HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

DIRECTOR OF PUBLIC PROSECUTIONS
REFERENCE NO 1 OF 2017

Director of Public Prosecutions Reference No 1 of 2017
[2019] HCA 9
20 March 2019
M129/2018

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Appeal of the Supreme Court of Victoria made on 23 March 2018 answering the point of law raised for consideration pursuant to s 308 of the* Criminal Procedure Act 2009 *(Vic), and in lieu thereof answer the point of law as follows:*

   > *"The direction commonly referred to as the '*Prasad *direction' is contrary to law and should not be administered to a jury determining a criminal trial between the Crown and an accused person."*

3. *The Director of Public Prosecutions (Vic) is to pay the reasonable costs of the acquitted person.*

On appeal from the Supreme Court of Victoria

Representation

K E Judd QC with D I Piekusis for the appellant (instructed by Office of Public Prosecutions Victoria)

O P Holdenson QC with J P O'Connor for the acquitted person (instructed by James Dowsley & Associates)

CATCHWORDS

Director of Public Prosecutions Reference No 1 of 2017

Criminal practice – Trial – Jury directions – *Prasad* direction – Where accused charged with murder – Where *Prasad* direction given over objection at close of Crown case – Where another *Prasad* direction given at close of defence case – Whether *Prasad* direction contrary to law and should not be administered to jury determining criminal trial.

Criminal practice – Jury – Reserve jurors – Where one of 13 jurors balloted off to consider response to *Prasad* direction – Where jury wished to hear more – Where juror balloted off re-joined jury – Where second ballot conducted to reduce jury to 12 jurors again – Where jury delivered verdicts of not guilty of murder and not guilty of manslaughter after second ballot – Whether ballot conducted at time at which "jury required to retire to consider its verdict".

Words and phrases – "fair trial", "fairness to the prosecution", "jury's suggested right to stop the case", "no case submission", "power of the trial judge", "practice of inviting the jury to stop the case", "*Prasad* direction", "retire to consider its verdict".

Criminal Procedure Act 2009 (Vic), ss 66, 213, 234, 238, 241.
Juries Act 2000 (Vic), s 48.

1 KIEFEL CJ, BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ. The issue in this appeal is the lawfulness and propriety of directing a jury in a criminal trial that it is open at any time after the close of the prosecution case to acquit the accused if the jury consider the evidence is insufficient to support a conviction. The direction is referred to as a "*Prasad* direction" because it is commonly sourced to an obiter dictum of King CJ in *R v Prasad*[1]:

> "It is, of course, open to the jury at any time after the close of the case for the prosecution to inform the judge that the evidence which they have heard is insufficient to justify a conviction and to bring in a verdict of not guilty without hearing more. It is within the *discretion* of the judge to inform the jury of this *right* …" (emphasis added)

The procedural history

2 On 15 November 2016, an accused person was arraigned in the Supreme Court of Victoria (Lasry J) on an indictment that charged her with the murder of her de facto partner. She entered a plea of not guilty and a jury of 13 persons was empanelled[2]. Immediately following the close of the prosecution case, defence counsel applied to have the jury given a *Prasad* direction, submitting that the prosecution was unable to negative that his client was acting in self-defence. The trial judge acceded to the application and gave a *Prasad* direction over the prosecutor's objection.

3 The direction was lengthy and included instruction on the elements of murder and manslaughter with particular reference to proof of the intent for murder, which was in issue. His Honour reminded the jury of the evidence that raised self-defence and instructed them of the necessity that the prosecution negative that the accused person was acting in self-defence with respect to liability for murder and manslaughter. The instruction covered the treatment of self-defence in the context of family violence under s 322M of the *Crimes Act 1958* (Vic). A printed copy of the transcript of the *Prasad* direction, a document of some 20 pages or more, was distributed to the jury.

---

1 (1979) 23 SASR 161 at 163.

2 Section 23(a) of the *Juries Act 2000* (Vic) (now s 23(1)(a)) provides that, in a criminal trial, the court may order the empanelment of up to three additional jurors.

4 Before the jury withdrew to consider their response to the direction, a ballot was conducted to reduce the jury to 12 persons in case the decision was to return a verdict or verdicts of acquittal. The juror who was "balloted off" remained in the court while, in the jury room, the jury considered their response to the *Prasad* direction. The jury returned and advised that they wished to hear more. The juror who had been balloted off re-joined the jury and the trial continued. Following the close of the defence case, but before addresses, the trial judge reminded the jury of the continuing operation of the *Prasad* direction and gave them a further opportunity to consider whether they wished to hear more. A second ballot was conducted, to again reduce the jury to 12, before the jury withdrew to consider their response to the renewed *Prasad* direction. On their return to the court on this occasion, the jury delivered verdicts of not guilty of murder and not guilty of manslaughter.

5 The Director of Public Prosecutions (Vic) ("the Director") referred to the Court of Appeal of the Supreme Court of Victoria a point of law that had arisen in the trial[3]. The Court of Appeal was asked to give its opinion on whether:

> "[t]he direction commonly referred to as the '*Prasad* direction' is contrary to law and should not be administered to a jury determining a criminal trial between the Crown and an accused person".

6 The reference of the point of law does not affect the trial in relation to which it was made or the acquittal[4]. The acquitted person appeared as contradictor in the Court of Appeal and in this Court, and was represented by junior and senior counsel. The Director agreed to pay the acquitted person's reasonable costs.

The Court of Appeal

7 The Court of Appeal (Maxwell P, Weinberg and Beach JJA) was divided on the answer to the point of law. In their joint reasons, Weinberg and Beach JJA were critical of the Director's challenge. Their Honours pointed out that the giving of a *Prasad* direction has been an accepted practice in Australian

---

3 *Criminal Procedure Act 2009* (Vic), s 308(1).

4 *Criminal Procedure Act*, s 308(4).

courts for the best part of 40 years[5]. In their Honours' view, there is no reason in principle for holding that, in an appropriate case, the trial judge should not give a *Prasad* direction[6]. Maxwell P, in dissent, drew back from holding that the *Prasad* direction is contrary to law, but held that the practice of giving the direction should be "comprehensively disapproved" as it has been in England[7].

8 The majority answered the point of law in terms:

> "The giving of what is commonly referred to as a *Prasad* direction, in appropriate circumstances, is not contrary to law."

9 In England, as Weinberg and Beach JJA observed, criticism of the practice of inviting the jury to "stop the case" and return a verdict of not guilty stems in part from the test applied to the determination of a no case submission. Following the passage of the *Criminal Appeal Act 1966* (UK), which permitted the setting aside, on appeal, of unsafe or unsatisfactory verdicts, it came to be accepted in England that it was open to the trial judge to direct an acquittal if the judge assessed the prosecution case to be such that a conviction would be unsafe[8]. The Court of Appeal and its predecessor, the Court of Criminal Appeal, were critical in such cases of the trial judge inviting the jury to acquit, rather than assuming the responsibility personally by directing an acquittal[9].

---

5 *Director of Public Prosecutions Reference No 1 of 2017* (2018) 55 VR 551 at 610 [235].

6 *Director of Public Prosecutions Reference No 1 of 2017* (2018) 55 VR 551 at 615 [262].

7 *Director of Public Prosecutions Reference No 1 of 2017* (2018) 55 VR 551 at 554 [4], 569 [60], 570 [62], citing *Falconer-Atlee* (1973) 58 Cr App R 348, *Kemp* [1995] 1 Cr App R 151, *R v Speechley* [2004] EWCA Crim 3067 and *R v Collins* [2007] EWCA Crim 854.

8 *R v Mansfield* [1977] 1 WLR 1102 at 1106; [1978] 1 All ER 134 at 140; *R v Galbraith* [1981] 1 WLR 1039; [1981] 2 All ER 1060.

9 *R v Young* [1964] 1 WLR 717 at 720; [1964] 2 All ER 480 at 481-482; *Falconer-Atlee* (1973) 58 Cr App R 348 at 357.

10 The test for the determination of a no case submission settled by this Court in *Doney v The Queen*[10] is central to understanding the difference of opinion below. *Doney* holds that, if there is evidence that is capable of supporting a verdict of guilty, the matter must be left to the jury[11]. Weinberg and Beach JJA considered that the stringency of the test provides a "compelling" reason for retaining the *Prasad* direction in a suitable case[12]. Their Honours emphasised that suitable cases will be rare and must be ones in which, without the assistance of closing addresses and a "full judicial charge", the jury are able to make a sensible assessment of whether acquittal is the just and appropriate verdict[13]. It follows that ordinarily the direction should not be given in a case of any significant complexity and should almost never be given in a case involving more than one accused[14].

11 Notwithstanding its length and complexity, their Honours considered that the *Prasad* direction given in the acquitted person's trial was impeccable; the jury had been "armed with all they needed to know in order to make sense of a simple allegation, and a simple response to that allegation"[15]. No question of the propriety of giving the direction in a trial in which more than 12 jurors remained was agitated before their Honours.

---

10 (1990) 171 CLR 207; [1990] HCA 51.

11 (1990) 171 CLR 207 at 214-215 per Deane, Dawson, Toohey, Gaudron and McHugh JJ.

12 *Director of Public Prosecutions Reference No 1 of 2017* (2018) 55 VR 551 at 614 [260].

13 *Director of Public Prosecutions Reference No 1 of 2017* (2018) 55 VR 551 at 615 [262]-[263].

14 *Director of Public Prosecutions Reference No 1 of 2017* (2018) 55 VR 551 at 615 [264].

15 *Director of Public Prosecutions Reference No 1 of 2017* (2018) 55 VR 551 at 615 [265].

12 Maxwell P's criticism was based on the view that the "*Prasad* procedure"[16] interferes with the division of functions between judge and jury[17]. His Honour illustrated what he saw as the "fundamental flaw in the *Prasad* procedure" by reference to a number of trials in which judges in Victoria had given a *Prasad* direction[18]. In each case the judge had ruled, or the defence had conceded, that there was a case to answer. Nonetheless, in each case the judge had come to the view, based upon his assessment of the evidence, that the case should stop. The *Prasad* procedure enabled the judge to invite the jury to acquit notwithstanding that the judge could not direct them to do so[19].

13 On 15 August 2018, Bell and Nettle JJ granted the Director special leave to appeal on grounds that contend that the *Prasad* direction is contrary to law and/or the direction should not continue to be given. As will appear, the Director's contention is that a trial judge is precluded from giving a *Prasad* direction either by the common law of Australia or by the statutory scheme for the conduct of trials on indictment in Victoria. For the reasons to be given, the Director's first-mentioned contention is accepted and it follows that the appeal must be allowed.

The Director's concession below

14 In *Prasad*, King CJ stated that it is within a trial judge's *discretion* to inform the jury of their *right* to bring in a verdict of not guilty at any time after the close of the prosecution case. In the Court of Appeal, the Director did not

---

16 *Director of Public Prosecutions Reference No 1 of 2017* (2018) 55 VR 551 at 555 [13].

17 *Director of Public Prosecutions Reference No 1 of 2017* (2018) 55 VR 551 at 554 [7], citing *Doney v The Queen* (1990) 171 CLR 207 at 215 per Deane, Dawson, Toohey, Gaudron and McHugh JJ.

18 *Director of Public Prosecutions Reference No 1 of 2017* (2018) 55 VR 551 at 579 [93]-[94], citing *R v Smart [Ruling No 5]* [2008] VSC 94 at [13] per Lasry J, *R v Butler [Rulings 1-10]* [2013] VSC 688, *R v Rapovski [Ruling No 3]* [2015] VSC 356 and *R v Gant* [2016] VSC 662.

19 *Director of Public Prosecutions Reference No 1 of 2017* (2018) 55 VR 551 at 579 [93] per Maxwell P.

challenge the existence of the right. The Director was content to challenge the discretion to inform the jury of the existence of the right. In this Court, the Director seeks to withdraw her concession as to the existence of the right. The acquitted person submits that the Director ought not to be allowed to resile from the concession.

15 Notwithstanding the stance taken below, it is appropriate to permit the Director to withdraw the concession given that determination of the point of law referred for the Court of Appeal's opinion is inextricably linked to the question of whether the common law of Australia recognises the right[20]. As Weinberg and Beach JJA rhetorically asked, "why would it be unlawful for a judge to inform the jury of a right which it was conceded they could legitimately exercise?"[21]

The practice of inviting the jury to acquit

16 Although in Australia the practice of informing the jury that they may stop the case by returning a verdict of acquittal at any time after the close of the prosecution case is commonly sourced to *Prasad*, it is evident that King CJ was describing a practice that his Honour regarded as unexceptional. Twenty years earlier in *Raspor v The Queen*, neither the Supreme Court of Victoria, sitting as a Court of Criminal Appeal, nor this Court questioned the regularity of the trial judge's invitation to the jury at the close of the prosecution case to acquit on the ground that the evidence was insufficient to make any conviction safe[22]. The referred point of law is to be determined upon acceptance that there has existed a practice since at least the middle of the last century of inviting the jury after the close of the prosecution case to consider acquitting the accused without hearing more in a case in which the judge assesses the evidence supporting a conviction to be tenuous ("the practice").

---

20 *Water Board v Moustakas* (1988) 180 CLR 491 at 497 per Mason CJ, Wilson, Brennan and Dawson JJ; [1988] HCA 12; *Pantorno v The Queen* (1989) 166 CLR 466 at 475-476 per Mason CJ and Brennan J; [1989] HCA 18.

21 *Director of Public Prosecutions Reference No 1 of 2017* (2018) 55 VR 551 at 610 [234].

22 (1958) 99 CLR 346 at 348 per Dixon CJ, Fullagar and Taylor JJ; [1958] HCA 30.

17 Recognition of the practice does not carry with it acceptance that the jury in a criminal trial possess a "long-standing right under common law"[23] to return a verdict of not guilty of their own motion at any time following the close of the prosecution case ("the right"). Weinberg and Beach JJA relied on a line of English authorities in accepting the existence of the right[24]. As will appear, those authorities source the right in the practice.

The origin of the right

18 The origin of the right, as distinct from the development of the practice, is obscure. In *Prasad*[25], the only authority cited for its existence is para 577 in the 39th edition of *Archbold*[26]. The paragraph, headed "R v Young", relevantly stated:

> "It is open to the jury, at any time after the close of the case for the prosecution, to inform the court that they are unanimously of opinion that the evidence which they have already heard is insufficient to justify a conviction. It is within the *discretion* of the judge to inform the jury of this *right*, and if he decides to do so he usually tells them at the close of the case for the prosecution that it is open to them to stop the case either immediately or at any later stage in the proceedings." (emphasis added)

---

23 *Director of Public Prosecutions Reference No 1 of 2017* (2018) 55 VR 551 at 599 [185].

24 *Director of Public Prosecutions Reference No 1 of 2017* (2018) 55 VR 551 at 599-600 [185]-[186], citing *Attorney General's Reference [No 2 of 2000]* [2001] 1 Cr App R 503 at 507, *R v Speechley* [2004] EWCA Crim 3067 at [51]-[53], *R v Collins* [2007] EWCA Crim 854 at [48] and *R v H(S)* [2011] 1 Cr App R 182 at 196 [49].

25 (1979) 23 SASR 161 at 163 per King CJ.

26 *Archbold: Pleading, Evidence & Practice in Criminal Cases*, 39th ed (1976) at 332.

19 The first reference to the right (and the practice) appeared in the 35th edition of *Archbold*[27], following the decision of the Court of Criminal Appeal in *R v Young*[28]. *Young* acknowledged, and was critical of, the practice. *Young* said nothing as to the existence of the right. The criticism of the practice was repeated in *Falconer-Atlee*[29], which again said nothing as to the right.

20 The development of the practice was explained by Lawton LJ in *R v Mansfield*, not as the reflection of a long-standing common law right, but as a response to the limited scope for a successful no case submission prior to the passage of the *Criminal Appeal Act 1966* (UK). His Lordship dated the practice to the two or three decades before the early 1960s[30].

21 The 9th edition of Powell's *Principles and Practice of the Law of Evidence*, a substantial reworking of the original, published in 1910, discussed the power of the judge to withdraw a civil action from the jury and the separate power of the jury to stop the case. With respect to the latter, it was stated that "[t]he jury has no right to interpose and stop the case by finding in favour of one party, until they have heard all the evidence tendered by the other party and the speech of his counsel"[31]. Powell's treatment of criminal trials made no reference to the jury's suggested right to stop the case[32], nor did other leading texts[33].

---

27 *Archbold: Pleading, Evidence & Practice in Criminal Cases*, 35th ed (1962), para 548A, inserted by Thirteenth Cumulative Supplement, 24 August 1966.

28 [1964] 1 WLR 717; [1964] 2 All ER 480.

29 (1973) 58 Cr App R 348.

30 [1977] 1 WLR 1102 at 1106; [1978] 1 All ER 134 at 139-140.

31 Odgers, *Powell's Principles and Practice of the Law of Evidence*, 9th ed (1910) at 688.

32 Odgers, *Powell's Principles and Practice of the Law of Evidence*, 9th ed (1910) at 592, citing *George* (1909) 1 Cr App R 168 and *Leach* (1909) 2 Cr App R 72.

33 Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898) at 47-262, particularly at 256; Best, *The Principles of the Law of Evidence*, 9th ed (1902) at 67; Taylor, *A Treatise on the Law of Evidence as Administered in England and*

(Footnote continues on next page)

22 Sir Patrick Devlin's and Professor Glanville Williams' Hamlyn Lectures on the criminal jury trial[34] and Professor Langbein's study of its development[35] make no reference to the right. An article published in *The Solicitors' Journal* in 1939 under the heading "Request to Jury to Stop Case", consistently with the history described in *Mansfield*, suggests that the practice was yet to emerge. The article was prompted by the decision in *Alexander v H Burgoine & Sons Ltd*, which concerned the propriety of counsel inviting the jury trying a civil action to dispense with the summing-up[36]. The burden of the article was the suggestion that it should be within the judge's power in a criminal trial, following the close of the prosecution case, to invite the jury to return a verdict of not guilty without hearing more[37].

23 The absence of reference to the right before the development of the practice is not to deny that on occasions English juries returned a verdict of acquittal after the close of the prosecution case[38]. The brief report of *R v Perfitt*, a trial before the Newington Sessions in 1903, records that in the course of the defence case the jury stopped the hearing and returned a verdict of not guilty, prompting counsel for the prosecution to unsuccessfully assert a right to address the jury[39].

Ireland, 11th ed (1920), vol 1 at 28-29 §25A; Cross, *Evidence* (1958) at 54; Wigmore, *Evidence in Trials at Common Law* (1981), vol 9 at 379 §2494, 388-389 §2495.

34 Devlin, *Trial by Jury* (1956) and Williams, *The Proof of Guilt: A Study of the English Criminal Trial*, 3rd ed (1963).

35 Langbein, *The Origins of Adversary Criminal Trial* (2003).

36 [1939] 4 All ER 568 at 569-570.

37 "Request to Jury to Stop Case" (1939) 83 *The Solicitors' Journal* 951 at 951.

38 *R v Holden* (1838) 8 Car & P 606 [173 ER 638]; and see Lawson and Keedy, "Criminal Procedure in England, Part II" (1911) 1 *Journal of the American Institute of Criminal Law and Criminology* 748 at 761.

39 (1903) 38 LJ 479.

24 The institution of the criminal jury trial has undergone a process of evolution reflecting, among other things, changing perceptions of the minimum content of a fair trial. It is necessary to exercise caution in treating *Perfitt* as illustrative of the right. A decade after *Perfitt*, in a trial before the Swansea Assizes the judge interrupted the cross-examination of the accused and asked the jury: "is the evidence sufficient for you?"[40] The jury did not require to hear further and returned a verdict of guilty. The Court of Criminal Appeal dismissed an appeal against conviction, holding that it was a very plain case, that the jury did not want to hear more, and that they could not have found otherwise than that the prisoner was guilty[41]. Needless to say, it is inconceivable that today a judge might lawfully invite a jury to stop the case in order to return a verdict of guilty, much less that the invitation should be taken as evidencing the jury's common law right to do so.

The English authorities

25 The first reference to the right in the English decisions canvassed in argument below and in this Court is in *Kemp*[42]. The jury at Kemp's trial returned a verdict of guilty after being invited by the trial judge to consider whether they wanted to stop the case and acquit. On appeal to the Court of Appeal, counsel for Kemp unsuccessfully argued that the verdict was unsafe because the judge had made clear his view that the evidence did not establish guilt and "juries are often keen to register their independence and do not like to feel that they are being pushed about by the judge"[43].

26 McCowan LJ, giving the judgment of the Court, was critical of the judge's intervention in inviting the jury to consider stopping the case and acquitting, but nonetheless held that the intervention had not made the conviction unsafe[44].

---

40 *Newman* (1913) 9 Cr App R 134 at 136.

41 *Newman* (1913) 9 Cr App R 134 at 136.

42 [1995] 1 Cr App R 151.

43 *Kemp* [1995] 1 Cr App R 151 at 155.

44 *Kemp* [1995] 1 Cr App R 151 at 155.

Before parting with the case, his Lordship referred to the commentary in the 1993 edition of *Archbold*, which now asserted[45]:

> "The right of the jury to acquit an accused at any time after the close of the case for the Crown, either upon the whole indictment or upon one or more counts, is well established at common law. Judges may remind juries of their rights in this respect at or after the close of the case for the Crown … If the observation of Roskill LJ in *R v Falconer-Atlee* … conflicts with this long established practice, it is submitted that it must have been *per incuriam* and should be ignored. It is submitted, however, that there is no conflict in view of the distinction between 'inviting a jury to acquit' and 'reminding them of their right to acquit.'"

27 His Lordship rejected the suggestion that Roskill LJ's statements in *Falconer-Atlee* were to be ignored, observing that it is not always "easy to distinguish between an invitation to acquit and a mere intimation of a right to stop the case"[46]. There was no consideration of the "right" referred to in *Archbold*. His Lordship's focus was on the risk that, in informing the jury that it is open to stop the case and acquit, the result may be to leave a convicted defendant with a grievance[47].

28 Weinberg and Beach JJA, summarising the English authorities, observed that "[e]ven *Collins*, which represents the high-water mark of criticisms of the practice, asserts that 'it is difficult to hold that the common law right of a jury to stop a case after the close of the prosecution case no longer exists'"[48]. The conclusion of the Court of Appeal (Criminal Division) in this respect in *R v Collins*[49] rested on the decisions in *Falconer-Atlee*, *Kemp* and *R v*

---

45 *Kemp* [1995] 1 Cr App R 151 at 155-156, citing *Archbold: Pleading, Evidence and Practice in Criminal Cases* (1993), vol 1 at 566 [4-312].

46 *Kemp* [1995] 1 Cr App R 151 at 156.

47 *Kemp* [1995] 1 Cr App R 151 at 156.

48 *Director of Public Prosecutions Reference No 1 of 2017* (2018) 55 VR 551 at 600 [186], citing *R v Collins* [2007] EWCA Crim 854 at [48].

49 [2007] EWCA Crim 854.

Speechley[50]. Reference has already been made to two of these decisions, and, as noted, *Falconer-Atlee*, while critical of the practice, was silent as to the right. The third, *Speechley*, is important to understanding the nature of the "right" acknowledged in *Collins*.

29 In *Speechley*, the trial judge refused to permit defence counsel to remind the jury of "their common law right to return a verdict of not guilty at any time after the close of the prosecution case"[51]. The Court of Appeal held the trial judge was right to rule as he did[52]. Their Lordships went on to say this[53]:

> "It appears to be accepted that a jury does have a right to acquit after the conclusion of the prosecution case, but we know of no case in which that right has ever been exercised other than at the invitation of the trial judge, and we are satisfied that it can only be exercised if the trial judge invites the jury to consider exercising it. That is because it is the duty of the judge to ensure that the trial is fair, both to the defence and to the prosecution, and he must therefore be in a position to decide when the time has come for the jury to be permitted to reach a decision."

The Australian authorities

30 Any ambiguity in King CJ's obiter dictum in *Prasad* was clarified in *R v Pahuja*[54]. His Honour made clear that the jury's power to return a verdict of not guilty at any time after the conclusion of the case for the prosecution is exercisable only upon the invitation of the trial judge[55]. The Australian decisions are at one in emphasising that it is within the discretion of the trial judge to give,

---

50 [2004] EWCA Crim 3067.

51 [2004] EWCA Crim 3067 at [50].

52 *R v Speechley* [2004] EWCA Crim 3067 at [51].

53 *R v Speechley* [2004] EWCA Crim 3067 at [51].

54 (1987) 49 SASR 191.

55 *R v Pahuja* (1987) 49 SASR 191 at 201.

or to decline to give, a *Prasad* direction[56]. None affords support for the view that the jury might exercise the right in the absence of a *Prasad* direction.

31 It would be surprising if it were otherwise. It cannot be that the jury possess a personal right to acquit at the close of the prosecution case regardless of the issues that arise for their determination. In cases of legal or factual complexity, a jury may not be able to return a "true verdict", consistently with the oaths taken by each juror[57], without the assistance of addresses and the judge's instruction on the applicable law. The point is illustrated by *Seymour v The Queen*[58]. After being given a *Prasad* direction, the jury returned a verdict of not guilty in respect of one accused and indicated they would like the case against Seymour to continue. Seymour was convicted and appealed against his conviction to the Court of Criminal Appeal of New South Wales. The need for an explanation of the prosecution case of joint criminal enterprise was the evident cause of the seemingly inconsistent verdicts. Hunt A-JA was critical, in the circumstances, of the decision to give the *Prasad* direction, explaining that the "procedure" is premised on the jury being in a position, without the assistance of the judge or counsel, to assess the cogency of the evidence on which the prosecution relies[59].

32 Recognition by courts in Australia and England that the right is only exercisable at the invitation of the trial judge makes clear that what is being spoken of is not a right possessed by the jury. The recognition is of the discretion of the trial judge to direct the jury, after the close of the prosecution case, that they may acquit. However the direction is framed, it is in truth an invitation to consider returning a verdict of not guilty without hearing more, as

---

56 See, eg, *R v Pahuja* (1987) 49 SASR 191; *Dean v The Queen* (1995) 65 SASR 234 at 239 per Cox J; *R v Reardon* (2002) 186 FLR 1 at 32-33 [153] per Simpson J; *Seymour v The Queen* (2006) 162 A Crim R 576 at 595 [64]-[66] per Hunt A-JA; *R v White [No 8]* [2012] NSWSC 472 at [6]-[7] per R A Hulme J; *Director of Public Prosecutions Reference No 1 of 2017* (2018) 55 VR 551 at 615 [264] per Weinberg and Beach JJA.

57 *Juries Act*, Sch 3 (Oaths by jurors – Criminal Trial).

58 (2006) 162 A Crim R 576.

59 *Seymour v The Queen* (2006) 162 A Crim R 576 at 595 [64]-[66].

distinct from a reminder of a long-standing common law right to do so. It should be accepted that the common law of Australia does not recognise that the jury empanelled to try a criminal case on indictment have a right to return a verdict of not guilty of their own motion at any time after the close of the prosecution case.

33 It remains, as Weinberg and Beach JJA observed, that the practice of giving a *Prasad* direction has a long history in the Australian jurisdictions and has not been subject to the trenchant criticism made in England.

The submissions

34 The Director submits that the practice developed from a flawed foundation: King CJ's dictum was drawn from English practice, which at the time had been subject to repeated criticism. The criticism was not confined to the desirability of the judge assuming the responsibility for directing an acquittal, but reflected recognition of risks that are equally applicable to the conduct of criminal trials in the Australian jurisdictions[60]. The Director submits that giving a *Prasad* direction seriously erodes conventional trial procedure and cuts across the quintessential fact-finding function of the jury.

35 The Director's principal argument draws on Maxwell P's reasons, namely that the essential difficulty with the *Prasad* procedure is that the discretion to give the direction turns on the trial judge's assessment of the cogency of the evidence to support a verdict of guilty[61], the very assessment that is entrusted to the jury. It is an assessment that should only be undertaken after the jury have had the benefit of the parties' submissions and the judge's directions as to the law. Attenuated instruction on the law given in the course of a *Prasad* direction is suggested to risk leading the jury into error.

36 The Director's alternative submission is that provisions of the *Criminal Procedure Act 2009* (Vic) ("the CPA") taken with the *Jury Directions Act 2015* (Vic) ("the JDA"), which govern the conduct of criminal trials in Victoria, are inconsistent with the discretion to give a *Prasad* direction. Section 66 of the

---

60 *R v Young* [1964] 1 WLR 717 at 719-720; [1964] 2 All ER 480 at 481; *Falconer-Atlee* (1973) 58 Cr App R 348 at 356; *R v Mansfield* [1977] 1 WLR 1102; [1978] 1 All ER 134.

61 See, eg, *R v Smart [Ruling No 5]* [2008] VSC 94 at [13] per Lasry J.

CPA sets out the options available to the accused after the close of the prosecution case, which include making a submission that there is no case to answer. In the event that the trial judge accedes to such an application, s 241(2)(b) of the CPA provides that the trial judge may discharge the jury from delivering a verdict and direct that an entry of not guilty be made on the record. Notably, in the Director's submission, no provision is made under the CPA for the jury to return a verdict of not guilty following a *Prasad* direction.

37 The Director's argument also relies on both s 234(1) of the CPA, which provides that the prosecution is entitled to address the jury for the purpose of summing up the evidence after the close of all evidence and before the closing address of the accused, and s 238 of the CPA, which provides that at the conclusion of addresses "the trial judge must give directions to the jury so as to enable the jury to properly consider its verdict". Finally, the Director notes that the JDA was enacted with the object of simplifying and clarifying the duties of the trial judge in directing the jury in a criminal trial[62], and she submits that the absence of reference to the *Prasad* direction is a further indicator that the practice has not survived the statutory scheme for the conduct of criminal trials in Victoria.

38 The acquitted person submits that nothing can be drawn from the scheme of the CPA and the JDA with respect to the continued availability of the *Prasad* direction. Neither the CPA nor the JDA purports to abolish the *Prasad* direction or to alter the common law as stated in *Prasad*. The "entitlement" conferred by s 234(1) of the CPA to make a prosecution address cannot be understood as absolute, given that the judge may discharge the jury and enter "not guilty" on the record following a successful no case application. More to the point, she submits that s 213(2) of the CPA preserves the powers exercisable by a trial judge at common law, which are to be understood as including the power to give a *Prasad* direction.

39 The jury's role as the constitutional tribunal for the determination of questions of fact[63], in the acquitted person's submission, is not diluted by

---

62 JDA, s 1(c).

63 *R v Baden-Clay* (2016) 258 CLR 308 at 329 [65] per French CJ, Kiefel, Bell, Keane and Gordon JJ; [2016] HCA 35.

informing them that they may return a verdict of acquittal without hearing more. She argues that there is no tension between the *Prasad* direction and *Doney*: where a *Prasad* direction is given, the facts remain for the jury. Concerns that the jury may be either "keen to register independence", or tempted to return a verdict of not guilty because they perceive the judge thinks this is the correct verdict, can be addressed by an appropriately worded direction emphasising the role of the jury as the trier of fact[64].

40 The acquitted person submits that the dangers associated with a *Prasad* direction identified in *Collins* illustrate why the discretion is one to be exercised "sparingly" but provide no support for the conclusion that giving the direction is contrary to law. The circumstance that the direction has not been doubted in Australia throughout its long history, in her submission, is against acceptance of the Director's argument. The direction is suggested to serve important public purposes by saving time and costs and by relieving the accused of unnecessary strain in a trial in which the evidence in support of conviction is tenuous[65].

Criticisms of the practice

41 Quite apart from the view that the practice of inviting the jury to stop the case and acquit is an abnegation of the trial judge's responsibility, criticism of the practice in England has focussed on a number of practical difficulties to which it gives rise. They were distilled in *Collins*. In summary, the jury are deprived of the benefit of addresses by counsel and the judge's summing-up; provisional views about the acceptance of a witness's evidence may be hard to displace; juries are often keen to register their independence and may react against perceived pressure to acquit; the practice is inherently more dangerous in a complex case or one with multiple accused; the prosecution or defence may not have the opportunity to correct a mistaken understanding of their case; and there is a danger, in a case in which the defence is contemplating not calling evidence, of asking the jury if they want to hear more[66].

---

64 *R v Reardon* (2002) 186 FLR 1 at 33 [157].

65 *Director of Public Prosecutions Reference No 1 of 2017* (2018) 55 VR 551 at 609 [233].

66 *R v Collins* [2007] EWCA Crim 854 at [49].

42 While Australian courts have not disavowed the practice of giving *Prasad* directions, they too have recognised the practical dangers associated with it[67]. Of particular relevance, in light of the lengthy *Prasad* direction given at the acquitted person's trial, are King CJ's statements in *Pahuja*. His Honour cautioned that the direction should be used "sparingly", that the judge should bear in mind that defence evidence may strengthen the prosecution case, and that "[t]here should be nothing in the nature of a pre-trial summing up"[68]:

> "If the jury cannot properly reach a decision at that stage on the law as explained in the opening, perhaps clarified by a concise correction or explanation if necessary, it is better not to embark upon the course of action at all. A partial summing up at that stage of the trial is a serious departure from the due course of trial and is to be avoided."

The *Juries Act*

43 The focus of the Director's statutory challenge to the *Prasad* direction is the combined operation of the CPA and the JDA. Before turning to this challenge, there should be reference to the irregularity occasioned at the acquitted person's trial by the giving of a *Prasad* direction at a time when the jury comprised more than 12 jurors.

44 The *Juries Act* allows for the empanelment of up to three additional jurors in a criminal trial[69]. The *Juries Act* does not permit the verdict in such a case to be returned by a jury of more than 12 jurors. If more than 12 jurors remain "at the time at which the jury is required to retire to consider its verdict", a ballot must be conducted to reduce the jury to 12 jurors before they retire[70]. If the trial is not concluded after the verdict is given (whether because it is not in respect of all the accused or not in respect of all the charges on the indictment), the juror (or

---

67 *R v Pahuja* (1987) 49 SASR 191 at 201; *Dean v The Queen* (1995) 65 SASR 234 at 239; *R v Reardon* (2002) 186 FLR 1 at 33 [157]; *Seymour v The Queen* (2006) 162 A Crim R 576 at 595 [64]-[66].

68 *R v Pahuja* (1987) 49 SASR 191 at 201.

69 *Juries Act*, s 23(1)(a).

70 *Juries Act*, s 48(1).

jurors) selected in the ballot must return to the jury and continue as part of them[71]. A fresh ballot must be conducted each time "the jury is required to retire to consider its verdict"[72].

45 A *Prasad* direction is not a direction to the jury to retire to consider their verdict. Nonetheless, after having been given a *Prasad* direction, it is possible that the jury will return with a verdict of acquittal. It was against this possibility that the trial judge directed a ballot to reduce the jury to 12 jurors before the jury withdrew to consider whether they wished to hear more. On the jury's return, the juror who had been balloted off re-joined the jury and the trial proceeded. A second ballot was conducted before the jury again withdrew to consider whether they wished to hear more.

46 On neither occasion was the ballot conducted "at the time at which the jury [were] required to retire to consider [their] verdict"[73]. On each occasion, the ballot was conducted at a time when the jury were invited to retire to consider whether they wished the trial to proceed. The *Juries Act* does not make any provision for the reduction of a jury to 12 jurors in order to consider a *Prasad* direction or for the juror (or jurors) who have been removed by ballot to re-join the jury in the event that the decision of the 12 jurors is for the trial to continue. The withdrawal of 12 jurors to consider the position in the absence of the 13th juror, that juror's return to the jury during the continuation of the trial, and the second ballot to again reduce the jury to 12 jurors, was in each instance a serious departure from the proper conduct of the trial. Unless by chance the same juror was balloted off the jury on each occasion, the conclusion is inevitable that the verdicts may have been influenced by a person who was not a member of the jury that returned them.

47 The acquitted person acknowledged on the hearing in this Court that the provisions of the *Juries Act* may mean that a *Prasad* direction cannot be given to a jury comprising 13 or more jurors.

---

71 *Juries Act*, s 48(3).

72 *Juries Act*, s 48(4).

73 *Juries Act*, s 48(1).

The CPA and the JDA

48 The Court of Appeal (Criminal Division) in *Collins* considered it "strongly arguable" that giving the equivalent of a *Prasad* direction has not survived the enactment of the *Human Rights Act 1998* (UK)[74]. The argument, which their Lordships did not find it necessary to determine, was that the direction breaches Art 6 of the European Convention on Human Rights ("the ECHR") in that it contemplates that the jury might return a verdict without the benefit of speeches by counsel and appropriate directions by the trial judge[75]. The entitlement under the CPA of the prosecution to make a closing address[76], and the requirement to have the trial judge give directions to the jury to enable them to properly consider their verdict[77], may be thought to provide a firmer foundation for the conclusion that there is no room for the *Prasad* procedure than does the less prescriptive language of Art 6 of the ECHR. The Director's CPA argument does not, however, strengthen her case: if, contrary to her principal submission, there is no impediment under the common law of Australia to the giving of a *Prasad* direction in a criminal trial, s 213(2) of the CPA operates to preserve the power. Section 213(2) provides:

> "Nothing in this Act removes or limits any powers of a trial judge that existed immediately before the commencement of this Act."

49 The Director's contention that the discretion to give a *Prasad* direction is not a "power" of a trial judge within the meaning of s 213(2) must be rejected. There is no reason to give the provision the confined operation for which the Director contends. As the acquitted person points out, the JDA uses the language of "power" with reference to the trial judge's direction as to the standard of proof[78]. Nor does the absence of reference to the *Prasad* direction in the CPA

---

74 [2007] EWCA Crim 854 at [48].

75 *R v Collins* [2007] EWCA Crim 854 at [44].

76 CPA, s 234(1).

77 CPA, s 238.

78 JDA, s 63(2).

and the JDA necessitate the conclusion that the power to give the direction has been abolished by implication.

The common law of Australia

50 The point of law is to be determined by consideration of whether the trial judge possesses the power to give a *Prasad* direction under the common law of Australia. Weinberg and Beach JJA did not expand on their conclusion that "a more rigorous approach" applied to the determination of a no case submission in Australia might provide an "all the more compelling" reason for retaining the trial judge's power to give a *Prasad* direction[79]. The saving of time and costs, and restoring the accused to his or her liberty at the earliest opportunity, may be taken to be the considerations that informed the conclusion.

51 They are considerations that lose much of their force given that it is common ground that the *Prasad* direction is unsuited to any trial of legal or factual complexity or to the trial of more than one accused. The saving of time and costs is likely to be relatively modest in the case of an uncomplicated trial of a single accused. The capacity to relieve the accused of the strain of the continuation of a trial in the case of an uncomplicated trial of a single accused is to be weighed against the acknowledged dangers of the practice.

52 Those dangers include that the jury will react adversely to the perceived pressure to acquit or that they will be influenced by the perception that the judge considers the proper verdict to be not guilty. Regardless of the care with which the direction is framed, it is difficult to overcome the risk of the latter perception. It is, after all, conventional for the judge to explain to the jury in opening remarks the expected course of the trial, including that, at the conclusion of the evidence, the jury will hear addresses of counsel followed by the judge's summing-up. A direction at the close of the prosecution case or thereafter that it is open to the jury to return a verdict of not guilty without hearing more might be thought inevitably to carry with it that the judge considers acquittal to be the appropriate verdict.

---

79 *Director of Public Prosecutions Reference No 1 of 2017* (2018) 55 VR 551 at 614 [260].

53 Even if it were possible to frame a *Prasad* direction to avoid such a perception, there remains the vice that the direction trenches on the adversarial nature of the trial. The duty of the judge is to preside impartially, ensuring that the trial is fair to each party[80]. The prosecution is entitled to have a full opportunity to explain the way its case is put, and to have a verdict from the jury that is based on the application of the law as explained by the judge to their factual determinations.

54 The acquitted person's trial illustrates the problem. Even if it is accepted that the jury were not influenced by the view they perceived the trial judge to have formed, the direction was given over objection and served to prevent the prosecutor from explaining how the prosecution sought to prove the intent necessary for murder and to negative that the act causing death was done in self-defence. In these respects, the prosecution wished to rely on the statements made by the acquitted person to the "000" operator. At the time the direction was given, the trial judge had not ruled on whether the prosecution would be permitted to rely on those statements as inculpatory.

55 Leveson LJ, giving the judgment of the Court of Appeal (Criminal Division), observed in *R v H(S)* that fairness to the prosecution is recognised as encompassing consideration of the interests of victims and witnesses. Once there is a case to answer, his Lordship said, they are entitled to know that the jury have "heard the case through"[81]. The more liberal test applied in England to the determination of a no case submission does not lessen the application of the same considerations to the conduct of criminal trials in this country.

56 While the decision in *Prasad* anticipated the decision of this Court in *Doney*, Maxwell P was right to hold[82] that King CJ's obiter dictum does not cohere with the analysis in *Doney*. The practice of permitting the trial judge to direct an acquittal based upon the judge's assessment of the insufficiency of the

---

80 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 28 per Mason CJ; [1989] HCA 46; *McInnis v The Queen* (1979) 143 CLR 575 at 581-582 per Mason J; [1979] HCA 65, citing *R v Cox* [1960] VR 665 at 667 per Herring CJ, Lowe and Little JJ.

81 *R v H(S)* [2011] 1 Cr App R 182 at 197 [50].

82 *Director of Public Prosecutions Reference No 1 of 2017* (2018) 55 VR 551 at 579 [93].

evidence to support a conviction was rejected in *Doney* as wrongly "enlarging the powers of a trial judge at the expense of the traditional jury function"[83]. If there is evidence (even if tenuous or inherently weak or vague) that is capable of supporting a verdict of guilty, the matter *must* be left to the jury[84]. This analysis does not sit readily with conferring on the trial judge a discretion, based upon the judge's assessment of the cogency of the evidence to support a conviction, to inform the jury that they may return a verdict of not guilty without hearing more. It is true that, in the circumstance of a *Prasad* direction, the jury and not the judge would make the decision as to whether the evidence was so unconvincing as not to provide a safe foundation for conviction. But, as has already been noticed[85], it is difficult to exclude the possibility that a jury might be influenced by what the judge said to them about the quality of the evidence and might take the judge's invitation to stop the trial as an authoritative pronouncement that the evidence is so unsatisfactory that it is appropriate for them to stop the trial on that basis. The exercise of the discretion to give a *Prasad* direction based upon the trial judge's estimate of the cogency of the evidence to support conviction is inconsistent with the division of functions between judge and jury and, when given over objection, with the essential features of an adversarial trial.

57 Moreover, to invite a jury to decide to stop a trial without having heard all of the evidence, without having heard counsel's final addresses, and without the understanding of the law and its application to the facts that only the judge's summing-up at the end of the trial can give them, is to invite the jury to decide the matter from a basis of ignorance which may be profound[86]. If evidence taken at its highest is capable of sustaining a conviction, it is for the jury as the constitutional tribunal of fact to decide whether the evidence establishes guilt beyond reasonable doubt. A jury is not fully equipped to make that decision until and unless they have heard all of the evidence, counsel's addresses and the judge's summing-up. Anything less falls short of the trial according to law to which both the accused and the Crown are entitled.

---

83 (1990) 171 CLR 207 at 215 per Deane, Dawson, Toohey, Gaudron and McHugh JJ.

84 *Doney v The Queen* (1990) 171 CLR 207 at 214-215 per Deane, Dawson, Toohey, Gaudron and McHugh JJ.

85 See [52].

86 *Seymour v The Queen* (2006) 162 A Crim R 576 at 595 [66].

Orders

58 For these reasons, there should be the following orders:

1. Appeal allowed.

2. Set aside the order of the Court of Appeal of the Supreme Court of Victoria made on 23 March 2018 answering the point of law raised for consideration pursuant to s 308 of the *Criminal Procedure Act 2009* (Vic), and in lieu thereof answer the point of law as follows:

> "The direction commonly referred to as the '*Prasad* direction' is contrary to law and should not be administered to a jury determining a criminal trial between the Crown and an accused person."

3. The Director of Public Prosecutions (Vic) is to pay the reasonable costs of the acquitted person.