HIGH COURT OF AUSTRALIA

FRENCH CJ,
CRENNAN, KIEFEL, BELL AND KEANE JJ

Matter No S313/2013

DO YOUNG (AKA JASON) LEE — APPELLANT

AND

THE QUEEN — RESPONDENT

Matter No S314/2013

SEONG WON LEE — APPELLANT

AND

THE QUEEN — RESPONDENT

Lee v The Queen
Lee v The Queen
[2014] HCA 20
21 May 2014
S313/2013 & S314/2013

ORDER

In each matter:

1. *Appeal allowed.*

2. *Set aside paragraph 2 of the order of the Court of Criminal Appeal of the Supreme Court of New South Wales made on 3 April 2013 and, in its place, order that:*

    (a) the appeal be allowed;

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

    (c) a new trial be had.

On appeal from the Supreme Court of New South Wales

Representation

M Thangaraj SC with G A Bashir for the appellant in S313/2013 (instructed by Nyman Gibson Stewart)

T A Game SC with S S Pararajasingham for the appellant in S314/2013 (instructed by Nyman Gibson Stewart)

N J Adams SC with J E Davidson and H R Roberts for the respondent in both matters (instructed by Solicitor for Public Prosecutions (NSW))

CATCHWORDS

Lee v The Queen

Criminal law – Appeal against conviction – Where appellants gave evidence before New South Wales Crime Commission ("Commission") – Where non-publication direction made under s 13(9) of *New South Wales Crime Commission Act* 1985 (NSW) – Where transcripts of appellants' evidence before Commission published to members of New South Wales Police Force and officers of Director of Public Prosecutions – Whether publication of appellants' evidence before Commission meant subsequent trial differed in fundamental respect from that which our system of criminal justice seeks to provide – Whether publication of appellants' evidence before Commission gave rise to miscarriage of justice.

Words and phrases – "miscarriage of justice", "non-publication direction".

Criminal Appeal Act 1912 (NSW), s 6(1).
New South Wales Crime Commission Act 1985 (NSW), s 13(9).

1 FRENCH CJ, CRENNAN, KIEFEL, BELL AND KEANE JJ. The appellants and one Brendon Pak were the subject of an investigation by the New South Wales Crime Commission ("the Commission"). As part of that investigation and pursuant to powers given by the *New South Wales Crime Commission Act* 1985 (NSW) ("the NSWCC Act")[1], the appellants were summoned by the Commission to give evidence before it. These appeals concern the publication of that evidence to members of the New South Wales Police Force and to officers of the Director of Public Prosecutions ("the DPP"). The appellants submit that their joint trial on various drug and firearms offences miscarried as a result of the DPP's possession and possible use of that evidence.

2 The appellant in the first matter, Jason Lee ("the first appellant"), was examined by the Commission on two occasions, on 26 November and 1 December 2009. At the time of the examinations, he had not been charged with the offences in question.

3 Section 13(9) of the NSWCC Act required the Commission to make a direction prohibiting the publication of evidence given before it where publication might prejudice the fair trial of a person who may be charged with an offence. A direction was made by the Commissioner on the occasion of the first appellant's first examination in these terms:

> "I direct that any evidence given by this witness or tendered or produced in the presence of this witness or any information that might enable this witness to be identified as a person who has given evidence before the Commission, shall not be published except in such manner and to such persons as the Commission specifies."

4 It is accepted that this direction continued to apply to the first appellant's second examination.

5 On 7 December 2009, members of the New South Wales Police Force executed a search warrant at premises in Sydney, where a firearm and a quantity of white powder in boxes labelled "washing powder" were found. In another part of the premises, another weapon, a quantity of white powder and a substantial

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1 The *New South Wales Crime Commission Act* 1985 (NSW) has been replaced by the *Crime Commission Act* 2012 (NSW). Section 45 of the *Crime Commission Act* 2012 is, however, in similar terms to the relevant provision under the *New South Wales Crime Commission Act* 1985, namely s 13(9).

quantity of cash were found. The first appellant was charged with possession of prohibited firearms and an offence in the nature of money laundering, connected to the cash found at the premises. A strong suspicion was held that the powder seized was drugs, but drugs charges could not be laid until tests of the powder had been completed.

6 The appellant in the second matter, Seong Won Lee ("the second appellant"), is the first appellant's son. The second appellant was present at the premises when the search warrant was executed and was charged with firearms offences. He was examined on 16 December 2009. At that time, charges against both appellants relating to the supply of prohibited drugs were imminent. A direction under s 13(9) was not made when the second appellant came to be examined, but it was accepted by the Crown in the court below that such a direction ought to have been made. That is clearly correct, as the supply of drugs charges were, at the time, anticipated. These proceedings have been conducted on the basis that the second appellant's evidence before the Commission was subject to a direction in the same terms as that set out in relation to the first appellant above.

7 Pseudoephedrine was subsequently found in some of the powder. In May 2010, the first appellant was charged with two counts of the supply of prohibited drugs, and the second appellant with one count of supply and, alternatively, of being knowingly concerned in the first appellant's supply of the drugs found in one part of the premises searched by police.

8 The transcripts of the appellants' evidence before the Commission were published by the Commission to the police and to the DPP. Documents which had been produced by the first appellant to the Commission were also made available to potential witnesses, the police and the DPP. The focus of these appeals is on the publication of the transcripts of the appellants' evidence to the DPP.

9 In July 2010, a solicitor with the DPP who was preparing the prosecution of the charges against the appellants emailed the police officer who had been seconded to the Commission and had laid the charges against the appellants ("the charging officer")[2]. The solicitor asked if she could see the transcripts of the appellants' evidence given before the Commission, "especially if it is something that defence are going to try & rely on – specifically that they had no knowledge

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2 *New South Wales Crime Commission Act* 1985, s 32(5).

that the washing powder was actually drugs." The charging officer forwarded the email to an officer of the Commission, who advised the counsel assisting the Commissioner, regarding the transcripts, that the DPP "need[s] to know whether there is content in them which the defence may rely on". The counsel assisting forwarded this email to the Commissioner. A short time later, the Commissioner responded, "[a]pproved". The transcripts of the appellants' evidence before the Commission were made available to the DPP. It is not suggested that, in approving this publication, the Commissioner turned his mind to the purpose of s 13(9) and the direction which had been made. The Crown's concession that publication was unlawful, discussed later in these reasons, would appear to accept that he did not.

10 At a pretrial hearing held in the District Court of New South Wales on 23 November 2010, a question concerning the relevance of evidence of property owned by a company controlled by the first appellant to the drugs charges was raised. In the course of discussion, the Crown Prosecutor advised the Court that this evidence:

> "is led to rebut any innocent explanation of, firstly, the cash that was found in the unit, but also we say it goes to the possession of the drugs, because we say that is the only rational explanation for not only the cash, but the property themselves that has been purchased by the company supports that suggestion."

The prosecution case relied upon the presence of the money, the drugs and the guns at the premises to support an inference of guilt respecting the drugs charges. The Crown Prosecutor continued:

> "[T]he Crown has nothing much to go on as to how the defence will be run, and obviously not required to indicate how they are going to run their defence, but both of the accused were examined at the Crime Commission, and whilst that evidence isn't admissible in these proceedings I suppose it gives us a bit of an idea where they might be heading …
>
> Well we are not in a position to lead that evidence. All I'm saying, your Honour, is that because they were given the usual rider at the commencement of their evidence when objection's taken that it can't be used against them. But there's things said there to the Commission, which, as I say, give the Crown at least a possible scenario for where the defence might suggest that there's some innocent explanation about, not only the money in the unit, but they don't know anything about drugs.

> That innocent explanation in terms of how it all connects up with the property is the father Jason Lee, for example, in his evidence at the Crime Commission indicated he'd received large amounts of money from--".

At this point, senior counsel for the first appellant interrupted and complained about the prosecution apparently having been provided with transcripts of evidence given before the Commission. The Crown Prosecutor reiterated that the prosecution would present a case which rebutted any innocent explanation about the money and the drugs. In the result, the Court ordered that the money laundering charge be tried separately from the drugs and firearms charges, but that the evidence in relation to the cash found at the premises could be led with respect to the drugs charges. No further discussion was had about the prosecution's possession of the transcripts of the appellants' evidence before the Commission. In fact, the transcripts were, at that time, part of the prosecution brief, a copy of which had been provided to the appellants' legal representatives.

11 On 16 March 2011, the first appellant was found guilty on two counts of the supply of prohibited drugs and one count of possessing a prohibited firearm. The second appellant was found guilty on the alternative count of being knowingly concerned in the first appellant's supply of drugs found in one part of the premises searched by police on 7 December 2009, as well as four counts relating to the possession of firearms.

12 The appellants' legal representatives were aware, before the trial, that the prosecution was in possession of the transcripts of the appellants' evidence before the Commission. Indeed, the second appellant's solicitor later said that the publication of the transcript of the second appellant's evidence foreclosed the possibility that the second appellant would give evidence at trial. The first appellant's solicitor had been present when the Commission made the only direction of non-publication. Neither the appellants' legal representatives nor the Crown Prosecutors having the carriage of the pretrial hearings and the trials appear to have turned their minds to how the prosecution came to be in possession of the transcripts. It is possible that they misapprehended the extent of the Commission's power to release the transcripts. At all times, that power was limited by the protective purpose of s 13(9).

13 However, the appellants' legal representatives did not know that the transcripts of the appellants' evidence before the Commission had been supplied to the DPP, at the DPP's request, in order that the DPP could ascertain any defences the appellants might raise. This information was only revealed to them on 21 August 2012, a few days before their appeals against conviction were

heard by the Court of Criminal Appeal of the Supreme Court of New South Wales.

14 The appellants' appeals from their convictions were then amended to claim that there had been a miscarriage of justice within the meaning of s 6(1) of the *Criminal Appeal Act* 1912 (NSW), by reason of the prosecution's possession and possible use of the appellants' evidence given before the Commission. The Court of Criminal Appeal (Basten JA, Hall and Beech-Jones JJ) dismissed the appeals[3].

15 At the hearing of the appeals, the Crown Prosecutor who had had the conduct of the trial was cross-examined, to a limited extent. As one might expect, he agreed that it was "interesting" and "informative" to know what the defence might say. He said that the transcripts of the evidence given before the Commission gave the prosecution some knowledge of what might be a defence in relation to the cash, and that other material from the Commission suggested that what might be relied on by the first appellant as an explanation might not be truthful. Answers given by the second appellant before the Commission must also have been of assistance to the prosecution in its preparation of its case. It is neither necessary nor appropriate to detail those answers.

16 The Crown Prosecutor believed that he was entitled to read the transcripts, although he conceded that he had thought it "unusual" that he had materials which seemed to disclose the defence case. But he did not take the matter further. He did not enquire whether the transcripts should have been provided to him.

The Crown's concession in the Court of Criminal Appeal

17 In written submissions filed in the Court of Criminal Appeal, the Crown conceded that:

> "In view of the protective purpose of s 13(9) of the NSWCC Act in relation to a fair trial, the Crown concedes that the dissemination to the DPP was unlawful, in the unusual circumstances of this case, and that the appellants' trial miscarried in respect of the drugs charges … The Crown does not make this concession in respect of the appellants' trial on the weapons charges".

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3 *Lee v The Queen* [2013] NSWCCA 68.

The Crown, however, submitted that neither a verdict of acquittal nor a permanent stay would be appropriate, but, implicitly, accepted that an order for retrial would.

18 The Court of Criminal Appeal expressed reservations about accepting the concession. This resulted in a withdrawal of part of the concession. The concession that the publication had been unlawful was maintained, but it was no longer conceded that there had been a miscarriage of justice concerning the drug convictions.

19 As these reasons will explain, the concession first made was correct, though it did not go far enough. The appellants' trial miscarried in a fundamental respect. The appeals should have been allowed on that ground. Because the prosecution case connected the firearms, the money and the drugs, there should have been orders quashing the convictions on all charges and a retrial ordered.

Section 13(9) and its protective purpose

20 The NSWCC Act, in common with the Commonwealth legislation[4] considered in *X7 v Australian Crime Commission*[5], has its origins in the earlier *National Crime Authority Act* 1984 (Cth), which provided the National Crime Authority with coercive investigatory powers. Those powers included a power of compulsory examination[6], for the purpose of co-ordinating investigation of serious and organised crime.

21 The Commission established by the NSWCC Act consisted of a Commissioner and such Assistant Commissioners as were appointed to exercise the functions given by the NSWCC Act (ss 5, 5B). The principal functions of the Commission included: investigating matters relating to a relevant criminal activity which had been referred to it by the Commission's Management Committee[7]; assembling of evidence admissible in the prosecution of a person for a relevant offence and the furnishing of such evidence to the DPP; furnishing

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4 *Australian Crime Commission Act* 2002 (Cth).

5 (2013) 248 CLR 92; [2013] HCA 29.

6 *National Crime Authority Act* 1984 (Cth), ss 28, 30.

7 Which comprised the Minister for Police, the Commissioner of Police, the Chair of the Board of the Australian Crime Commission and the Commissioner: s 24(1).

reports relating to illegal drug trafficking and organised and other crime; and disseminating investigatory, technological and analytical expertise to such persons or bodies as the Commission thought fit (s 6(1)). The Commission could, with the approval of the Management Committee, disseminate intelligence and information to such persons or bodies as the Commission thought appropriate (s 7(a)).

22 For the purpose of its investigations, the Commission could hold hearings (s 13(1)). A hearing was to be held in private and the Commission could give directions as to the persons who could be present (s 13(5)). A member of the Commission had power to summon a person to appear before the Commission to give evidence and to produce such documents or things as were referred to in the summons (s 16(1)) and the Commission could require the person to give evidence on oath or affirmation (s 16(5)). A person summoned to appear as a witness was required not to fail to attend without reasonable excuse (s 18(1)) and was not excused from answering any question or producing any document on the ground that the answer or production could incriminate or tend to incriminate him or her, or on any other ground (s 18B(1)).

23 The terms of s 18B(1) affected the privilege against self-incrimination. It is not in dispute that the sub-section applied to the appellants as persons who might be charged with relevant offences. Section 18B(2) provided that any answer made, or document produced, by a witness at a hearing before the Commission would not be admissible in evidence against the person in any proceedings, civil or criminal. The exceptions to that prohibition are not presently relevant. It was these provisions to which the Crown Prosecutor alluded in the pretrial hearing referred to above. He also referred to the provision by which a witness could be taken to have objected to all answers or productions, without having to do so on each occasion (s 18B(5)). However, the Crown Prosecutor apparently did not have in mind the terms of s 13(9) and whether a direction had been made pursuant to it.

24 Section 13(9) provided:

"The Commission may direct that:

(a) any evidence given before it,

(b) the contents of any document, or a description of any thing, produced to the Commission or seized pursuant to a search warrant issued under section 11,

(c) any information that might enable a person who has given or may be about to give evidence before the Commission to be identified or located, or

(d) the fact that any person has given or may be about to give evidence at a hearing,

shall not be published, or shall not be published except in such manner, and to such persons, as the Commission specifies, and the Commission shall give such a direction if the failure to do so might prejudice the safety or reputation of a person or prejudice the fair trial of a person who has been or may be charged with an offence."

25 A person who contravened a direction made pursuant to s 13(9) was guilty of an offence punishable by fine or imprisonment for a period not exceeding two years, or both (s 13(12)).

26 Section 13(10) and (11) provided for an exception to the non-publication of evidence the subject of a direction under s 13(9) which involved the courts. Where a person had been charged with an offence before a New South Wales court and the court considered it may be desirable, in the interests of justice, that evidence given before the Commission, in respect of which a direction under s 13(9) had been given, be made available to the person or the person's legal representative, the court could give the Commission a certificate to that effect, upon which the Commission was to make the evidence available to the court. If the court, after examining the evidence, was satisfied that the interests of justice so required, the court could make the evidence available to the person charged or the person's legal representative.

27 The involvement of the courts in determining whether evidence would be released confirms the importance of the confidentiality that s 13 attached to evidence given before the Commission. The larger question, regarding the interests of justice, is one which is usually reserved for courts. The Commission's considerations were more confined, but were nonetheless important in ensuring the protection which s 13(9) sought to provide for the fair trial of the person examined.

28 The NSWCC Act provided extraordinary powers to the Commission to compel the giving of evidence by a person against the person's interest and which might incriminate the person. These powers were provided in order that the Commission could more effectively investigate serious and organised crime. But the NSWCC Act also provided safeguards. Section 13(9) obliged the

Commission to make a direction prohibiting publication of evidence before it, if not to do so might prejudice the person's fair trial. If there was a risk of prejudice, s 13(9) required a direction to be made. Whether such a risk existed was a question to be assessed objectively. In considering that question, the Commission would be expected to adopt a careful approach reflecting the protective purpose for which the duty to make such a direction was imposed on it. A decision, inconsistent with that duty or purpose, to publish transcripts or documents which were, or should have been, the subject of such a direction would not be a decision which the Commission was empowered by the Act to make.

29 The making of a direction under s 13(9) was not the first, or the only, occasion on which the Commission was required to consider the possible effects of a compulsory examination on a person's trial. Section 13(5) required that the Commission determine who should (and, it would follow, who should not) be present at the private hearing. It could set at nought the protection afforded by s 13(9) if persons associated with the possible prosecution of the person giving evidence were present.

30 Nor was the Commission's decision whether to make a direction, or to specify a person to whom publication should be made, exempt from judicial review. It does not appear to have been doubted by this Court that decisions of this kind, relating to the publication of evidence obtained on compulsory examination by an investigative authority, are subject to review[8]. In *X7*, French CJ and Crennan J pointed out[9] that the failure of an examiner to provide any, or any adequate, direction of this kind could be met with remedies by way of judicial review. A fortiori such remedies, including in this case prohibition and certiorari, could apply to a decision to publish transcripts or documents contrary to, or without regard to, the duty imposed on the Commission by s 13(9).

31 In *X7*, a majority of this Court held that the powers of compulsory examination given to the Australian Crime Commission were not to be construed as applying to persons already charged with offences the subject of the examination. To do so would be to depart from the accusatorial nature of the criminal justice system in a fundamental respect. Clear words or those of

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8 See, for example, *Johns v Australian Securities Commission* (1993) 178 CLR 408; [1993] HCA 56.

9 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 124 [59].

necessary intendment were therefore necessary and neither were present in the legislation in question. As such, it was not necessary for the majority in *X7* to consider the protective purpose of a provision similar to s 13(9)[10]. However, French CJ and Crennan J, who were in dissent, did so. It was a matter of some significance to their Honours' reasoning that the legislation, in providing for a direction regarding non-publication, did so in order to safeguard the examined person's trial as fair[11].

32 Our system of criminal justice reflects a balance struck between the power of the State to prosecute and the position of an individual who stands accused. The principle of the common law[12] is that the prosecution is to prove the guilt of an accused person. This was accepted as fundamental in *X7*[13]. The principle is so fundamental that "no attempt to whittle it down can be entertained"[14] albeit its application may be affected by a statute expressed clearly or in words of necessary intendment[15]. The privilege against self-incrimination may be lost, but

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10 *Australian Crime Commission Act* 2002, s 25A(9).

11 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 110-111 [26]-[27], 115 [36], 123 [55], [57].

12 *Woolmington v The Director of Public Prosecutions* [1935] AC 462; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477; [1993] HCA 74.

13 (2013) 248 CLR 92 at 119-120 [46], 135-136 [100]-[102], 153 [159]; see also *Lee v NSW Crime Commission* (2013) 87 ALJR 1082 at 1126 [176], 1154 [318]; 302 ALR 363 at 417, 453-454; [2013] HCA 39.

14 *Woolmington v The Director of Public Prosecutions* [1935] AC 462 at 481-482; *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 119-120 [46].

15 *Momcilovic v The Queen* (2011) 245 CLR 1 at 51 [53], 97 [191], 200 [512], 240 [659]; [2011] HCA 34.

the principle remains[16]. The principle is an aspect of the accusatorial nature of a criminal trial in our system of criminal justice[17].

33 The companion rule to the fundamental principle is that an accused person cannot be required to testify. The prosecution cannot compel a person charged with a crime to assist in the discharge of its onus of proof[18]. Recognising this, statute provides that an accused person is not competent to give evidence as a witness for the prosecution[19], a protection which cannot be waived[20].

34 The purpose of s 13(9) of the NSWCC Act was to protect the fair trial of a person who might be charged with offences. It supported the maintenance of the system of criminal justice referred to in *X7* and the trial for which that system provides, in which the prosecution has a defined role and the accused does not. The protective purpose of s 13(9) would usually require that the Commission quarantine evidence given by a person to be charged from persons involved in the prosecution of those charges. It would require the Commission to make a direction having that effect and to maintain the prohibition in the face of requests for access to the evidence. That purpose was not met in the present case, with the consequence that the appellants' trial differed in a fundamental respect from that which our criminal justice system seeks to provide.

The publications

35 As discussed, the appellants rely on the publication of the transcripts of the appellants' evidence before the Commission to the DPP as contrary to the direction pursuant to s 13(9) and the purpose of that provision. No issue

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16 *Lee v NSW Crime Commission* (2013) 87 ALJR 1082 at 1127 [182]; 302 ALR 363 at 419.

17 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 119-120 [46], 136 [101]-[102], 142-143 [124], 153 [159]-[160]; *Lee v NSW Crime Commission* (2013) 87 ALJR 1082 at 1123 [159]; 302 ALR 363 at 413.

18 *Lee v NSW Crime Commission* (2013) 87 ALJR 1082 at 1095 [20], 1116 [125], 1123 [159], 1126 [175]; 302 ALR 363 at 376, 404, 413, 417.

19 See, for example, *Evidence Act* 1995 (NSW), s 17(2).

20 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 at 565 [51]-[52]; [2010] HCA 1.

concerning the meaning of the term "published" in s 13(9)[21] arises in this connection, given the concession that the publication was unlawful. The appellants also rely on two other acts said to involve publication contrary to that direction.

36 In the first place, the Commissioner approved the release of the appellants' transcripts of evidence to the police, so that they could review them for the purpose of preparing the brief on the charges brought against the appellants. Apart from any obligation under the general law, the police officers investigating these offences were subject to a duty under the *Director of Public Prosecutions Act* 1986 (NSW) to disclose to the DPP all relevant information, including documents, obtained during the investigation that might reasonably be expected to assist the case for the prosecution or the accused[22]. Amendments to that Act have since refined the scope of the duty with respect to the disclosure of material that is the subject of a non-publication order under s 45 of the *Crime Commission Act* 2012 (NSW)[23]. The effect of those amendments is not raised by these appeals. The police did provide the transcripts to the DPP as part of the brief of evidence. Neither in relation to this direct publication to the police, nor in relation to such indirect publication to the prosecution, is it suggested that the Commission took into account the protective purpose of s 13(9). In each case, as in the Commission's direct publication to the DPP, the decision to publish was, in law, no decision at all[24].

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21 See *SD v New South Wales Crime Commission* (2013) 84 NSWLR 456 at 466 [33].

22 Section 15A.

23 A provision relieving police officers of the duty to disclose to the DPP material the subject of a bona fide claim of privilege, public interest immunity or statutory immunity (subject to the requirement to inform the DPP of the fact that material of that kind had been obtained) was introduced by the *Director of Public Prosecutions Amendment (Disclosures) Act* 2011 (NSW), Sched 1. This provision was repealed and re-enacted in a different form, and a new provision relieving law enforcement officers of the duty to disclose material contravening a statutory publication restriction, including under s 45 of the *Crime Commission Act* 2012 (subject to the requirement, to the extent not prohibited by the restriction, of informing the DPP of the existence and nature of the material), was introduced by the *Director of Public Prosecutions Amendment (Disclosures) Act* 2012 (NSW), Sched 1.

24 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 506 [76]; [2003] HCA 2.

37 The first appellant also relies upon the publication by the Commission of documents which were produced by him under compulsion at his second examination. On their face, the documents might have provided an innocent explanation as to the sources of the monies which the prosecution sought to link to the drugs. The documents were used by the Commission to take statements from persons who were signatories to them as to their authenticity. The documents were then attached to the statements and made available to the police.

38 A number of questions arise respecting the use of these documents. As the Court of Criminal Appeal observed[25], copies of these documents were also found when the search of the premises was conducted by police. Furthermore, the respondent submits that the documents, as documents produced or seized (s 13(9)(b)), do not come within the terms of the direction made. It would not appear that a direction specifically covering the documents was sought, although the first appellant submits that the Commission ought to have made one as a matter of course.

39 These matters may be put to one side. It is sufficient for the disposition of these appeals to focus attention upon the publication of the transcripts of the appellants' evidence before the Commission to the prosecution, directly to the DPP officer and indirectly through the police. The decision to do so, without regard to the protective purpose of s 13(9), was not authorised by the NSWCC Act. The publication to the DPP, in particular, was for a patently improper purpose, namely the ascertainment of the appellants' defences. However, the critical question on these appeals is not whether the publication was unlawful and wrongful. It is whether, as a result of the prosecution being armed with the appellants' evidence, there has been a miscarriage of justice in the eyes of the law.

A miscarriage of justice?

40 The principal reason given by the Court of Criminal Appeal for dismissing the appellants' appeals was that there had been no "practical unfairness", which is to say that the publication of the transcripts had no discernible effect on their defence. Nothing in the transcripts of the appellants' evidence was considered to be relevant to the trial as it was conducted[26].

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25 *Lee v The Queen* [2013] NSWCCA 68 at [93], [136]-[137].

26 *Lee v The Queen* [2013] NSWCCA 68 at [146]-[147], [149].

41 Basten JA, with whom the other members of the Court of Criminal Appeal agreed, did recognise that the second appellant's evidence before the Commission could be used to forewarn the prosecution witness Pak and to permit clarification of his evidence. It could also be used indirectly, to aid the prosecutor's preparation for the cross-examination of the second appellant, in the event that he gave evidence[27]. In this regard, it will be recalled that the second appellant's solicitor gave evidence before the Court of Criminal Appeal that the prosecution's possession of the second appellant's evidence foreclosed that possibility. An accused person may be prejudiced in his or her defence because he or she can no longer determine the course to take at trial according only to the strength of the prosecution case[28]. Further, the Court of Criminal Appeal appears to have overlooked the nature and extent of the evidence given by the second appellant before the Commission – in particular, that concerning his relationship and dealings with Pak.

42 Basten JA also considered it to be fatal to the appellants' appeals[29], absent practical unfairness, that the defence failed to object to the apparent possession by the prosecution of evidence from the Commission. As has been mentioned, while a complaint was initially made at a pretrial hearing that the prosecution appeared to have such material, it was not further pursued.

43 These appeals do not fall to be decided by reference to whether there can be shown to be some "practical unfairness" in the conduct of the appellants' defence affecting the result of the trial. This is a case concerning the very nature of a criminal trial and its requirements in our system of criminal justice. The appellants' trial was altered in a fundamental respect by the prosecution having the appellants' evidence before the Commission in its possession.

44 The prosecution has a specific role in our system of criminal justice, one which entails particular responsibilities. It is not to the point that the defence lawyers did not object or seek a stay of the proceedings. No forensic advantage could have been sought by the failure to do so. It is the prosecution which has the responsibility of ensuring its case is presented properly and with fairness to

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27 *Lee v The Queen* [2013] NSWCCA 68 at [159].

28 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 142-143 [124], 146 [136].

29 *Lee v The Queen* [2013] NSWCCA 68 at [163].

the accused[30]. It is therefore more to the point that the prosecution's possession of the appellants' evidence before the Commission put at risk the prospect of a fair trial, which s 13(9) sought to protect. The prosecution should have enquired as to the circumstances in which the evidence came into its possession and alerted the trial judge to the situation, so that steps could be taken to ensure that the trial was not affected. The trial judge could have ordered a temporary stay, while another prosecutor and other DPP personnel, not privy to the evidence, were engaged.

45 It must be acknowledged that the matters in question occurred, and the decision of the Court of Criminal Appeal was given, before judgment in *X7* was handed down. Attention was therefore not directed to the principle of the common law respecting proof by the prosecution, unaided by the accused, which was in that case confirmed as fundamental to our system of criminal justice.

46 In *X7*, it was held that the compulsory examination of a person with respect to an offence with which the person stands charged would be a departure, in a fundamental respect, from that principle[31]. *X7* was ultimately concerned with questions of statutory construction. Nevertheless, the point it makes about what may amount to a fundamental departure from a criminal trial as it is comprehended by our system of criminal justice is relevant to this case. It is a breach of the principle of the common law, and a departure in a fundamental respect from a criminal trial which the system of criminal justice requires an accused person to have, for the prosecution to be armed with the evidence of an accused person obtained under compulsion concerning matters the subject of the charges. It cannot be said that the appellants had a trial for which our system of criminal justice provides and which s 13(9) of the NSWCC Act sought to protect. Rather, their trial was one where the balance of power shifted to the prosecution.

47 In *Wilde v The Queen*[32], Brennan, Dawson and Toohey JJ held that the common form proviso has no application where an irregularity in the trial process has occurred "which is such a departure from the essential requirements

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30 *Richardson v The Queen* (1974) 131 CLR 116 at 119; [1974] HCA 19; *Whitehorn v The Queen* (1983) 152 CLR 657 at 675; [1983] HCA 42; *Attorney-General (NT) v Emmerson* [2014] HCA 13 at [63].

31 *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 131 [85], 140 [118], 142-143 [124].

32 (1988) 164 CLR 365 at 372-373; [1988] HCA 6.

of the law that it goes to the root of the proceedings." Their Honours were referring to a criminal trial which was fundamentally flawed. Deane J[33] said that "[t]he fundamental prescript of the administration of criminal justice in this country is that no person should be convicted of a serious crime except by the verdict of a jury after a fair trial according to law", and the proviso did not negate this principle. In a case where impropriety or unfairness permeated or affected a trial to an extent where it ceased to be a fair trial according to law, an appeal court could not dismiss an appeal on the basis that there had been no substantial miscarriage of justice. In *Jago v District Court (NSW)*[34], his Honour referred to the circumstance where irregularity in proceedings was such that the trial "has been rendered unfair or has lost its character as a trial according to law."

48 This statement was cited by Gaudron, Gummow and Callinan JJ in *Katsuno v The Queen*[35], where their Honours said that a "failure to observe the requirements of the criminal process in a fundamental respect" means that a conviction cannot stand[36]. In *Weiss v The Queen*[37], this Court held that some 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 proviso.

49 In the passage from *Wilde* referred to above, Deane J spoke of impropriety as affecting a fair trial. In *Katsuno*, the Court was concerned with the provision of information respecting jurors, which had been obtained by the prosecution in breach of statute. McHugh J[38] spoke of the improper manner in which the information had been obtained as well as its giving the prosecution an unfair advantage over the accused. In the latter respect, his Honour observed, the Crown had "subverted the legislative scheme" for selecting an impartial jury and used information which the legislation intended to deny it. Though his Honour

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33 *Wilde v The Queen* (1988) 164 CLR 365 at 375.

34 (1989) 168 CLR 23 at 56; [1989] HCA 46.

35 (1999) 199 CLR 40 at 60 [35]; [1999] HCA 50.

36 Citing *Maher v The Queen* (1987) 163 CLR 221 at 234; [1987] HCA 31; see also *Katsuno v The Queen* (1999) 199 CLR 40 at 95 [131]-[132] per Kirby J.

37 (2005) 224 CLR 300 at 317-318 [43]-[46]; [2005] HCA 81.

38 *Katsuno v The Queen* (1999) 199 CLR 40 at 66-67 [56]-[59].

was there in dissent as to whether a failure to observe the requirements of the criminal process in a fundamental respect had occurred, a similar observation respecting the NSWCC Act might be thought appropriate here.

50 The wrongfulness of conduct on the part of the police or the prosecution has on occasions raised questions of policy, rather than questions of unfairness to an accused. It is, for example, questions of public policy which have largely informed the court's discretion to exclude evidence which has been improperly obtained. In *Bunning v Cross*[39], Stephen and Aickin JJ said that "[i]t is not fair play that is called in question in such cases but rather society's right to insist that those who enforce the law themselves respect it". Their Honours said that the executive should not be free to disregard safeguards built into regulatory interventions affecting the liberty of the subject[40]. Moreover, the courts "should not be seen to be acquiescent in the face of the unlawful conduct of those whose task it is to enforce the law."[41] On the other hand, where "accidental non-compliance" may be involved and there is "no overt defiance of the will of the legislature", the court, as the tribunal upholding the law, will not be demeaned[42].

51 The circumstances of this case involve the wrongful release and possession of evidence. However, its effects cannot be equated with the use of evidence illegally or improperly obtained. The question whether such evidence should, as a matter of discretion, be admitted does not arise. Clearly, s 18B(2) of the NSWCC Act provided that the appellants' evidence before the Commission was inadmissible at their trial. Rather, these appeals concern the effect of the prosecution being armed with the appellants' evidence. It is not necessary to resort to questions of policy to determine whether a miscarriage of justice has occurred. What occurred in this case affected this criminal trial in a fundamental respect, because it altered the position of the prosecution vis-à-vis the accused. There was no legislative authority for that alteration. Indeed, it occurred contrary

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39 (1978) 141 CLR 54 at 75; [1978] HCA 22.

40 *Bunning v Cross* (1978) 141 CLR 54 at 77.

41 *Bunning v Cross* (1978) 141 CLR 54 at 78.

42 *Bunning v Cross* (1978) 141 CLR 54 at 78; see also *Cleland v The Queen* (1982) 151 CLR 1 at 19-20, 34-35; [1982] HCA 67; *Pollard v The Queen* (1992) 176 CLR 177 at 202-203 per Deane J; [1992] HCA 69; *Foster v The Queen* (1993) 67 ALJR 550 at 556-557, 565; 113 ALR 1 at 10, 21; [1993] HCA 80; *Ridgeway v The Queen* (1995) 184 CLR 19 at 30-33, 49, 84; [1995] HCA 66.

to the evident purpose of s 13(9) of the NSWCC Act, directed to protecting the fair trial of examined persons.

Orders

52 The appeals should be allowed and the judgment of the Court of Criminal Appeal set aside. In lieu thereof, it should be ordered that the appellants' convictions be quashed and that they have a new trial.