HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, CRENNAN, KIEFEL, BELL AND GAGELER JJ

MICHEL BAINI APPELLANT

AND

THE QUEEN RESPONDENT

Baini v The Queen
[2012] HCA 59
12 December 2012
M87/2012

ORDER

1. *Appeal allowed.*

2. *Set aside paragraphs 5 to 12 of the order of the Court of Appeal of the Supreme Court of Victoria made on 5 October 2011.*

3. *Remit the matter to the Court of Appeal of the Supreme Court of Victoria for further consideration in accordance with the reasons of this Court.*

On appeal from the Supreme Court of Victoria

Representation

P F Tehan QC with T R Alexander for the appellant (instructed by Defteros Lawyers)

T Gyorffy SC with E H Ruddle for the respondent (instructed by Solicitor for Public Prosecutions (Vic))

CATCHWORDS

Baini v The Queen

Criminal law – Appeal – Error or irregularity in trial – Failure to sever counts – Appellant charged with numerous counts of blackmail of one victim and one count of blackmail of another victim – Trial judge refused application to sever trial of separate count – Court of Appeal held that trial judge erred in refusing application – Whether refusal to sever resulted in "substantial miscarriage of justice" within meaning of s 276 of *Criminal Procedure Act* 2009 (Vic).

Words and phrases – "substantial miscarriage of justice".

Criminal Procedure Act 2009 (Vic), s 276.

FRENCH CJ, HAYNE, CRENNAN, KIEFEL AND BELL JJ.

The issue

1 Section 276(1)(b) of the *Criminal Procedure Act* 2009 (Vic) ("the Act") obliges the Court of Appeal to allow an appeal against conviction if the appellant satisfies the Court that "as the result of an error or an irregularity in, or in relation to, the trial there has been a substantial miscarriage of justice". The appellant (together with another accused) was charged with, and found guilty of, numerous counts of blackmailing one victim (Hassan Rifat)[1]. The appellant was also charged with, and found guilty of, one count of blackmailing a second victim (Nicholas Srour). All the counts were tried together.

2 It is now accepted that the single count of blackmailing Mr Srour should have been tried separately. Because the counts were tried together, the jury heard both victims describe the demands and the menaces the appellant was alleged to have made to each. The jury thus heard Mr Srour's evidence to the effect that the appellant was "a standover man" and that the appellant had told him that he (the appellant) used standover tactics, bullying and assaulting people in order to get things. It is now accepted that at least some of the evidence of one victim was not relevant in the trial of the count or counts concerning the other victim.

3 The Court of Appeal held[2] that the appellant had shown a substantial miscarriage of justice in respect of the trial of the Srour count because the jury heard "highly prejudicial" evidence about the Rifat counts which was irrelevant to the Srour count. But the Court of Appeal held[3] that the appellant had not shown a substantial miscarriage of justice in respect of the trial of the Rifat counts. This was for two reasons. The first depended upon the jury having been instructed to consider each count separately. The Court of Appeal said[4] that the jury's return of different verdicts on different counts "strongly suggests that [the jury] gave separate consideration to each count, and only found a count established where the evidence of guilt of the particular accused was clear-cut". Second, the evidence in respect of the Rifat counts was not such as to "bespeak a

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1 Contrary to s 87 of the *Crimes Act* 1958 (Vic).

2 *Baini v The Queen* (2011) 213 A Crim R 382 at 399 [71].

3 (2011) 213 A Crim R 382 at 398 [70].

4 (2011) 213 A Crim R 382 at 399 [70] (footnote omitted).

situation in which the jury should have had a reasonable doubt" of the appellant's guilt and the Court of Appeal "entertain[ed] no such doubt"[5].

4 Did the Court of Appeal apply s 276(1)(b) of the Act correctly?

The course of proceedings

5 It is desirable to say a little more about the course of the proceedings leading to this appeal.

6 The appellant and another accused, Badar Arafan, were presented and tried by judge and jury in the County Court of Victoria on a presentment charging the appellant with 16 counts of blackmail, Mr Arafan with 20 counts of blackmail and both the appellant and Mr Arafan together with a further 32 counts of blackmail. All but one of the counts alleged that the victim of the blackmail was Mr Rifat. One count, preferred against only the appellant, alleged that the victim of the blackmail was Mr Srour.

7 At trial, there were directed verdicts of acquittal on some counts and, on others, the jury returned verdicts of not guilty. The jury found the appellant guilty on 36 of the counts, including the Srour count, and the jury found Mr Arafan guilty on 13 of the counts.

8 It is now not disputed that the trial judge (Judge Wood) erred in refusing to sever the trial of the Srour count from the trial of the other counts on the presentment, all of which concerned Mr Rifat. Further, it is now not disputed that, because there was no severance, evidence was led at the trial about the demands and the menaces allegedly made against one victim that was not admissible on the trial of the count or counts relating to the other victim. And it did not appear ultimately to be disputed that the evidence about the Srour count which would not have been admissible in a separate trial of the Rifat counts included Mr Srour's evidence that has already been described: that the appellant was "a standover man" and that the appellant had told him that he (the appellant) used standover tactics, bullying and assaulting people in order to get things. It is accepted that much of the extensive evidence given in support of the numerous Rifat counts was not admissible in the trial of the Srour count.

9 On application for leave to appeal to the Court of Appeal against conviction, that Court (Warren CJ, Nettle and Ashley JJA) granted leave and

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5 (2011) 213 A Crim R 382 at 403 [101]; see also at 398 [70], 403 [102].

allowed[6] the appellant's appeal against his conviction on the Srour count, ordered that there be a new trial of the Srour count, and refused the appellant leave to appeal against his convictions on the Rifat counts. The principal reasons of the Court were given by Ashley JA, who concluded[7] that, for the reasons that have been described, the appellant had not shown "that any substantial miscarriage was occasioned to the [appellant] in respect of the Rifat counts by reason of the refusal to sever" the presentment.

10 By special leave, the appellant appeals to this Court alleging that the Court of Appeal should have found that there was a substantial miscarriage of justice in respect of the trial of the Rifat counts. Whether that is so depends upon the proper construction and application of the Act and in particular s 276(1)(b).

The Act and appeals against conviction

11 Section 274 of the Act provides:

> "A person convicted of an offence by an originating court may appeal to the Court of Appeal against the conviction on any ground of appeal if the Court of Appeal gives the person leave to appeal."

The County Court in its original jurisdiction is an "originating court"[8].

12 Section 276 of the Act provides:

> "(1) On an appeal under section 274, the Court of Appeal must allow the appeal against conviction if the appellant satisfies the court that—
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> (a) the verdict of the jury is unreasonable or cannot be supported having regard to the evidence; or

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6 (2011) 213 A Crim R 382.

7 (2011) 213 A Crim R 382 at 398 [70].

8 s 3. "[O]riginal jurisdiction" is defined in s 3 as including, relevantly, a proceeding for an indictable offence.

(b) as the result of an error or an irregularity in, or in relation to, the trial there has been a substantial miscarriage of justice; or

(c) for any other reason there has been a substantial miscarriage of justice.

(2) In any other case, the Court of Appeal must dismiss an appeal under section 274."

13 There was no dispute in this Court that the Rifat counts and the Srour count should have been tried separately. The refusal to sever the trials was "an error or an irregularity in, or in relation to, the trial" of the appellant. The central focus of argument was whether the Court of Appeal should have found that the appellant had satisfied the Court that, as the result of this error or irregularity, "there has been a substantial miscarriage of justice". That is the determinative question in this appeal: should the Court of Appeal have been satisfied that "there has been a substantial miscarriage of justice" within the meaning of s 276(1)(b)? And that question is ultimately one of statutory construction.

A question of construction

14 Whether there has been a "substantial miscarriage of justice" within the meaning of s 276(1)(b) requires consideration of the text of the statute. As the Court said in *Fleming v The Queen*[9], "[t]he fundamental point is that close attention must be paid to the language" of the relevant provision because "[t]here is no substitute for giving attention to the precise terms" in which that provision is expressed. Paraphrases of the statutory language, whether found in parliamentary or other extrinsic materials or in cases decided under the Act or under different legislation, are apt to mislead if attention strays from the statutory text[10]. These paraphrases do not, and cannot, stand in the place of the words used in the statute.

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9 (1998) 197 CLR 250 at 256 [12]; [1998] HCA 68.

10 See generally *Catlow v Accident Compensation Commission* (1989) 167 CLR 543 at 550 per Brennan and Gaudron JJ; [1989] HCA 43; *Bushell v Repatriation Commission* (1992) 175 CLR 408 at 425 per Brennan J, 437 per Toohey J; [1992] HCA 47; *Marshall v Director General, Department of Transport* (2001) 205 CLR 603 at 632-633 [62] per McHugh J; [2001] HCA 37; *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2008) 233 CLR 259 at 270 [31] per

(Footnote continues on next page)

15 It follows that, contrary to at least some of the argument in this Court, consideration of s 276(1)(b) does *not* begin with this Court's decision in *Weiss v The Queen*[11]. *Weiss* concerned the application of the common form criminal appeal provision[12] derived from the *Criminal Appeal Act* 1907 (UK). That form of appeal provision did not govern the appeal to the Court of Appeal in this matter; s 276 of the Act did. And while extrinsic material indicates[13] that s 276 was enacted to meet perceived problems with the common form criminal appeal provision, it is to be borne in mind that, to adopt what was said[14] by Brennan J in a different context, s 276 "must be construed according to its own terms rather than by reference to constructions placed on its statutory predecessor". This is not to say that observations made in *Weiss* about the application of the common form criminal appeal provision cannot also apply to s 276. The same or similar observations may be made about s 276 but only if the statutory text so permits.

16 Against this background, it is convenient to begin the task of construing s 276 first by making three immediate observations about the text of the section and second by noticing how s 276 differs from the common form criminal appeal provision.

Three immediate observations about s 276

17 The first observation to make is that s 276 deals exhaustively with the determination of an appeal under s 274. So much is clear from the statutory text.

Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ; [2008] HCA 5; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at 265 [33]-[34] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ; [2010] HCA 23; *Brennan v Comcare* (1994) 50 FCR 555 at 572-573 per Gummow J; *Ogden Industries Pty Ltd v Lucas* (1968) 118 CLR 32 at 39; [1970] AC 113 at 127.

11 (2005) 224 CLR 300; [2005] HCA 81.

12 See *Criminal Appeal Act* 1912 (NSW), s 6(1); *Criminal Law Consolidation Act* 1935 (SA), s 353(1); *Criminal Code* (Q), s 668E(1) and (1A); *Criminal Appeals Act* 2004 (WA), s 30(3) and (4); *Criminal Code* (Tas), s 402(1) and (2); *Criminal Code* (NT), s 411(1) and (2).

13 See Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 December 2008 at 4985-4986.

14 *Bushell v Repatriation Commission* (1992) 175 CLR 408 at 425.

If the appellant satisfies the Court of Appeal of one or more of the three matters identified in pars (a), (b) and (c) of s 276(1), the Court *must* allow the appeal against conviction, and s 276(2) provides that in *any* other case the Court *must* dismiss the appeal. The Court has no "discretion" to refuse to allow an appeal even if one of the identified grounds is established and likewise it has no "discretion" to allow an appeal even if none of the identified grounds is established.

18 The second observation to make is that the appellant bears the ultimate burden of persuasion. Section 276(1) provides that the appeal must be allowed if the *appellant* satisfies the Court that one or more of the grounds is established.

19 The third observation to make is that two of the stated grounds (s 276(1)(b) and (c)) expressly require demonstration that "there has been a substantial miscarriage of justice" whereas one ground (s 276(1)(a)) does not. As will be explained below, the separate inclusion of each of pars (a)-(c) is important. But for the moment, it is sufficient to note that there has surely been a substantial miscarriage of justice if, in the words of par (a), "the verdict of the jury is unreasonable or cannot be supported having regard to the evidence". The absence of the expression "substantial miscarriage of justice" in s 276(1)(a) should not be taken to suggest otherwise.

Comparisons with the common form criminal appeal provision

20 It is possible, of course, to draw some comparisons between s 276 and the different terms of the common form criminal appeal provision derived from the *Criminal Appeal Act* 1907. The appellant in this Court engaged in that comparative task to ask (and answer) whether s 276 "imposes the same statutory task on an appellate court" as the common form criminal appeal provision did and whether "this Court's decision in *Weiss* [is] applicable" to s 276. But as already explained, comparing a statute with its legislative predecessor (and cases decided under that predecessor) is only a useful exercise if doing so illuminates the actual text of the new provision. Whether or not this comparative task is profitable in other cases, its utility is not evident here.

21 First, to observe that the common form criminal appeal provision provided that an appeal be allowed on demonstration of a "miscarriage of justice" unless there was no "substantial miscarriage of justice", whereas s 276 provides that an appeal be allowed on demonstration of a "substantial miscarriage of justice", does not assist in construing s 276. The observation explains why what was said in *Weiss* cannot be "applied" to s 276 as if *Weiss* were decided under s 276.

Clearly it was not. But the observation says nothing about the meaning of "substantial miscarriage of justice".

22 Second, there appears to be little, if any, immediate utility in recognising that s 276 imposes the ultimate burden of persuasion on the appellant whereas the common form criminal appeal provision cast some burden (whether evidentiary or persuasive) on the respondent. In few, if any, cases will the placement of the onus of proof affect the content to be given to specific statutory expressions and criteria. And the observation that the ultimate burden of persuasion rests on the appellant, even in combination with the observation (or perhaps it is an assumed conclusion[15]) that statute and the common law recognise a presumption of innocence, says nothing about the content to be given to the expression "substantial miscarriage of justice". In particular, the appellant's broad statements that "it would be unjust for the appellant ... to be required to persuade the court that he or she was not guilty" are unhelpful because they do not grapple closely with the statutory text.

23 As a practical matter, few, if any, appeals governed by s 276 will turn upon which party bears the onus of proof. It is not to be supposed that notions of there being no case to answer at trial for want of proof of an element of an offence intrude into the determination of an appeal under s 274. Nor is it to be supposed that the respondent (whether a Director of Public Prosecutions or some other prosecuting authority) would not place all relevant arguments before the Court of Appeal.

24 Third, recognising that the question whether "there has been a substantial miscarriage of justice" is different from the question whether "no substantial miscarriage of justice has actually occurred"[16] invites identification and consideration of what follows from the differences. But that task distracts attention from the central inquiry, which is, and must remain, what do s 276(1)(b) and (c) mean when they refer to "a substantial miscarriage of justice"? It is to that question that these reasons now turn.

A substantial miscarriage of justice

25 Section 276 must be read recognising that miscarriages of justice may occur in many circumstances and may take many forms. As s 276(1)(b)

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15 See *RPS v The Queen* (2000) 199 CLR 620 at 632 [24]; [2000] HCA 3.

16 See, for example, the former s 568(1) of the *Crimes Act* 1958 (Vic).

contemplates, it will be possible sometimes to describe the cause of complaint as "an error or an irregularity in, or in relation to, the trial". That is a description which is apt to encompass any departure from trial according to law. But as s 276(1)(c) shows by its reference to "*any* other reason" (emphasis added), the description contemplated in par (b) is not exhaustive. When read together, pars (b) and (c) encompass any and every form of substantial miscarriage of justice. Yet the ultimate question will remain the same: has there been "a substantial miscarriage of justice"?

26 No single universally applicable description can be given for what is a "substantial miscarriage of justice" for the purposes of s 276(1)(b) and (c)[17]. The possible kinds of miscarriage of justice with which s 276(1) deals are too numerous and too different to permit prescription of a singular test. The kinds of miscarriage include, but are *not* limited to, three kinds of case. First, there is the case to which s 276(1)(a) is directed: where the jury have arrived at a result that cannot be supported. Second, there is the case where there has been an error or an irregularity in, or in relation to, the trial and the Court of Appeal cannot be satisfied that the error or irregularity did not make a difference to the outcome of the trial. Third, there is the case where there has been a serious departure from the prescribed processes for trial[18]. This is not an exhaustive list. Whether there has been a "substantial miscarriage of justice" ultimately requires a judgment to be made.

27 The singling out, in s 276(1)(a), of cases in which the verdict of the jury is unreasonable or cannot be supported having regard to the evidence is important. Its separate inclusion in the section indicates that pars (b) and (c) (and in particular the question whether there has been a substantial miscarriage of justice) cannot be confined to cases in which the Court of Appeal is satisfied that it was not open to the jury to convict the appellant. Paragraphs (b) and (c) must be read as dealing with more than the case where the Court of Appeal is satisfied that the evidence which was properly before the jury did not permit the conclusion that guilt was established beyond reasonable doubt because that sort of case is dealt with by s 276(1)(a)[19]. It follows that a "substantial miscarriage of

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17 Compare *Weiss* (2005) 224 CLR 300 at 317 [44] in relation to the proviso to the common form criminal appeal provision.

18 See, for example, *AK v Western Australia* (2008) 232 CLR 438 at 456 [55]-[56]; [2008] HCA 8; *Handlen v The Queen* (2011) 245 CLR 282; [2011] HCA 51.

19 See generally *M v The Queen* (1994) 181 CLR 487 at 493; [1994] HCA 63.

justice" encompasses not only cases identified by reference to inaccuracy of result but also cases identified by reference to departure from process even if it can be shown that the verdict was open or it is not possible to conclude whether the verdict was open.

28 An appellant's demonstration that there has been "a substantial miscarriage of justice" for the purposes of s 276(1)(b) and (c) may be affected by the strength of the prosecution case at trial. In some cases, it may be possible for an appellate court to conclude that there has *not* been "a substantial miscarriage of justice" because, despite the error, irregularity or other cause of complaint, the evidence properly admissible at trial required the conclusion that the appellant was guilty of the crime alleged. But several points must be made about this possibility.

29 First, in many cases of the kinds contemplated by s 276(1)(b) and (c), an appellate court will not be in a position to decide whether the appellant must have been convicted if the error had not been made. The nature of the error, irregularity or cause of complaint contemplated by those paragraphs will often prevent that conclusion from being reached by an appellate court on the record of the trial given the "natural limitations"[20] that attend the appellate task.

30 Second, and contrary to what the appellant's submissions sometimes suggested, the possibility that the Court of Appeal may conclude that no "substantial miscarriage of justice" occurred because a verdict of guilty, on the evidence properly admissible at trial, was inevitable neither reintroduces the proviso to the common form criminal appeal provision nor imposes on an appellant some onus of proving his or her innocence. To recognise that possibility does no more than acknowledge that the Court of Appeal's satisfaction that a finding of guilt was inevitable is *relevant* to determining whether there has been "a substantial miscarriage of justice". The Court's satisfaction that a guilty verdict was inevitable will not in every case conclude the issue about whether there has been a substantial miscarriage of justice but it is a matter to be taken into account in answering the question posed by s 276(1)(b) and (c).

31 If it is submitted that a guilty verdict was inevitable, an appellant need not prove his or her innocence to meet the point. An appellant will meet the point by showing no more than that, had there been no error, the jury may have entertained a doubt as to his or her guilt. As a practical matter, it will then be for

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20 See *Dearman v Dearman* (1908) 7 CLR 549 at 561; [1908] HCA 84; *Fox v Percy* (2003) 214 CLR 118 at 125-126 [23]; [2003] HCA 22.

the respondent to the appeal to articulate the reasoning by which it is sought to show that the appellant's conviction was inevitable.

32 Third, the inquiry to be made is whether a guilty verdict was *inevitable*, not whether a guilty verdict was *open*. (Whether the verdict was open is the question presented by s 276(1)(a).) If it is said that a guilty verdict was inevitable (which is to say a verdict of acquittal was not open), the Court of Appeal must decide that question on the written record of the trial with "the 'natural limitations' that exist in the case of any appellate court proceeding wholly or substantially on the record"[21]. That the jury returned a guilty verdict may, in appropriate cases[22], bear upon the question. But, at least in cases like the present where evidence has wrongly been admitted at trial and cases where evidence has wrongly been excluded, the Court of Appeal could not fail to be satisfied that there has been a substantial miscarriage of justice unless it determines that it was not *open* to the jury to entertain a doubt as to guilt[23]. Otherwise, there has been a substantial miscarriage of justice because the result of the trial *may* have been different (because the state of the evidence before the jury would have been different) had the error not been made.

33 This understanding of s 276 accommodates fundamental tenets of the criminal justice system in Australia. It recognises that the prescribed mode of trial was trial by jury. It does so by encompassing, within the expression "substantial miscarriage of justice", not only an error which possibly affected the result of the trial but also some departures from trial processes (sufficiently described for present purposes as "serious" departures), whether or not the impact of the departure in issue can be determined. It also recognises that an accused's guilt must be established by the prosecution at trial beyond reasonable doubt. It is not to be established[24] by speculation about what a jury, this jury, or a reasonable jury might have done but for the error. Nothing short of satisfaction beyond reasonable doubt will do, and an appellate court can only be satisfied, on the record of the trial, that an error of the kind which occurred in this case did not amount to a "substantial miscarriage of justice" if the appellate court concludes

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21 *Fox v Percy* (2003) 214 CLR 118 at 125-126 [23] (footnote omitted).

22 See generally *Weiss* (2005) 224 CLR 300 at 317 [43]; *Baiada Poultry Pty Ltd v The Queen* (2012) 86 ALJR 459 at 466 [28]; 286 ALR 421 at 430; [2012] HCA 14.

23 cf *R v Grills* (1910) 11 CLR 400 at 431 per Isaacs J; [1910] HCA 68.

24 cf *Weiss* (2005) 224 CLR 300 at 315-316 [37]-[40].

from its review of the record that conviction was inevitable. It is the inevitability of conviction which will sometimes warrant the conclusion that there has not been a substantial miscarriage of justice with the consequential obligation to allow the appeal and either order a new trial or enter a verdict of acquittal.

Extrinsic material

34 The above conclusions follow from the text of the Act but they are reinforced by reference to extrinsic material related to the Act. In the course of the second reading speech for the Bill which became the Act, the Attorney-General said[25] that the "new approach" adopted in the provisions that became s 276 "will result in appeals being allowed when the problem *could have reasonably made a difference* to the trial outcome; or if the error or irregularity was of a *fundamental* kind depriving the appellant of a fair trial" (emphasis added). This statement reinforces the view which follows from the statutory language: "a substantial miscarriage of justice" encompasses not only errors that did have or may have had an effect on the result of the trial but also departures from proper trial processes irrespective of their impact on the trial outcome.

35 The second reading speech is useful in so far as it confirms that s 276 takes into account questions of result and questions of process, but it provides no further assistance than this. In particular, it may be doubted that the second reading speech contains an exhaustive description of the effect of what became s 276 because it left unexplained the references to "reasonably made a difference" and error or irregularity of a "fundamental" kind. And even if these comments in the second reading speech were to be taken as intended to be an exhaustive description, it is a description that could not and must not be adopted as a substitute for the statutory language. To ask when an error "could have reasonably made a difference", or to ask whether an error or irregularity is "fundamental", is simply to ask in different language whether there has been a "substantial miscarriage of justice". But it is the statutory question which must be asked and answered.

Applying s 276(1)(b) in this case

36 The error or irregularity at the appellant's trial was the refusal to sever the trial of the Rifat counts from the trial of the Srour count. The consequence of

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25 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 December 2008 at 4986.

that error or irregularity was that the jury heard prejudicial evidence about the appellant which would not have been admissible if the trials had been severed. On the trial of the Srour count, the jury heard all of the evidence of repeated demands with menaces made of Mr Rifat. On the trial of the Rifat counts, the jury heard Mr Srour's evidence that the appellant was a standover man and that the appellant had told him, in effect, that blackmail was how he (the appellant) got things. Unless this error or irregularity had no bearing upon the result of the trial, there was thus a "substantial miscarriage of justice" because the jury may have reached different conclusions had the record of evidence been different.

37 The Court of Appeal ordered a retrial of the Srour count but it refused the appellant leave to appeal against the convictions recorded on the Rifat counts on the footing[26] that there was not shown to have been a substantial miscarriage of justice. In refusing leave, the Court made essentially two points. First, the jury had been given a direction to consider each count separately by reference only to the evidence relating to that count and their return of different verdicts on different counts suggested that they had followed this direction[27]. This the Court of Appeal concluded[28] outweighed what it described as the "over-dramatised" effect ascribed in the course of argument in that Court to the evidence given by Mr Srour. And second, on the Court's review of the record of the trial, the case against the appellant on the Rifat counts was said to be "very strong"[29] and "overwhelming"[30] because Mr Rifat's evidence "had credibility" and because it was "grossly improbable" that Mr Rifat would have willingly given the benefits he gave to the appellant and Mr Arafan[31]. The respondent supported this reasoning in this Court. But neither point demonstrates that the (now undisputed) failure to sever the trial of the Srour count from the trial of the Rifat counts did not result in a "substantial miscarriage of justice" with respect to the trial of the Rifat counts.

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26 (2011) 213 A Crim R 382 at 398 [70].

27 (2011) 213 A Crim R 382 at 398-399 [70]-[71].

28 (2011) 213 A Crim R 382 at 398 [70].

29 (2011) 213 A Crim R 382 at 398 [70].

30 (2011) 213 A Crim R 382 at 403 [102].

31 (2011) 213 A Crim R 382 at 403 [102].

38 As to the first point, that the jury were given a separate consideration direction (whether or not that direction is properly characterised as a "strong"[32] direction) does not deny that they had before them evidence which they should not have had and which may have influenced their deliberations. The Court of Appeal was therefore correct to conclude, as it did[33], that the separate consideration direction did not prevent there being a substantial miscarriage of justice in respect of the trial of the Srour count. The same conclusion must be reached about the Rifat counts.

39 As to the second point, it is of the utmost importance to recognise that the Court of Appeal's observations about the state of the evidence at trial were made in the course of considering the appellant's argument that the verdicts were unreasonable or could not be supported having regard to the evidence. It was in that context that Ashley JA said[34]:

> "the criticisms which [the appellant's] counsel made as to the state of the evidence do not bespeak a situation in which the jury *should have had* a reasonable doubt of the [appellant's] guilt. Having considered the evidence, I entertain no such doubt. ... [I]n my view the jury was in [sic] *entitled to conclude*, as I do, that the Crown case was overwhelming." (emphasis added)

The point made by Ashley JA was directed to the ground raised: was the verdict open to the jury? And the conclusion which he reached was expressed in terms apposite to that ground: the jury *should* not have had a reasonable doubt and they were *entitled* to return the verdicts which they did. But the reasoning at no time considered, as s 276(1)(b) and (c) required, whether the jury's verdicts were not only open but inevitable.

Conclusion and orders

40 The appellant having demonstrated to the Court of Appeal that evidence was received at the trial of the Rifat counts that should not have been admitted, it was well open to the Court of Appeal to be satisfied that there was a substantial miscarriage of justice in respect of those counts. Whether, having regard to the

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32 (2011) 213 A Crim R 382 at 398 [70].

33 (2011) 213 A Crim R 382 at 399 [71].

34 (2011) 213 A Crim R 382 at 403 [101]-[102].

whole of the evidence at trial, the Court of Appeal could conclude that the verdicts the jury returned in respect of the Rifat counts were inevitable (because the jury could not have entertained a reasonable doubt) is a question which has not been considered by that Court. It cannot be decided by this Court because it does not have the full record of the trial available to it. Because the Court of Appeal did not examine whether the appellant's convictions on the Rifat counts were inevitable, the matter should be remitted to the Court of Appeal for it to consider again whether there was "a substantial miscarriage of justice" in respect of the Rifat counts.

41 The appeal to this Court should be allowed and the matter remitted to the Court of Appeal for its further consideration.

GAGELER J.

Introduction

42 The "modern approach to statutory interpretation"[35]:

> "(a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means … one may discern the statute was intended to remedy". (footnote omitted)

43 That modern contextual approach ordinarily requires that statutory language re-enacted in an identical form after it has acquired a settled judicial meaning be taken to have the same meaning[36]. It equally requires that, changes of drafting style aside, statutory language re-enacted in an altered form after it has acquired a settled judicial meaning be taken to have a different meaning[37]. Were it otherwise, legislative policy choices would be blurred and orderly legislative reform would be impeded.

44 The Supreme Court of Canada reflected that concern, even before the modern era of statutory interpretation, when it explained[38]:

> "when we see in statutes *in pari materiâ*, by the very same legislature, additional words ... to a prior enactment, we would be setting at naught the very clear intention of the legislature if we gave to the last enactment the same construction that had been judicially given to the prior one ... We cannot so read out of a statute expressions that must be held to have deliberately been inserted so as to make the new statute different from the prior one."

45 Section 276 of the *Criminal Procedure Act* 2009 (Vic) was not cut from whole cloth. It was tailored from the common form criminal appeal statute which had existed in Victoria for almost a century. The similarities and

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35 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408; [1997] HCA 2.

36 *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96 at 106; [1994] HCA 34.

37 *Amalgamated Wireless (A/sia) Ltd v Philpott* (1961) 110 CLR 617 at 624; [1961] HCA 31.

38 *City of Ottawa v Hunter* (1900) 31 SCR 7 at 10.

differences of its language, and the difference of its structure, are relevant to its construction. They are essential features of its legislative design.

Common form criminal appeal statute

46 The common form criminal appeal statute, which derived from the *Criminal Appeal Act* 1907 (UK) and which continues to exist in most Australian States other than Victoria as well as in New Zealand[39], requires a court of criminal appeal to allow an appeal against conviction "if it thinks" that one or more of three criteria is or are met and in any other case to dismiss the appeal. The three criteria were stated in a single unbroken sentence in successive versions of the common form criminal appeal statute in Victoria[40]. For ease of comparison with s 276, it is convenient nevertheless to assign a lettered paragraph to each criterion. The first – paragraph (a) – is that "the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence". The second – paragraph (b) – is that "the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law". The third – paragraph (c) – is that "on any ground there was a miscarriage of justice". The requirement for a court of criminal appeal to allow the appeal if it thinks that one or more of those criteria is or are met is expressed to be subject to a proviso. The proviso is that, notwithstanding that the court of criminal appeal is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, the court may dismiss the appeal "if it considers that no substantial miscarriage of justice has actually occurred".

47 The common form criminal appeal statute is therefore structured so as to require a court of criminal appeal first to determine whether or not it thinks that one or more of the three criteria requiring it to allow an appeal against conviction is or are met and, if so, then to determine whether or not it considers that no substantial miscarriage of justice has actually occurred so as to be able nevertheless to dismiss the appeal in the application of the proviso. There has never been doubt that a court of criminal appeal making those determinations performs a curial function distinct from that of a jury[41]. Nor has there ever been doubt that the court of criminal appeal necessarily performs that function

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39 *Criminal Appeal Act* 1912 (NSW), s 6(1); *Criminal Code* (Q), s 668E; *Criminal Law Consolidation Act* 1935 (SA), s 353(1); *Criminal Code* (Tas), s 402; *Crimes Act* 1961 (NZ), s 385(1).

40 *Criminal Appeal Act* 1914 (Vic), s 4(1); *Crimes Act* 1958 (Vic), s 568(1).

41 *R v Weaver* (1931) 45 CLR 321 at 333; [1931] HCA 23.

"according to its [own] assessment of the facts of the case"[42], "making due allowance for the 'natural limitations' that exist in the case of an appellate court proceeding wholly or substantially on the record"[43]. The content of each criterion and the relationship between each criterion and the proviso, on the other hand, has been the subject of voluminous and evolving judicial exegesis.

48 With respect to the criterion in paragraph (a) of the common form criminal appeal statute – that "the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence" – the now settled understanding is that the question a court of criminal appeal must ask itself is "whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty"[44]. In answering that question, a doubt experienced by the court of criminal appeal on the basis of its own independent review and assessment of the evidence "will be a doubt which a jury ought also to have experienced" unless the "jury's advantage in seeing and hearing the evidence is capable of resolving [the] doubt experienced by [the] court"[45]. The conclusion of a court of criminal appeal that it was not open to the jury to be satisfied beyond reasonable doubt that the accused was guilty inevitably involves a conclusion that a substantial miscarriage of justice has actually occurred: the substantial miscarriage of justice having long been identified as lying in the existence of "a significant possibility that an innocent person has been convicted"[46]. The proviso has for that reason been treated as having no potential for application where the criterion in paragraph (a) is made out.

49 The criterion in paragraph (b) of the common form criminal appeal statute – that "the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law" – has always been understood to have the effect that "if there is a wrong decision of any question of law the appellant has the right to have his appeal allowed, unless the case can be brought within the proviso"[47]. And it has always been understood

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42 *Wilde v The Queen* (1988) 164 CLR 365 at 372; [1988] HCA 6. See also *Ratten v The Queen* (1974) 131 CLR 510 at 515-516; [1974] HCA 35.

43 *Weiss v The Queen* (2005) 224 CLR 300 at 316 [41]; [2005] HCA 81, citing *Fox v Percy* (2003) 214 CLR 118 at 125-126 [23]; [2003] HCA 22.

44 *M v The Queen* (1994) 181 CLR 487 at 493; [1994] HCA 63.

45 (1994) 181 CLR 487 at 494.

46 (1994) 181 CLR 487 at 494.

47 *Mraz v The Queen* (1955) 93 CLR 493 at 514; [1955] HCA 59, quoting *Cohen and Bateman v The King* (1909) 2 Cr App R 197 at 207.

that it is for the respondent and not the appellant to establish to the satisfaction of the court of criminal appeal that the case is within the proviso[48] – that "no substantial miscarriage of justice has actually occurred".

50 For a very long time it was understood to be an essential condition of that satisfaction that the respondent persuade the court that the wrong decision of the question of law did not deprive the appellant of a chance of acquittal that would have been fairly open. The underlying understanding was that "every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed"[49]. On that understanding, loss of a chance of acquittal that would otherwise have been fairly open amounted, without more, to a substantial miscarriage of justice. If the respondent failed to show that a wrong decision of a question of law did not deprive the appellant of a chance of acquittal that would otherwise have been fairly open, the court of criminal appeal could not conclude that no substantial miscarriage of justice had actually occurred[50]. One formulation of the essential condition was in terms that the appeal was to be allowed and the conviction set aside unless the respondent could establish that "had there been no blemish in the trial, an appropriately instructed jury, acting reasonably on the evidence properly before them and applying the correct onus and standard of proof, would inevitably have convicted the accused"[51]. The formulation left open a question (in practice rarely determinative) as to whether the inevitability of conviction was to be gauged by reference to the actual trial jury (acting reasonably) or to a hypothetical jury (acting reasonably)[52].

51 In 2005, *Weiss v The Queen*[53] overturned that understanding of the essential condition of the respondent persuading the court of criminal appeal that "no substantial miscarriage of justice has actually occurred". *Weiss* was a case in which consideration of the proviso arose because the paragraph (b) criterion had been made out. As reformulated, the essential condition became that the court of criminal appeal itself be persuaded "that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the

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48 *Mraz v The Queen* (1955) 93 CLR 493 at 514, quoting *Cohen and Bateman v The King* (1909) 2 Cr App R 197 at 207.

49 *Mraz v The Queen* (1955) 93 CLR 493 at 514.

50 *Wilde v The Queen* (1988) 164 CLR 365 at 371-372.

51 (1988) 164 CLR 365 at 372.

52 *R v Weiss* (2004) 8 VR 388 at 400-401 [70].

53 (2005) 224 CLR 300.

jury returned its verdict of guilty"[54]. The reasons given in *Weiss* for that reformulation included: that such entitlement as an accused person may have to the verdict of a jury is necessarily qualified by the possibility of appellate intervention so that the real question is ultimately whether appellate intervention is justified by the statutory language[55]; that "*any* departure from trial according to law, regardless of the nature or importance of that departure" (emphasis in original) is necessarily a "miscarriage of justice"[56]; and that important to the construction and application of the proviso are both its "permissive language" and "the way in which the condition for the exercise of [the] power is expressed (if it considers that no *substantial* miscarriage of justice has *actually* occurred)" (emphasis in original)[57].

52 The reformulation in *Weiss* must, of course, be applied by courts of criminal appeal "[u]nless, and until, a majority of this Court qualifies what is said in [it]"[58]. However, it is by no means apparent that the *Weiss* reformulation has any application to a statutory provision in which the criteria for appellate intervention are differently expressed, in which the appellant in every case bears the burden of persuading the court of criminal appeal that a criterion is met, and in which errors of law are governed by the same criterion as other errors and "irregularities".

53 The criterion in paragraph (c) of the common form criminal appeal statute – that "on any ground there was a miscarriage of justice" – has always been significant to an appreciation of the innovation involved in the common form criminal appeal statute. It is even more significant to an appreciation of the further innovation involved in s 276. The requirement for a court of criminal appeal, subject to the proviso, to allow an appeal against a conviction on demonstration by an appellant of a miscarriage of justice other than "an error in strict law" was said to have been "the greatest innovation" made by the common form criminal appeal statute, to lose sight of which "is to miss the point of the legislative advance"[59]. It has been observed that the English court of criminal

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54 (2005) 224 CLR 300 at 317 [44]. See also *Cooper v The Queen* [2012] HCA 50 at [21].

55 (2005) 224 CLR 300 at 312 [30].

56 (2005) 224 CLR 300 at 308 [18].

57 (2005) 224 CLR 300 at 317 [44].

58 *Libke v The Queen* (2007) 230 CLR 559 at 597 [115]; [2007] HCA 30.

59 *Hargan v The King* (1919) 27 CLR 13 at 23; [1919] HCA 45, quoted in *M v The Queen* (1994) 181 CLR 487 at 493.

appeal "[f]rom the beginning" consistently regarded its "duty to quash a conviction when it [thought] that on any ground there was a miscarriage of justice" as "covering not only cases where there is affirmative reason to suppose that the appellant is innocent, but also cases of quite another description"[60]. Applying the criterion in paragraph (c) of the common form criminal appeal statute, it would[61]:

> "set aside a conviction whenever it appear[ed] unjust or unsafe to allow the verdict to stand because some failure [had] occurred in observing the conditions which, in the court's view, [were] essential to a satisfactory trial, or because there [was] some feature of the case raising a substantial possibility that, either in the conclusion itself, or in the manner in which it has been reached, the jury may have been mistaken or misled".

54 The same approach was adopted by courts of criminal appeal in Australia. The words "on any ground" in paragraph (c) of the common form criminal appeal statute "do not postulate the demonstration of error" but rather "simply require that 'something occurred or did not occur' in the trial"[62]. The thing that occurred or did not occur in the trial may be an "irregularity" falling short of a failure to observe some condition essential to a satisfactory trial – such as a misdirection or non-direction of fact[63] or what is shown to have been at the time of exercise[64] or in the light of developments at the trial[65] a wrong but legally available exercise of judicial discretion resulting in the admission of evidence prejudicial to the appellant. In those circumstances, it has been accepted that the criterion in paragraph (c) will be made out only where the appellant is able to establish a causal connection between the irregularity and the conviction in the sense that, but for the irregularity, the result might have been different and the appellant

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60 *Davies and Cody v The King* (1937) 57 CLR 170 at 180; [1937] HCA 27, quoted in *Nudd v The Queen* (2006) 80 ALJR 614 at 617 [4]; 225 ALR 161 at 162; [2006] HCA 9.

61 *Davies and Cody v The King* (1937) 57 CLR 170 at 180, quoted in *Nudd v The Queen* (2006) 80 ALJR 614 at 617 [4]; 225 ALR 161 at 162.

62 *TKWJ v The Queen* (2002) 212 CLR 124 at 134 [30]; [2002] HCA 46, quoting *R v Scott* (1996) 137 ALR 347 at 362-363.

63 See *Cohen and Bateman v The King* (1909) 2 Cr App R 197 at 207; *Simic v The Queen* (1980) 144 CLR 319 at 326; [1980] HCA 25; *Dhanhoa v The Queen* (2003) 217 CLR 1 at 13 [38], 15 [49], 18 [60]; [2003] HCA 40.

64 See *R v Gallagher* [1998] 2 VR 671 at 679-680.

65 See *R v Demirok* [1976] VR 244.

might have been acquitted[66]. Before *Weiss*, it also appears to have been accepted that, by establishing that the irregularity might have affected the conviction that actually occurred, the appellant would succeed not only in making out the criterion in paragraph (c) but also in negating the application of the proviso. In *Simic v The Queen*[67], for example, the irregularity that occurred in the trial was described as "a misstatement of an important matter of fact"[68]. After making clear that the onus of establishing a miscarriage of justice lay with the appellant, the Court said[69]:

> "Of course minor inaccuracies and omissions will not be likely to make it possible that the verdict was affected. Bare and remote possibilities may be disregarded, but if it is considered reasonably possible that the misstatement may have affected the verdict and if the jury might reasonably have acquitted the appellant if the misstatement had not been made, there will have been a miscarriage of justice, and a substantial one. In considering a question of this kind, the appellate court must have regard to the gravity of the misstatement as well as to the strength of the case against the appellant."

In this way, as the Court of Appeal of the Supreme Court of Victoria observed in 1997, courts had "been able to apply this legislation for almost a century without ... finding it necessary to decide what, if anything, is the difference between a miscarriage of justice and a substantial miscarriage of justice"[70].

55 Acknowledgment of the difference in approach required in the application of the criterion in paragraph (c) of the common form criminal appeal statute from that required in the application of the criterion in paragraph (b) underlay one of the qualifications made by the Supreme Court of New Zealand to its acceptance

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66 *TKWJ v The Queen* (2002) 212 CLR 124 at 146-147 [72]-[73]; *Dhanhoa v The Queen* (2003) 217 CLR 1 at 13 [38], 15 [49], 18 [60].

67 (1980) 144 CLR 319.

68 (1980) 144 CLR 319 at 326.

69 (1980) 144 CLR 319 at 332.

70 *R v Gallagher* [1998] 2 VR 671 at 679. See also *TKWJ v The Queen* (2002) 212 CLR 124 at 146 [71].

of *Weiss* in *R v Matenga*[71]. Referring specifically to paragraph (c), the Supreme Court stated[72]:

> "Few trials are perfect in all respects. Frequent use of the proviso may create the false impression that the appeal court is too ready to resort to it despite the existence of a miscarriage of justice. In the end, departing in this respect from *Weiss*, we consider that in the first place the appeal court should put to one side and disregard those irregularities which plainly could not, either singly or collectively, have affected the result of the trial and therefore cannot properly be called miscarriages. A miscarriage is more than an inconsequential or immaterial mistake or irregularity."

Applying *Weiss* subject to that qualification, the Supreme Court went on[73]:

> "Proceeding in this way and having identified a true miscarriage, that is, something which has gone wrong and which was *capable* of affecting the result of the trial, the task of the Court of Appeal under the proviso is then to consider whether that potentially adverse effect on the result may *actually*, that is, in reality, have occurred. The Court may exercise its discretion to dismiss the appeal only if, having reviewed all the admissible evidence, it considers that, notwithstanding there has been a miscarriage, the guilty verdict was inevitable, in the sense of being the only reasonably possible verdict, on that evidence. ... In order to come to the view that the verdict of guilty was inevitable the Court must itself feel sure of the guilt of the accused." (emphasis in original) (footnotes omitted)

56 The reasoning of the plurality in *Cesan v The Queen*[74] in substance adopted the same qualified approach. That reasoning illustrates that, after *Weiss*, the application of the criterion in paragraph (c) of the common form criminal appeal statute where there is an irregularity falling short of a failure to observe some condition essential to a satisfactory trial still requires the appellant to establish that the irregularity might have affected the result[75]. However, the same reasoning also illustrates that, after *Weiss*, the appellant will not thereby necessarily succeed in negating the application of the proviso. It remains open to

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71 [2009] 3 NZLR 145.

72 [2009] 3 NZLR 145 at 157 [30].

73 [2009] 3 NZLR 145 at 158 [31].

74 (2008) 236 CLR 358; [2008] HCA 52.

75 (2008) 236 CLR 358 at 391-393 [112]-[122].

the court of criminal appeal to apply the proviso to uphold the conviction if the court can nevertheless be persuaded to conclude that the evidence properly admitted at trial proved the appellant's guilt beyond reasonable doubt[76].

Interpreting and applying s 276

57 Section 276 is set out in the reasons for judgment of the majority and is not usefully set out again.

58 Some features of the legislative design of s 276 are readily apparent from its text and internal structure. First, s 276(2) makes clear that the criteria by reference to which the Court of Appeal can allow an appeal against conviction are exhaustively stated in s 276(1). Second, the opening words and internal structure of s 276(1) make clear that the Court of Appeal must allow an appeal if satisfied that any one or more of the criteria in paragraphs (a), (b) and (c) is or are met. They also make clear that the onus is in every case on the appellant to satisfy the Court that such a criterion is met. Third, the structure of paragraphs (a), (b) and (c) of s 276(1) also indicates that the common characteristic of the criteria they set out is a circumstance in which "there has been a substantial miscarriage of justice": paragraphs (a) and (b) cover particular circumstances where there will have been a substantial miscarriage of justice and paragraph (c) covers circumstances where "for any other reason" there has been a substantial miscarriage of justice.

59 Other features of the legislative design of s 276 come into focus when its text and structure are compared with those of the common form criminal appeal statute. The focus is sharper when its text and structure are studied in light of the settled understanding and continuing uncertainties that had come to exist by 2009 in the interpretation and application of the common form criminal appeal statute.

60 The criterion in paragraph (a) of s 276(1) is expressed in language identical to the criterion in paragraph (a) of the common form criminal appeal statute. It is therefore to be taken to have the same meaning as that which has been settled for paragraph (a) of the common form criminal appeal statute. An appellant is to satisfy the Court of Appeal that on the whole of the evidence it was not open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty. That is to say, the appellant must satisfy the Court of Appeal on the whole of the evidence that the jury must (as distinct from might) have entertained a reasonable doubt.

61 The criterion in paragraph (b) of s 276(1), in contrast, is expressed in language materially different from the criterion in paragraph (b) of the common form criminal appeal statute. Moreover, the language in which the criterion is

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76 (2008) 236 CLR 358 at 393-396 [123]-[132].

expressed draws on concepts that have been employed by courts of criminal appeal to explain and apply the criterion in paragraph (c) of the common form criminal appeal statute.

62 The criterion in paragraph (b) of s 276(1) has two critical features. First, the criterion is addressed to "an error or an irregularity in, or in relation to, the trial". It treats all errors or irregularities, whether of fact or of law, in the same way. It neither incorporates nor gives rise to any presumption that an erroneous decision on a question of law amounts to a miscarriage of justice. Whether or not an error or irregularity has resulted in a substantial miscarriage of justice is the very question it poses. Second, curial satisfaction that the criterion is met does not turn simply on satisfaction that: (a) the error or irregularity has occurred; and (b) there has been a substantial miscarriage of justice. It turns critically on satisfaction of the existence of a causal connection between the error or irregularity and a substantial miscarriage of justice: that there has been a substantial miscarriage of justice "as the result" of the error or irregularity. The same requirement for satisfaction of a causal connection with a substantial miscarriage of justice is evident in the language of the criterion in paragraph (c) of s 276(1): that there has been a substantial miscarriage of justice "for any other reason".

63 Applying the criterion in paragraph (b) of s 276(1) in the face of an identified error or irregularity, the question for the Court of Appeal is not: is the Court satisfied that there has been a substantial miscarriage of justice? The question, so stated, is too abstract and unfocused. It is apt to engage the Court of Appeal in an inquiry of a nature that is broader than and different from that which is warranted by the statutory language.

64 The question for the Court of Appeal is narrower and more specific: is the Court satisfied by the appellant that the identified error or irregularity has had the result that there has been a substantial miscarriage of justice? That question is essentially the question that was asked by a court of criminal appeal applying the criterion in paragraph (c) of the common form criminal appeal statute before *Weiss* in the face of a demonstrated irregularity. The difference, at most one of degree, is the substitution of "substantial miscarriage of justice" for "miscarriage of justice".

65 In what circumstances should the Court of Appeal be satisfied that an identified error or irregularity has had the result that there has been a substantial miscarriage of justice? "Miscarriage is not defined in the legislation but its significance is fairly worked out in the decided cases"[77]. The long experience of

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77 *Ratten v The Queen* (1974) 131 CLR 510 at 516, quoted in *Nudd v The Queen* (2006) 80 ALJR 614 at 617 [5]; 225 ALR 161 at 162.

courts of criminal appeal, in applying the criterion in paragraph (c) of the common form criminal appeal statute and in applying the proviso, suggests that it would be unwise, even if it were possible, to attempt to be exhaustive. Equally, that experience permits recognition of two categories of circumstances in which an identified error or irregularity can ordinarily be said to have had such a result. One category, relatively narrow in compass[78], is where the error or irregularity has impacted on some fundamental aspect of the trial process: where there has been non-observance of some condition essential to a satisfactory trial. The other, more general, category is where the error or irregularity has impacted negatively on the trial outcome: where, but for the error or irregularity, the appellant might have been acquitted.

66 Applying the criterion in paragraph (b) of s 276(1) in the face of an identified error or irregularity, and leaving to one side a case where the error or irregularity has impacted on some fundamental aspect of the trial process, the critical question for the Court of Appeal is ordinarily therefore: is the Court satisfied by the appellant that, but for the error or irregularity, the appellant might have been acquitted? The question is whether there is a reasonable possibility that the conviction, being open, would not have been entered if the error or irregularity had not occurred. Where the appellant has been found guilty by a jury, the question therefore is not: did the evidence properly admitted at trial require the jury to reach the conclusion that the appellant was guilty? It is not: would acquittal have been perverse? The question is rather: is it reasonably possible that the jury that actually convicted the appellant would have acquitted the appellant if the error or irregularity had not occurred? The question is to be answered having regard to the gravity of the error or irregularity in the context of the trial as a whole, including the strength of the case against the appellant and the manner in which the jury can be inferred to have reached the verdict that it did.

67 Stating the question in that way accords with the language and structure of paragraph (b) of s 276(1). More particularly, it gives weight to the similarities and differences in the language and structure of paragraph (b) of s 276(1) when compared with the common form criminal appeal statute. It departs in practice from the approach in *Weiss* because the legislative foundation for that approach has been removed.

68 Stating the question in that way also accords with the legislative intention revealed in the relevant extrinsic materials.

69 The explanatory memorandum to the Criminal Procedure Bill 2008 (Vic) explained that compared to the common form criminal appeal provision, s 276

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78 *Green v The Queen* (1997) 191 CLR 334 at 346-347; [1997] HCA 50.

"has been substantially changed as a result of a review of the grounds of appeal against conviction and the proviso"[79]. After adverting to the decision in *Weiss*, the explanatory memorandum went on to explain that s 276 "simplifies the appeal grounds without departing from the overall 'substantial miscarriage of justice' test"[80]. The explanatory memorandum said that "the current first ground of appeal is fundamentally sound"[81] but that[82]:

> "errors or irregularities in the trial should result in appeals being allowed when the problem could have reasonably made a difference to the trial outcome; or if the error or irregularity was of a fundamental kind depriving the appellant of a fair trial or amounting to an abuse of process (regardless of whether it could have made a difference to the trial outcome)".

It also emphasised that "the onus to persuade the court of the matters required for a successful appeal should be on the appellant" because "there is a presumption that, until the contrary is shown, a trial before judge and jury was fair and in accordance with law"[83].

70 In his second reading speech the Victorian Attorney-General observed that the common form criminal appeal statute, as then existing in Victoria, had been "drafted approximately 100 years ago", that the meaning of some of its words was unclear, that it was internally inconsistent and that *Weiss* had "added a level of complexity and uncertainty" to its application[84]. He added[85]:

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79 Victoria, Legislative Assembly, Criminal Procedure Bill 2008, Explanatory Memorandum at 100.

80 Victoria, Legislative Assembly, Criminal Procedure Bill 2008, Explanatory Memorandum at 101.

81 Victoria, Legislative Assembly, Criminal Procedure Bill 2008, Explanatory Memorandum at 101.

82 Victoria, Legislative Assembly, Criminal Procedure Bill 2008, Explanatory Memorandum at 102.

83 Victoria, Legislative Assembly, Criminal Procedure Bill 2008, Explanatory Memorandum at 101.

84 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 December 2008 at 4985.

85 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 December 2008 at 4985.

> "The provision and recent High Court authority also do not necessarily operate on the presumption that a trial before a judge and jury was conducted fairly and in accordance with law unless the appellant shows that it was not."

The Attorney-General continued[86]:

> "The bill addresses the fundamental problems that have plagued this provision. The bill will improve the operation and application of appeals against conviction ... by:
>
> removing the two-stage test and replacing it with a single stage test;
>
> retaining the 'substantial miscarriage of justice' test for determining whether an appeal should be allowed or refused. This is an appropriate test for determining when an appeal should be allowed; and
>
> requiring the appellant to satisfy the court that the appeal should be allowed.
>
> *The new approach will mean that errors or irregularities in the trial will result in appeals being allowed when the problem could have reasonably made a difference to the trial outcome; or if the error or irregularity was of a fundamental kind depriving the appellant of a fair trial*. The appeal process will therefore operate to ensure that the accused receives a fair trial. It will also ensure that appeals will not be allowed on technical points that did not affect the outcome of the trial or the fairness of the proceeding." (emphasis added)

71 To formulate the question for the Court of Appeal, applying the criterion in paragraph (b) of s 276(1) in the face of an identified error or irregularity, in terms of whether a jury verdict was "inevitable" may not be inappropriate in the circumstances of a particular case, provided the concept of "inevitability" is used in the sense of referring to the absence of a reasonable possibility of a different verdict. But the formulation is best avoided. It runs the risk of misapplying the onus and of overlooking the necessity for a causal connection to be affirmatively established. It thereby runs the risk of broadening the appellate inquiry and, with that, the scope for appellate intervention, beyond the statutory mandate.

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86 Victoria, Legislative Assembly, *Parliamentary Debates* (Hansard), 4 December 2008 at 4985-4986.

The result in the appeal

72 The essential facts are set out in the reasons for judgment of the majority.

73 The conclusion of the Court of Appeal, as expressed by Ashley JA, was that "it cannot be said that any substantial miscarriage was occasioned to the applicant in respect of the Rifat counts by reason of the refusal to sever"[87]. The reasons for that conclusion, in substance, were as follows. The verdicts of guilty on the Rifat counts were open on the evidence that was properly admitted on those counts. The prosecution case on those counts was "very strong", indeed "overwhelming"[88]. The trial judge had given a clear direction that evidence on the Srour count was not to be taken into account in determining the Rifat counts[89]. There was no reason to consider that the jury failed to heed that direction. And "[t]he course of the jury's verdicts, which must be brought to consideration, strongly suggests that it gave separate consideration to each count, and only found a count established where the evidence of guilt of the particular accused was clear-cut"[90].

74 The conclusion of the Court of Appeal, and the reasons stated for it, reveal no error of principle. Special leave to appeal having been granted, however, the question in the appeal is not limited to one of principle. The grounds of appeal also include a limited challenge to the Court of Appeal's application of principle.

75 The ultimate question in the appeal is whether this Court, standing in the shoes of the Court of Appeal, is satisfied on the arguments presented by the appellant that there is a reasonable possibility that, but for the failure to sever, the jury would have acquitted on the Rifat counts. On the arguments presented by the appellant, it should not be satisfied.

76 It may be accepted that Mr Srour's evidence that the appellant was "a standover man" and that the appellant had told Mr Srour that he bullied and assaulted people "to get things" was highly prejudicial. Notwithstanding the strength of the trial judge's direction, it is difficult to conceive that the jury could have wholly ignored the evidence in returning guilty verdicts on the Rifat counts. It is by no means clear that the Court of Appeal drew any inference that the jury did ignore that evidence. If the Court of Appeal drew that inference, the Court of Appeal should not have done so.

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87 *Baini v The Queen* (2011) 213 A Crim R 382 at 398 [70].

88 (2011) 213 A Crim R 382 at 398 [70], 403 [102].

89 (2011) 213 A Crim R 382 at 398 [70].

90 (2011) 213 A Crim R 382 at 398-399 [70].

77 That, argues the appellant, is enough for the appeal to be allowed: "it is inappropriate to consider whether the failure to sever would have made a difference to the outcomes on the Rifat counts". The argument must be rejected. Accepting that the jury is unlikely to have ignored Mr Srour's evidence in returning guilty verdicts on the Rifat counts, it remains for the appellant to establish a reasonable possibility that the jury would have acquitted the appellant had Mr Srour's evidence not been placed before it. The question is not whether it would have been perverse for the jury to acquit the appellant on the evidence properly admitted on the Rifat counts. The question is whether there is shown to be a reasonable possibility that the guilty verdicts on the Rifat counts that were in fact returned by the jury, being open, would not have been returned if the Srour count had been severed and if Mr Srour's evidence had not been placed before the jury.

78 The appellant has not challenged the findings of the Court of Appeal that the verdicts of guilty on the Rifat counts were open on the evidence properly admitted on those counts and that the prosecution case on those counts was overwhelming. The jury undertook its task diligently, acquitting the appellant on some counts, but finding guilt where the evidence was strong. Accepting that the jury is unlikely to have ignored Mr Srour's evidence in returning guilty verdicts on the Rifat counts, the appellant has not shown there to be a reasonable possibility that he would have been acquitted on the Rifat counts if Mr Srour's evidence had not been placed before the jury.

79 The appeal should be dismissed.