstanding the warning, he was satisfied, beyond reasonable doubt, that the appellant was the offender". It is true that these failures existed, but if in fact the trial judge did not give himself an identification warning, they were not failures to comply with s 120(2), for his judgment could not then be said to fail to have included a principle of law which he applied. His failure was rather a failure to comply with s 119(3).

114 Whether or not the submission of the appellant about the failure to give an identification warning can be fitted into ground 1, in view of the conclusion reached above in relation to s 120(2), it is not necessary finally to determine its correctness. However, there is much to be said for the view that the success of the appellant's argument in relation to the failure of the complainant to explain why and how she identified the appellant as the offender tends to prevent his s 119(3) argument from having a satisfactory foothold. The need for an identification warning normally arises in relation to visual identification. This was not a case of visual identification. The kind of warning commonly given would require substantial variation in the case of identification by touch, but despite Pullin JA's contrary opinion, this was not a case of identification by touch. Either it was a case of identification by some form of intuition or feeling, or it was a case of identification by circumstantial inference from the fact of where the children were positioned when they went to bed. If identification was of the former kind, the complainant's evidence was inadmissible, and the flaw in the trial judge's approach was at a point anterior for the need for an identification warning. If identification was of the latter kind, no identification warning was needed. Either way, no s 119(3) error was material. It is thus also unnecessary to consider whether, if there was a s 119(3) error, it was so serious as to exclude the possibility of applying the proviso.

Ground 2: the proviso

115 Since ground 1 has been made out, ground 2 need not be dealt with, for the point of ground 1 is that if the reasoning underlying it is sound, it is not permissible to engage in the process of examining the whole record in which the Court of Appeal engaged before applying the proviso, and the target of ground 2 was the details of that reasoning process.

Orders

116 In view of the appellant's success in relation to ground 1, the appeal should be allowed and a new trial ordered.