HIGH COURT OF AUSTRALIA

GAUDRON, McHUGH, GUMMOW, KIRBY AND HAYNE JJ

DIRECTOR OF PUBLIC PROSECUTIONS APPELLANT

AND

B RESPONDENT

Director of Public Prosecutions v B (A51-1997) [1998] HCA 45
23 July 1998

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Full Court of the Supreme Court of South Australia answering the questions reserved by Mohr J under s 350 of the* Criminal Law Consolidation Act *1935 (SA) and in lieu thereof order that it is inappropriate to answer either of the questions reserved.*

On appeal from the Supreme Court of South Australia

Representation:

B M Selway QC (Solicitor-General for the State of South Australia) with R F Gray for the appellant (instructed by Director of Public Prosecutions, South Australia)

M L Abbott QC with J A English for the respondent (instructed by Legal Services Commission of South Australia)

Intervener:

J R McKechnie QC with R M Mitchell intervening on behalf of the Attorney-General for the State of Western Australia (instructed by Crown Solicitor for Western Australia)

CATCHWORDS

Director of Public Prosecutions v B

Criminal law – Practice and procedure – Prosecution attempted to enter nolle prosequi – Whether court has power to refuse to accept entry of nolle prosequi – Jurisdiction of Full Court of Supreme Court to answer questions reserved – Whether questions arose "at the trial" – Time at which criminal trial upon an information begins – No power to issue advisory opinion.

Words and phrases – "at the trial".

Criminal Law Consolidation Act 1935 (SA), ss 285A, 350.

1 GAUDRON, GUMMOW AND HAYNE JJ. On 28 November 1994, the respondent was arraigned before Judge Lowrie in the District Court of South Australia on an information alleging six counts of sexual offences against a young girl. He pleaded not guilty and his trial was adjourned to be heard at a date to be fixed. In July 1995 he applied for leave to elect for trial by judge alone but that application was adjourned for hearing by the trial judge at the commencement of the trial which was fixed for 11 July 1995. On 6 July 1995, the matter was transferred to the Supreme Court pursuant to s 110 of the *Summary Procedure Act* 1921 (SA).

2 On 10 July 1995, the day before the trial was fixed to begin, the matter was called on before the judge assigned to hear the trial (Mohr J). The application for leave to elect for trial by judge alone was not pursued. The proceeding was adjourned to 11 July 1995.

3 On that day, before the accused was arraigned, counsel for the prosecution told the judge there had been a problem contacting the complainant; neither the complainant nor her mother were present at court. The Crown, therefore, sought to have the matter taken from the trial list. This the judge refused. Counsel for the prosecution took instructions and then told the judge that she was instructed to enter a nolle prosequi. The judge replied:

> "I am not prepared to accept a nolle prosequi in the circumstances of this case. I think the accused is entitled to a verdict."

4 The events that followed can be seen from the transcript of proceedings:

> "MR NITSCHKE [then counsel for the respondent]: Your Honour has spoken, and that's simply my argument. It is improper for the Crown to come along and attempt to enter a nolle prosequi in such circumstances. I invite your Honour to see it as an abuse of the court's process to attempt to do so.
> HIS HONOUR: You reopen your application of 28 June.
> MR NITSCHKE: I do.
> HIS HONOUR: In the circumstances, I am prepared to accept your application. You elect for trial by judge alone.
> MR NITSCHKE: Yes. Those papers have been filed on the certificates.
> HIS HONOUR: I know that you withdrew it. I will give you leave to reinstate your application.
> MR NITSCHKE: I reinstate those papers relating to the election that are on the file.
> HIS HONOUR: I will grant that application.
> PLEA: NOT GUILTY ALL COUNTS

MISS McDONALD [then counsel for the Director of Public Prosecutions]: I tender no evidence.

HIS HONOUR: In those circumstances, the accused is found not guilty of all counts and is discharged."

5 The Director of Public Prosecutions asked Mohr J to reserve questions for consideration of the Full Court. That application was made relying on s 350 of the *Criminal Law Consolidation Act* 1935 (SA) and, in particular, sub-s (1A). Section 350 provided at the time[1]:

"(1) If on the trial or sentencing of any person convicted on information any question of difficulty in point of law or concerning the sentencing has arisen, it shall be lawful for the presiding judge in his discretion to reserve the question for the consideration and determination of the Full Court and to respite execution of the judgment or postpone judgment until the question has been considered and decided.

(1A) Where a person is tried on information and acquitted, the court shall, on the application of the Attorney-General or the Director of Public Prosecutions, reserve any question of law arising at the trial for the consideration and determination of the Full Court.

(2) A case shall be stated as provided in section 351 –

(*a*) if the Full Court, on motion, makes a rule or order for that purpose, which rule or order the Full Court is hereby authorised to make;

(*b*) if the Full Court, on an appeal involving a question of law alone, so requires as hereinafter mentioned.

(3) Where a person has been convicted on information and a question of law has been reserved, or the Full Court has ordered a case to be stated, in relation to his trial or sentencing, the presiding judge may, in his discretion, commit the convicted person to gaol, or release him on recognizance of bail with one or two sufficient sureties and in such sum as the judge thinks fit,

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1 The provisions for reserving questions of law said to have arisen on a trial resulting in acquittal were amended by the *Criminal Law Consolidation (Appeals) Amendment Act* 1995 (SA). Section 11 of that amending Act provided that the amendments do not apply to an information laid before the commencement of that Act (on 4 January 1996). The information in this matter was laid on 28 November 1994.

conditioned to appear at such time or times as the court directs, and receive judgment or render himself in execution, as the case may be."

The case stated, and the questions to be reserved, were prepared by the appellant and submitted to the primary judge. It is as well to set out much of that case stated:

"1. By Information filed by the Director of Public Prosecutions in the District Court of South Australia on the 28th November 1994, [the respondent, B] (the accused) appeared before me charged with one count of Indecent Assault, one count of Unlawful Sexual Intercourse with a Person Under 12, one count of Attempted Unlawful Sexual Intercourse and three counts of Unlawful Sexual Intercourse.

2. The particulars of the charges against the accused were as follows:

[There was then set out the text of the counts on the Information.]

3. The accused was first arraigned in the District Court of South Australia on the 28th November 1994.

4. The trial of the accused was listed to commence on the 10th July 1995[2]. On this date I was notified by the prosecutor of the non-attendance of the alleged victim and her mother.

5. An application was made by the prosecutor to have the matter taken from the trial list. I refused this application.

6. The prosecutor then entered a nolle prosequi on behalf of the Director of Public Prosecutions[3]. I refused to accept the nolle prosequi.

7. I then invited counsel for the accused to make an application for trial by judge alone. Such an application was made and I granted the accused a trial by judge alone.

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2 The notes on the back of the Information suggest that this date may be wrong but nothing turns on it.

3 Whether a nolle prosequi was entered may be open to doubt. Certainly the prosecutor attempted to do so but, as the next sentence in the case records, the judge refused to accept it.

8. The accused was then re-arraigned before me and pleaded not guilty to all of the counts on the Information before the court. I invited the prosecution to tender no evidence. The prosecutor adopted this course.

9. I found the accused not guilty of all of the counts on the Information.

10. Pursuant to s 350(1A) of the Criminal Law Consolidation Act, 1935, I now reserve for the consideration of the Full Court the following questions of law:

    (1) Do I have the power to refuse to accept a nolle prosequi entered by the Director of Public Prosecutions, and

    (2) If the answer to the first question is yes, are there any limitations to the exercise of that power."

6 The Full Court held[4] that the questions should both be answered "Yes". Debelle J examined the history in this country, and elsewhere, of the entry of a nolle prosequi by the Attorney-General and, more recently, by Directors of Public Prosecutions pursuant to powers conferred on them by statute[5]. He concluded that although the Court may not review the prerogative power of the Attorney-General to enter a nolle prosequi[6], the Court does have power to refuse to permit the entry of a nolle prosequi whether by the Attorney-General or by the Director of Public Prosecutions[7]. Mullighan J was of the opinion that the Court had power to refuse to accept a nolle prosequi and that it ought do so if to accept it would defeat the expectation of parties, court and community that a trial would proceed to a conclusion on its merits[8]. Nyland J agreed with Debelle J and Mullighan J[9]. The Director of Public Prosecutions now appeals by special leave.

7 We consider that it is necessary to begin by examining whether there was power to reserve the questions which were reserved by Mohr J for consideration by the Full Court. In particular, are the questions that were reserved questions of

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4 *Question of Law Reserved on Acquittal (No 3 of 1995)* (1996) 66 SASR 450.

5 In South Australia, the *Director of Public Prosecutions Act* 1991, s 7(1)(e).

6 (1996) 66 SASR 450 at 459, 472.

7 (1996) 66 SASR 450 at 472.

8 (1996) 66 SASR 450 at 451-452.

9 (1996) 66 SASR 450 at 473.

law which arose at the trial of the respondent? If they are not, it would follow that s 350(1A) did not authorise the reservation of those questions for the consideration of the Full Court and that the Full Court should not have answered them. These issues were not debated in the Full Court and were raised in the course of the appeal to this Court only as a result of interventions by the Court in the course of argument. They are, however, issues which cannot be swept aside. During the argument leave was given to present written submissions on these issues.

8 It must now be accepted that the answers to questions reserved for consideration after an acquittal may be the subject of appeal to this Court. Why that is so casts light on whether there was power to reserve the questions that were reserved here.

9 In *Mellifont v Attorney-General (Q)*[10] it was held that the opinion of the Court of Criminal Appeal in Queensland on a point of law referred under s 669A of the *Criminal Code* (Q) was a judgment decree or order within s 73 of the Constitution from which an appeal might be brought to the High Court[11]. The Court overruled *Saffron v The Queen*[12]. In *Mellifont* the trial judge had ruled that evidence which the accused had given to a Royal Commission was evidence which was not material to the enquiries of that Commission. Before the judge was able to direct the jury to return a verdict of not guilty to the charge of perjury brought against the accused, the prosecutor entered a nolle prosequi and, accordingly, the accused was discharged. The Attorney-General then referred a number of questions to the Court of Criminal Appeal including whether the trial judge's test of materiality was correct. The Crown told the accused that if the questions which were referred were answered in the sense contended for by the Attorney-General a fresh indictment would be presented against him. The majority in *Mellifont* said expressly that they did not rely upon this fact in concluding that the decision of the Court of Criminal Appeal was a judgment decree or order within s 73 of the Constitution[13].

10 It is, however, important for present purposes to note that central to the reasoning of the majority was the conclusion that proceedings under s 669A(2) of the *Criminal Code* (Q) enabled the Court of Criminal Appeal to correct an error of law that was made at the trial and that the Court of Criminal Appeal's decision was

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10 (1991) 173 CLR 289.

11 (1991) 173 CLR 289 at 305 per Mason CJ, Deane, Dawson, Gaudron and McHugh JJ, 327 per Toohey J; cf Brennan J at 319.

12 (1953) 88 CLR 523.

13 (1991) 173 CLR 289 at 306 per Mason CJ, Deane, Dawson, Gaudron and McHugh JJ, 326 per Toohey J.

a decision made with respect to a "matter" which was the subject-matter of the legal proceedings at first instance[14]. It was that characteristic which was identified as stamping the proceedings as an exercise of judicial power and the decision as a judgment decree or order within s 73. Thus it was the relationship between the question reserved and the trial which was critical to the conclusion reached.

11 The questions reserved in this case were cast in very general terms, apparently unrelated to any facts, not even the facts in the case stated. That the questions were so general is, itself, a strong indication that they did not arise at any trial. Whether a particular power should be exercised in a particular way may well arise at a trial and although that might require consideration of whether power of the kind in question does exist, the question which arises at trial will, at least ordinarily, not be that broad and general question - "does the power exist?" - it will usually be whether the alleged power can be exercised in the circumstances arising at the trial. The failure to connect the questions with the facts stated in the case might be seen as some drafting defect that should not be permitted to impede the resolution of the questions. But the generality of the questions that were referred is not simply a defect in drafting. It is a symptom of a more deep-seated problem.

12 The difficulties in the case stated procedure, whether the case is stated in a criminal or civil matter or, if in a criminal matter, whether stated at the instance of the prosecution or defence, are well known[15]. At least some of those difficulties stem from a failure to recognise that the jurisdiction is not conferred to permit courts to offer general advisory opinions on hypothetical questions[16]. The questions reserved in this matter appear to invite such an opinion.

13 No doubt, if the first question reserved for the consideration of the Full Court in this matter could properly be answered no (as the appellant submitted it should

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14 (1991) 173 CLR 289 at 305 per Mason CJ, Deane, Dawson, Gaudron and McHugh JJ, 325-326 per Toohey J.

15 See, eg, *Mack v Commissioner of Stamp Duties (NSW)* (1920) 28 CLR 373 at 381 per Isaacs J; *Dickson v Commissioner of Taxation (NSW)* (1925) 36 CLR 489 at 497 per Isaacs J; *R v Rigby* (1956) 100 CLR 146 at 151-153 per Dixon CJ, McTiernan, Webb, Kitto and Taylor JJ; *KLDE Pty Ltd v Commissioner of Stamp Duties (Q)* (1984) 155 CLR 288 at 304-305 per Brennan J; *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 460-461, 482-484; *Woolf v City of Camberwell* [1931] VLR 162; *City of Hawthorn v Victorian Welfare Association* [1970] VR 205; *Industrial Equity Ltd v Commissioner for Corporate Affairs* [1990] VR 780.

16 *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581-582.

be) it would be apparent that steps taken by the primary judge in this proceeding were ill-founded. In that sense it may be said that a negative answer to the first question would answer a question or questions which fell for decision in this proceeding. But if the first question was answered correctly by the Full Court (when it held that the Court has power to refuse to accept a nolle prosequi) two things can be observed. First, if there is power to refuse to accept a nolle prosequi, the existence of that power would have been of significance to the course of events before Mohr J only if the power was one which could be exercised in circumstances of the kind that arose in that case. Secondly, as the second question reserved reveals, unless that question was to be answered "no", the Court was invited to embark upon an attempt to define the boundaries within which the power to refuse to accept a nolle prosequi might properly be exercised or to give as it did such a general answer as to be devoid of any practical utility. On no view, however, did the question of defining the boundaries of the discretion arise at the trial of the respondent. And yet that is what the second question asks: "... are there *any* limitations to the exercise of that power?"

14 These are reasons enough to suggest that the questions reserved for consideration by the Full Court should not have been answered. But there is another, equally fundamental reason why that is so.

15 The appellant accepted that the trial of the respondent had not begun when Mohr J refused to accept the nolle prosequi. He contended that in South Australia, unlike some other States, a criminal trial upon an information commences when the judge who is to try the accused embarks upon the hearing and determination of any preliminary questions, or upon the empanelling of the jury, the accused having already been arraigned before *that* judge. The *Criminal Law Consolidation Act* empowers "[a] court before which a person has been arraigned ... if it thinks fit, [to] hear and determine any question relating to the admissibility of evidence, and any other question of law affecting the conduct of the trial, before the jury is empanelled."[17] In *Attorney-General's Reference No 1 of 1988*[18], King CJ (with whom Millhouse J agreed) held that[19]:

> "The 'court' referred to in the section [s 285A] is not the court as an institution, but the particular court constituted of the judge who is sitting to try the case. The arraignment is not the first arraignment at which the accused

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17 s 285A.

18 (1988) 49 SASR 1.

19 (1988) 49 SASR 1 at 5.

> pleads but the process by which the accused is arraigned before the trial judge at the commencement of the trial."

He further held that[20]:

> "In this State, therefore, the trial commences when the accused having been arraigned before the judge who is to try him, that judge embarks upon the hearing and determination of any preliminary questions or upon the empanelling of the jury."

16 This may be contrasted with the position in other States. Thus, to take one example from the decisions of this Court, it was held in *Newell v The King*[21] that a trial in Tasmania commenced on the date of the accused's first arraignment before the Court, s 351(6) of the *Criminal Code* (Tas) providing that: "The trial shall be deemed to begin when the accused is called upon to plead."[22] There is no equivalent provision in South Australia.

17 It may be that the answer to the question - when does the trial begin - requires consideration of the context within which that question arises[23] and does not admit of an answer of the generality given in *Attorney-General's Reference No 1 of 1988*[24]. We need not decide if that is so. Here we have no doubt that the appellant was right to concede that the respondent's trial had not begun when the primary judge refused to accept the nolle prosequi. It was only *after* the judge had declined to receive the nolle prosequi that the accused was arraigned before him. Only then did the trial begin. The short debate that took place about the entry of a nolle prosequi took place before the trial began and was not resolved under the powers given by s 285A as a question of law affecting the conduct of the trial, before the jury was empanelled. That power is predicated upon the accused having been arraigned and the respondent had not then been arraigned before Mohr J (or, indeed, in the Supreme Court).

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20 (1988) 49 SASR 1 at 5-6.

21 (1936) 55 CLR 707.

22 cf *Crimes Act* 1900 (NSW), s 395; *Crimes Act* 1958 (Vic), s 391; *Criminal Code* (Q), s 594; *R v Talia* [1996] 1 VR 462 at 470-476; *Bond* (1992) 62 A Crim R 383 at 394-395; *R v His Honour Judge Noud, ex parte MacNamara* [1991] 2 Qd R 86 at 99-100.

23 cf *R v Howard* (1992) 29 NSWLR 242 at 246-250; *R v Nicolaidis* (1994) 33 NSWLR 364 at 367; *R v Symons* [1981] VR 297; *R v Talia* [1996] 1 VR 462 at 470-476.

24 (1988) 49 SASR 1.

18 The conclusion that the refusal to accept entry of a nolle prosequi took place before the trial began suggests, and, to our mind, suggests strongly, that any question about that refusal was not a question arising "at the trial". The appellant submitted, however, that we should, nevertheless, conclude that a question about the power to reject a nolle prosequi was a question which had arisen at the trial because, although no such submission was made at trial, it would have been open to the prosecutor to have contended that the Court lacked jurisdiction to embark upon the trial as it did, a nolle prosequi having already been validly entered.

19 It may be that there are circumstances in which it may be said that a question arises at a trial even though it is not the subject of submissions in the course of that trial. So much was held in *R v Brown*[25] and *R v Turnbull*[26]. But the question which it was sought to agitate in the Full Court and in this Court was not whether the primary judge lacked jurisdiction to try the case; it was whether the primary judge was right to reject the nolle prosequi. Those two questions are very different. Even if the answer to one may depend upon, or be affected by, the answer which is given to the other, that does not mean that the questions which in fact were referred to the Full Court are questions which arose at the trial.

20 The time at which the question arose is no mere matter of form. It reflects a point of fundamental significance. The trial of the accused not having begun, could the Director of Public Prosecutions refuse to proceed with the prosecution by filing a nolle prosequi?

21 The line between, on the one hand, the decisions whether to institute or continue criminal proceedings (which are decisions the province of the executive) and on the other, decisions directed to ensuring a fair trial of an accused and the prevention of abuse of the court's processes (which are the province of the courts) is of fundamental importance. As was said in *Maxwell v The Queen*[27]:

> "It ought now be accepted, in our view, that certain decisions involved in the prosecution process are, of their nature, insusceptible of judicial review. They include decisions whether or not to prosecute[28], to enter a nolle

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25 (1889) 24 QBD 357 at 360 per Lord Coleridge CJ.

26 [1907] VLR 11 at 14 per Cussen J; see also *R v Mellor* (1858) 7 Cox CC 454.

27 (1996) 184 CLR 501 at 534 per Gaudron and Gummow JJ; see also at 513-514 per Dawson and McHugh JJ.

28 See *Connelly v Director of Public Prosecutions* [1964] AC 1254 at 1277; *R v Humphrys* [1977] AC 1 at 46; *Barton v The Queen* (1980) 147 CLR 75 at 94-95, 110.

prosequi[29], to proceed ex officio[30], whether or not to present evidence[31] and, which is usually an aspect of one or other of those decisions, decisions as to the particular charge to be laid or prosecuted[32]. The integrity of the judicial process - particularly, its independence and impartiality and the public perception thereof - would be compromised if the courts were to decide or were to be in any way concerned with decisions as to who is to be prosecuted and for what[33]."

22 The accused's trial not having begun and the decision being a decision about whether to continue a prosecution, the question whether to do so was a matter which fell within the province of the executive. It was not a question which arose at the trial of an accused. And the trial not having begun, no question could arise whether the entry of a nolle prosequi constituted an abuse of process. Other considerations may have arisen (we do not say they would) if the question had been one relating to the continuation of a trial that had already begun or had been whether prosecution of a fresh information amounted to some abuse of process. But those questions did not arise here.

23 It was suggested, in argument, that the power of the Director of Public Prosecutions to enter a nolle prosequi was a power that could be exercised only (as s 7(1)(e) of the *Director of Public Prosecutions Act* 1991 (SA) says) "in appropriate cases" and that accordingly the primary judge's decision to reject the nolle prosequi could be founded in the supervisory jurisdiction of the Supreme Court of South Australia by way of judicial review. We say nothing about whether s 7(1)(e) does limit the power of the Director to enter a nolle prosequi or about whether judicial proceedings could be brought to control the exercise of that power. If the decision of the primary judge is properly characterised as an exercise

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29 See *R v Allen* (1862) 1 B & S 850 [121 ER 929]; *Barton v The Queen* (1980) 147 CLR 75 at 90-91.

30 See *Barton v The Queen* (1980) 147 CLR 75 at 92-93, 104, 107, 109.

31 See, eg, *R v Apostilides* (1984) 154 CLR 563 at 575.

32 See *McCready* (1985) 20 A Crim R 32 at 39; *Chow v Director of Public Prosecutions* (1992) 28 NSWLR 593 at 604-605.

33 *Barton v The Queen* (1980) 147 CLR 75 at 94-95; *Jago v District Court (NSW)* (1989) 168 CLR 23 at 38-39, 54 per Brennan J, 77-78 per Gaudron J; *Williams v Spautz* (1992) 174 CLR 509 at 548 per Deane J; *Ridgeway v The Queen* (1995) 184 CLR 19 at 74-75 per Gaudron J.

of power of judicial review it would clearly not be a decision of a question arising at the trial of the respondent.

24 In our view, the questions reserved did not arise at the trial of the respondent. It follows that there was no power to reserve them for the consideration of a Full Court.

25 It also follows that this Court should not, and indeed cannot, accept the invitation proffered by the appellant to express its opinion upon the issues which it was sought to agitate by the case stated. To do so would be to deliver an advisory opinion and that, of course, is beyond the power of this Court whether in its appellate or its original jurisdiction[34].

26 The appeal should be allowed, the orders of the Full Court answering the questions reserved should be set aside and in lieu orders made that it is inappropriate to answer either of the questions reserved. It is unnecessary to provide for the costs of the appeal, the appellant being liable for them in any event[35].

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34 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257; *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 300, 303, 305 per Mason CJ, Deane, Dawson, Gaudron and McHugh JJ, 314, 316-319 per Brennan J; *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 612 per Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ, 642 per McHugh J.

35 *Criminal Law Consolidation Act* 1935 (SA), s 351B.

27 McHUGH J. In this appeal from a decision of the Full Court of the Supreme Court of South Australia the appellant, the Director of Public Prosecutions for the State of South Australia ("the DPP"), asks this Court to determine whether a court has the power to refuse to accept a nolle prosequi entered, or sought to be entered, by or on behalf of the Crown. The DPP contends that the decision to enter a nolle prosequi is a long-standing Crown prerogative that is beyond the reach of judicial review. The respondent, who was acquitted after a trial judge refused to accept the entry of a nolle prosequi, argues that the power to refuse to accept a nolle prosequi is an incident of a court's inherent power to protect its processes from abuse.

28 Regrettably, the question that the DPP raises cannot be answered in the present appeal: the trial judge did not have jurisdiction to reserve the relevant questions of law for consideration by the Full Court of the Supreme Court under ss 350(1a) and 351 of the *Criminal Law Consolidation Act* 1935 (SA) ("the Act"), as it then stood. This is because the suggested questions did not arise "at the trial" of the respondent as required by s 350(1a). Consequently, neither the Full Court nor this Court had or has jurisdiction to determine the questions reserved.

The history of the litigation

29 The respondent, identified only as B, was charged with a number of sexual offences against a nine year old girl. B was arraigned in the District Court of South Australia on 28 November 1994. His trial was listed to commence in the Supreme Court of South Australia on 10 July 1995 before Mohr J. However, before B had been arraigned before Mohr J, counsel for the DPP applied to have the matter taken from the list because two important Crown witnesses were unavailable to testify. His Honour refused the application and counsel for the DPP then sought to enter a nolle prosequi. Mohr J refused to accept the nolle prosequi.

30 Mohr J then invited B's counsel to apply for a trial by judge alone. The application was made and granted. B was arraigned before Mohr J and pleaded not guilty to all the counts on the information. At his Honour's suggestion, the prosecution tendered no evidence. His Honour found B not guilty on all of the counts. On the DPP's application under s 350(1a) of the Act, his Honour reserved for the consideration of the Full Court the following two questions of law:

(i) Do I have the power to refuse to accept a nolle prosequi entered by the Director of Public Prosecutions?; and

(ii) If the answer to the first question is yes, are there any limitations on the exercise of that power?

The Court of Criminal Appeal of the Supreme Court of South Australia (Debelle, Mullighan and Nyland JJ) answered the two questions: "Yes" and

"Yes"[36]. Their Honours do not appear to have considered the question whether the trial judge had jurisdiction to reserve the two questions of law for consideration by the Full Court.

The trial judge did not have jurisdiction to reserve the two questions of law for consideration by the Full Court

31 At all material times, s 350(1a) of the Act provided[37]:

> "Where a person is tried on information and acquitted, the court shall, on the application of the Attorney-General or the Director of Public Prosecutions, reserve any question of law arising at the trial for the consideration and determination of the Full Court."

Section 351(1) provided:

> "In any of the cases referred to in section 350, the presiding judge shall state a case setting forth the question reserved, with the circumstances on which it has arisen, and shall sign the case and transmit it within a reasonable time to the Full Court."

32 In the present case, Mohr J had jurisdiction to reserve the two questions of law only if they were questions "arising at the trial". However, no "trial" had begun when Mohr J purported to reject the entry of the nolle prosequi. At that time, the respondent had not been arraigned before Mohr J. In South Australia, the trial of an accused does not commence before the accused is arraigned before the judge who will hear or preside at the trial of the indictment. As King CJ (with whom Millhouse J agreed) said in *Attorney-General's Reference No 1 of 1988*[38]:

> "In this State … the trial commences when the accused having been arraigned before the judge who is to try him, that judge embarks upon the hearing and determination of any preliminary questions or upon the empanelling of the jury."

33 The reasoning of King CJ applies to the facts of this case and shows that there was no trial in progress when Mohr J decided to refuse to accept the entry of the nolle prosequi. Indeed, the DPP concedes that the trial had not commenced when Mohr J purported to reject the nolle prosequi. Notwithstanding this concession,

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36 *Question of Law Reserved on Acquittal (No 3 of 1995)* (1996) 66 SASR 450.

37 Section 348 defined "Full Court" as meaning "the Supreme Court constituted of an uneven number of judges, not being less than three".

38 (1988) 49 SASR 1 at 5-6.

the DPP contends that the question of whether the trial judge had power to reject the nolle prosequi was "a question which arose at the trial" because counsel could have maintained an objection to the rejection of the nolle prosequi after the trial had properly commenced. This argument must be rejected.

34 The question must arise "at the trial", not "in relation to" or "in respect of" the trial. One reason for the restrictive language of s 350 may have been a legislative desire to avoid valuable appellate court time being spent in providing opinions on the validity of pre-trial tactical manoeuvres. Whatever the reason, it would be a misuse of language to describe a prosecutorial act that sought to prevent a trial commencing as one that arose at the trial. Mohr J, therefore, did not have jurisdiction to reserve the two questions of law because they did not arise at the trial of the respondent.

35 Accordingly, the Full Court had no jurisdiction to answer the questions reserved. The appeal to this Court must be allowed, and the answers given by the Full Court set aside. The two questions reserved should both be answered: "no jurisdiction to answer".

36 KIRBY J. This appeal from orders of the Supreme Court of South Australia[39] presents a number of questions of substance and of jurisdiction.

37 The most important of the points of substance is whether, and if so in what circumstances, a judge may decline to accept the entry of a nolle prosequi[40] by the Director of Public Prosecutions. On the way to the resolution of that question, which attracted special leave to appeal, lies a thicket of jurisdictional problems. None of them arose in the courts below. Congenial though it would be to be spared the obligation of resolving the point of substance (which is not without difficulty), I cannot do so for I am unconvinced by the suggested jurisdictional defects. Lurking in the background, beyond the thicket and the points of substance and jurisdiction, stand certain constitutional questions, the majority of them raised in defence of the judgment of the Supreme Court.

Nolle prosequi refused: case stated

38 The facts could not be simpler. The complainant, whose evidence against the respondent, B, was essential to the prosecution case, failed to attend to give evidence at his trial. The primary judge[41] declined, in effect, to grant an adjournment. Prosecuting counsel thereupon announced instructions to enter a nolle prosequi. The judge declined "in the circumstances" to accept it. The respondent elected for trial by judge alone. That application was granted. He was "rearraigned" and pleaded not guilty to all counts. The prosecutor tendered no evidence. The judge found him not guilty on all counts and discharged him. At the request of the Director of Public Prosecutions for South Australia (the appellant) the judge stated a case which was heard and determined by the Full Court of the Supreme Court, sitting as the Court of Criminal Appeal.

39 The stated case and the meagre transcript will not be repeated. Relevant passages appear in the reasons of Gaudron, Gummow and Hayne JJ. It is perhaps worth noting that the Court file, which is reproduced in the appeal papers, and to which reference was made without objection, explains the statement that the respondent was "rearraigned". The file shows that the venue for the trial was initially laid in the District Court of South Australia. The proceedings came before Lowrie DCJ on 28 November 1994. According to the file note, signed by the Clerk of Arraigns, the respondent was arraigned on that day "on all six counts". He pleaded not guilty. Thereafter there were further mentions for procedural orders. On 24 March 1995, Jennings DCJ remanded the respondent for trial on 11 July

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39 (1996) 66 SASR 450.

40 *Broome v Chenoweth* (1946) 73 CLR 583 at 599 per Dixon J; cf *Davis v Gell* (1924) 35 CLR 275 at 287.

41 Mohr J.

1995. On 3 July 1995 an application out of time by the respondent for leave to elect for trial by judge alone was stood over to be heard at the commencement of the trial. On 6 July 1995, the proceedings were transferred to the Supreme Court by judicial order[42]. The trial was called on before the primary judge on 10 July 1995. It was then that the prosecutor first notified a difficulty in securing the attendance of the complainant. On 11 July 1995 the trial was listed for hearing. The several interlocutory proceedings noted on the file are not atypical of the preliminary hearings in Australian criminal courts today. Such hearings did not previously take place. However, they are now a regular feature of the criminal trial process in most, if not all, parts of Australia.

40 In the course of explaining the Crown's request that the trial be adjourned, the prosecutor stated "unfortunately up until now the Crown has relied on the mother to contact the alleged victim". The prosecutor made reference to the fact that "charges were withdrawn on the previous occasion" and to a statement from the complainant asking that the charges not be proceeded with.

41 Clearly enough, if the prosecutor had an uncontrolled power to enter a nolle prosequi and thereby to terminate the proceedings on the indictment (as the appellant submits), the primary judge's refusal to adjourn or otherwise stop the trial, and his expressed belief that the respondent was "entitled to have his trial proceed" would be put at naught. The judge (and the respondent) did not accept that outcome. The trial took the course described. The appellant's response was to ask for a case to be stated. This was not done at the trial by reservation there of a question of law[43]. The statutory provision as then appearing, under which the appellant sought and obtained the statement of the case, read[44]:

> "Where a person is tried on information and acquitted, the court shall, on the application of the ... Director of Public Prosecutions, reserve any question of law arising at the trial for the consideration and determination of the Full Court."

42 The duty of the judge to state a case arose under s 351 of the *Criminal Law Consolidation Act* 1935 (SA) ("the Act") but only "[i]n any of the cases referred to in section 350". By s 351(2a), in a case where the accused has been acquitted but a question of law is reserved, it is provided that "the Full Court shall have authority

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42 Pursuant to the *Summary Procedure Act* 1921 (SA), s 110.

43 *Criminal Law Consolidation Act* 1935 (SA), s 350. Sections 350 and 351 were subsequently repealed by the *Criminal Law Consolidation (Appeals) Amendment Act* 1995 (SA), ss 4 and 5. The 1995 amendments do not apply to the present proceedings.

44 *Criminal Law Consolidation Act* 1935 (SA), s 350(1a).

to hear and finally determine the question reserved, but the determination of the Full Court shall not invalidate or otherwise affect the acquittal". In such cases, where there might otherwise be no contradictor, the appellant is declared to be "liable to pay the taxed costs of the defendant in proceedings relating to the reservation and determination of the question of law"[45]. If the defendant does not appear, the Director "shall instruct counsel to present such argument to the Court as might have been presented by counsel for the defendant"[46]. The procedure of the stated case, being a relic of times before the enactment of general facilities of appeal, has many artificialities and rigidities to which judges have drawn attention[47].

43 Having received the stated case, the Full Court heard and determined the questions reserved. It "determine[d] and answer[ed]" the questions by orders subsequently filed and signed on behalf of the Court by the Deputy Registrar. To question number 1 ("Do I have the power to refuse to accept a nolle prosequi entered by the Director of Public Prosecutions?"), the Court gave the answer "Yes". To question number 2 ("If the answer to question 1 is yes, are there any limitations to the exercise of that power?"), the Court also gave the answer "Yes". In the course of the reasons of the judges constituting the Full Court (although not in its order), various limitations on the exercise of the power were suggested. Some of these were expressed affirmatively ("whether there has been an abuse of process"[48], whether required by the "principles of fairness and justice"[49]). Some were expressed negatively to emphasise that a refusal to accept a nolle prosequi "does not involve a review of the decision of the Director of Public Prosecutions to enter [it]"[50]. All judges in the Full Court agreed that the

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45 *Criminal Law Consolidation Act* 1935 (SA), s 351(2b).

46 *Criminal Law Consolidation Act* 1935 (SA), s 351(2b).

47 See eg *Mack v Commissioner of Stamp Duties (NSW)* (1920) 28 CLR 373 at 381; *Connor v Pittaway* [1969] VR 335 at 337; *R v Douglas; Ex parte Attorney-General* [1991] 1 Qd R 386 at 386.

48 (1996) 66 SASR 450 at 473.

49 (1996) 66 SASR 450 at 452.

50 (1996) 66 SASR 450 at 451. See also at 472.

refusal would be reserved to "rare"[51], "extreme"[52] or "exceptional"[53] cases, including to "prevent oppression or injustice"[54]. In many cases, they suggested, it would be proper to leave the question of the risk of abuse of process to be dealt with by a different court in the event (which might not ensue) that proceedings against the accused were revived[55].

44 Both before the Full Court and in this Court, the appellant argued that this approach was fundamentally misconceived. So were the decisions in Queensland[56], Western Australia[57] and the suggestions in South Australia[58] along similar lines. According to the appellant, legal history, an appreciation of criminal procedure, the proper role of the courts in relation to prosecutions and legal principle dictated a return to the earlier doctrine by which courts, both in England[59] and Australia[60] acknowledged that they had no power to "decline to accept" a nolle prosequi tendered by the prosecutor appearing in the interests of the Crown. Once

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51 (1996) 66 SASR 450 at 453, 465.

52 (1996) 66 SASR 450 at 465, quoting from *R v Jell; Ex parte Attorney-General* [1991] 1 Qd R 48 at 53.

53 (1996) 66 SASR 450 at 453, 462.

54 (1996) 66 SASR 450 at 453. See also at 462.

55 (1996) 66 SASR 450 at 470 where Debelle J conceded that there was a "good deal of force" in the opinion of Murray J to this effect in *R v Lorkin* (1995) 15 WAR 499 at 535.

56 *R v Saunders* [1983] 2 Qd R 270; *R v Jell; Ex parte Attorney-General* [1991] 1 Qd R 48; *R v Ferguson; Ex parte Attorney-General* [1991] 1 Qd R 35; McDermott, "Nolle Prosequi - The Law and Practice in Queensland" (1993) 17 *Criminal Law Journal* 319.

57 *R v Lorkin* (1995) 15 WAR 499.

58 *Rona v District Court (SA)* (1995) 63 SASR 223 at 228-229.

59 *R v Comptroller-General of Patents* [1899] 1 QB 909 at 914.

60 *Gilchrist v Gardner* (1891) 12 NSWR 184 at 186-187; *Williams v The Queen* [1936] QWN 3; *Kokles v The Queen* [1936] QWN 22; *R v Carnes* (noted in [1976] Tas SR (NC) 1, but on this point see the unreported reasons for judgment: Supreme Court of Tasmania, 12 February 1976); *R v Heald* [1979] Tas R 185; *R v Judge CF McLoughlin and Cooney* [1988] 1 Qd R 464 at 468; cf *R v Economou* (1989) 51 SASR 421.

such tender was made, such proceedings were brought to an end. The court's jurisdiction to do anything but discharge the accused was terminated[61].

Issues arising

45 The following issues arise in the appeal. The first two of them were not raised by the parties or the intervener[62] but by questioning directed to the parties by the Court:

1. *The foundation of jurisdiction point:* Did the questions of law, purportedly included in the case stated, arise "at the trial" of the respondent so as to enliven the power of the Full Court to consider and determine those questions (and thus of this Court to hear an appeal from its orders)?

2. *The jurisdiction points:* If so, was the appeal to this Court otherwise beyond jurisdiction upon the ground that it (a) was not from a judgment, decree, order or sentence of the Supreme Court of a State within s 73(ii) of the Constitution[63]; (b) invoked the exercise of non-judicial power by the Court, whether in the provision of an advisory opinion or otherwise[64]; or (c) presented for determination a question in which the respondent had no real interest and which was wholly hypothetical.

3. *The deprivation of jurisdiction point:* Upon the announcement by the prosecutor that the appellant entered a nolle prosequi in respect of the indictment charging the respondent with certain offences did the court conducting the trial lose jurisdiction to make any order save for the discharge of the respondent upon that indictment?

4. *Refusal of nolle prosequi point:* If not, was it within the power of the primary judge, either as a matter of the procedures followed or as a substantive matter of law, to decline to accept the nolle prosequi whether upon the ground of protecting the court from abuse of process or to prevent oppression and injustice to an accused or otherwise?

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61 *R v Lorkin* (1995) 15 WAR 499 at 535 per Murray J (diss).

62 The State of Western Australia.

63 cf *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289.

64 *Saffron v The Queen* (1953) 88 CLR 523 at 524; *President of India v The Moor Line Ltd [No 2]* (1958) 99 CLR 212.

5. *The judicial review point:* Was the challenge to the exercise by the appellant of his statutory discretion "to enter a *nolle prosequi* ... in appropriate cases"[65] susceptible to judicial review and, if so, was the procedure which took place before the primary judge, and the power which he purported to exercise explicable as an instance of judicial review?

6. *The constitutional point:* If, on its true construction, the *Director of Public Prosecutions Act* 1991 (SA) ("the DPP Act") conferred on the appellant a power to enter a nolle prosequi which could not be refused by the court to which it was presented although it amounted to an abuse of process, was the section conferring such power invalid as a purported diminution of the power of the court to operate as a court within the meaning of Ch III of the Australian Constitution? Or was it invalid to the extent that would otherwise bring the court into disrepute by leaving it powerless to prevent an abuse of process?

7. *The form of the questions point:* Having regard to the determination of the foregoing points were the questions reserved in the case stated otherwise so objectionable in form that this Court should decline to answer them?

Common ground

46 Having regard to the number and complexity of the points argued, it could easily be inferred that there was little common ground in the appeal. However, at least as between the parties, there was a great measure of agreement. Essentially, each of them came to the Court anticipating that they would be arguing the refusal of the nolle prosequi point with occasional incursions into the deprivation of jurisdiction point (raised by the appellant) and the judicial review point and, if need be, the constitutional point (raised defensively for the respondent). As it turned out, much of the oral argument was addressed to questions from the Court on the preliminary points of jurisdiction and on the final point as to the form of the questions contained in the case stated.

47 It is worth recording the matters which represented the common ground of the parties:

1. There was no relevant dispute about the facts. Nor did either party contest the entitlement of this Court to go beyond the stated case to the recorded transcript of proceedings before the primary judge or the notations on the Court file in order to understand the case stated[66].

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65 *Director of Public Prosecutions Act* 1991 (SA), s 7(1)(e).

66 cf *Thomas v The King* (1937) 59 CLR 279 at 286.

2. Although the conduct of interlocutory proceedings prior to the "rearraignment" of the respondent was uncontested, neither party suggested that any special statutory provisions under which such "pre-trial" proceedings are heard in South Australia threw any light upon the meaning of the phrase "at the trial" in s 350(1a) of the Act as it then stood. I am content to proceed on that assumption.

3. A number of concessions were made for the appellant which became common ground:

   (a) that under the law of this country, a court has jurisdiction to protect itself (and those who invoke its process) against abuse of the process of the court. The appellant contended that this jurisdiction continued only during the conduct of a trial and not after the trial was concluded, as he submitted had happened in this case, by the entry of a nolle prosequi;

   (b) that a court would have jurisdiction to stay subsequent proceedings, brought after entry of a nolle prosequi, where a revival of a prosecution of an accused in such proceedings would, in the circumstances, amount to an abuse of the court's process; and

   (c) that the entry of the nolle prosequi in this case had not been made by the Attorney-General or by the appellant pursuant to any prerogative power but solely pursuant to the DPP Act and in terms of the statutory power there conferred upon the appellant[67].

4. For the respondent, who relied upon the power of the primary judge, as a judge of the Supreme Court, to review the lawfulness of the prosecutor's decision to enter the proffered nolle prosequi, it was eventually accepted that the procedures for judicial review of that decision, required by the Rules of the Supreme Court of South Australia, had not been followed[68]. The parties usual to proceedings for judicial review of such decisions were not given notice. However, it was suggested that this did not matter in the context of a collateral attack on the legality of the appellant's decision, at least in a trial conducted in the Supreme Court where the legality of the decision was critical to the proceedings[69].

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67 *Barton v The Queen* (1980) 147 CLR 75 at 90; *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 at 219-221; *CCSU v Minister for the Civil Service* [1985] AC 374 at 417-418.

68 Supreme Court Rules 1987 (SA), r 98.

69 cf *Ousley v The Queen* (1997) 71 ALJR 1548 at 1590; 148 ALR 510 at 567.

5. It was accepted by both sides that differing views might be held, as a matter of fact, about the correctness of the response of the primary judge to the circumstances which had arisen before him. Reservations in this regard were noted in the Full Court. Mullighan J expressly stated that "the resolution of the issues raised by this case stated [should not be] interpreted as approval by this Court of the manner in which the learned trial judge exercised his discretion"[70]. However, whether because that issue was taken to raise only a question of fact or otherwise, it was not argued before the Full Court. Nor was it contested in this Court. The matter proceeded on the footing that the tender of the nolle prosequi was either itself an abuse of process, or the first step in an abuse of process, as the primary judge concluded. The question then presented was whether, in such circumstances, there was nothing which the primary judge could do but accept the entry of the nolle prosequi or whether the judge was entitled to refuse to accept it and to require that the trial proceed.

Foundation of jurisdiction point

48 It is logical to deal first with the suggestion that s 350(1a) of the Act was not engaged so as to authorise the reservation of the purported questions of law or the consideration and determination of them by the Full Court or by this Court. This was an objection raised by members of the Court. It is the first duty of every court, where a doubt has arisen, to satisfy itself as to its own jurisdiction before entering into the exercise of it[71].

49 The resolution of the point turns on the phrase "arising at the trial" appearing in s 350(1a). If a narrow construction of that phrase is adopted, the "trial" of the respondent did not commence until his "rearraignment". As the purported refusal to accept the nolle prosequi occurred before the rearraignment, it is arguable that any question of law relating to the primary judge's power to so refuse was not one "arising at the trial". Instead, it was one arising immediately before the trial commenced. This is the construction of the section which enjoys the support of the majority. Respectfully, I disagree. My reasons are as follows:

1. As with any phrase in legislation, that in question here must be given a meaning in the context of the Act and for the purposes of achieving the

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70 (1996) 66 SASR 450 at 452.

71 See *R v Alley; Ex parte NSW Plumbers & Gasfitters Employees' Union* (1981) 153 CLR 376 at 382.

statutory objectives[72]. Introducing in the Legislative Council the legislation that inserted s 350(1a)[73], the South Australian Attorney-General stated that[74]:

> "The amendment, as proposed by the Bill, will enable the Crown to exercise a responsible role in building up a coherent and consistent body of criminal law, without prejudicing decisions made by juries in favour of accused persons."

When the legislation was read a second time in the House of Assembly, the government expressed the view that the amendment would allow the same issues to be canvassed as in an appeal by the accused[75]:

> "[I]t acknowledges that just as in the case of the trial of an accused who is found guilty, there may be errors of law in summing up of the trial judge or other matters which deserve consideration by the Full Court or other appeal courts, in the same way such considerations may arise when an accused person is acquitted ... while the accused person should certainly not again be put at risk, the Crown should be given the opportunity in some way to have the disputed matters of law dealt with by an appeal. So, it was said that it could be done in the way proposed."

Section 350(1a) is a beneficial procedure, adopted by Parliament to permit courts to give "authoritative decisions on questions of criminal law for the better administration of justice"[76]. A narrow construction of "arising at the trial" in the sub-section would frustrate the achievement of that purpose. Such a construction should therefore be avoided. The fact that the question of law reserved on the application of the appellant did not strike either the primary judge or the Full Court as falling outside the ambit of "the trial" is not, of course, determinative. Oversights can occur, even in such a fundamental matter as jurisdiction. But the approach taken by their Honours is open unless there is imposed on s 350(1a) of the Act a jurisprudence concerning the commencement of "the trial" which was developed for quite

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72 *Newcastle CC v GIO General Ltd* (1997) 72 ALJR 97 at 110-111; 149 ALR 623 at 639-640.

73 *Criminal Law Consolidation Act Amendment Act* 1980 (SA), s 6.

74 South Australia, Legislative Council, *Parliamentary Debates* (Hansard), 5 August 1980 at 39.

75 South Australia, House of Assembly, *Parliamentary Debates* (Hansard), 4 November 1980 at 1745.

76 *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 305, referring to s 669A(2) of the *Criminal Code* (Q) - the Queensland equivalent of s 350(1a) of the Act.

different purposes than those which s 350(1a) was designed to advance. The procedures of stated cases have been notoriously technical. They have presented many questions concerning the last moment at which a judge may be asked to reserve a question of law for the opinion of a higher court[77]. The fact that the Attorney-General or the Director of Public Prosecutions may now, by statute, reserve any question of law after a trial at which a person is acquitted assists in defining the purpose of the sub-section. It suggests that the question of law concerned need not have been raised expressly at the trial. This was the view taken by Cussen J in *R v Turnbull*[78] of a like provision in Victorian legislation[79]. He considered:

> "[I]f there was an existing point of law which arose on the materials at the trial, and which might have been taken, it can be said to have arisen at the trial, although no contention as to it had been raised there, and although the judge's attention had not been directed to it at the trial."

A similar opinion was reached by several of the judges of the English Court of Criminal Appeal in *R v Mellor*[80], including Lord Campbell CJ[81], Cockburn CJ[82], Coleridge J[83] and Martin B[84]. Whilst others took a narrower view, I find the reasoning for a broader approach more consonant with the purposive construction of the provisions and the balance of authority. Particularly is this so in relation to an exceptional statutory provision which permits a prosecution challenge to a legal ruling which led to the acquittal of the accused.

2. The approach which I favour is also one which is more realistic when it is remembered that a provision such as s 350(1a) is now to be construed in the context (of which Parliament was presumably aware) of extensive

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77 See eg *R v Whelan* (1868) 5 WW & a'B (L) 7; *R v Tidemann* (1871) 5 SALR 48; *R v Duncan* (1892) 4 QLJ 219; *R v S* (1953) 53 SR (NSW) 460.

78 [1907] VLR 11 at 14.

79 *Crimes Act* 1890 (Vic), s 482.

80 (1858) 7 Cox CC 454. See also *R v Brown* (1889) 24 QBD 357 at 360 per Lord Coleridge CJ for the Court for Crown Cases Reserved.

81 (1858) 7 Cox CC 454 at 456.

82 (1858) 7 Cox CC 454 at 461.

83 (1858) 7 Cox CC 454 at 465.

84 (1858) 7 Cox CC 454 at 474.

interlocutory determinations in Australian criminal proceedings. These can affect the conduct of a subsequent trial and concern questions of law expected to arise in the trial. Their earlier determination may govern the way in which the whole trial is conducted. A narrow view would require that such preliminary rulings of law, affecting the trial, must be ignored, and the facility for their legal correction after the acquittal of the accused completely lost, although s 350(1a) of the Act was clearly enacted with the general purpose of avoiding such disadvantages for the proper administration of criminal justice.

3. In the present case, it is highly artificial, in the continuous dialogue between the trial judge and counsel placed before this Court, to draw a line in the proceedings of that day at the point at which the respondent was rearraigned and required to plead: disregarding all that happened before that moment for the purpose of deciding whether the contested question of law arose "at the trial". It is sometimes important, for particular purposes, to decide precisely when a trial commenced; for example, to determine whether a new statutory regime will apply to it[85]. In South Australia it has been held that, ordinarily, a criminal trial commences "when the accused having been arraigned before the judge who is to try him, that judge embarks upon the hearing and determination of any preliminary questions or upon the empanelling of the jury"[86]. The point of commencement appears to have been even later at common law[87]. However that may be, such considerations are of little relevance to the meaning of the disputed phrase as it appears in s 350(1a). There, the question in issue is not the delineation of events for the application of a particular legislative regime, the introduction of different procedures or the attachment of new and different rights. It is the provision of the facility for the consideration of a question of law which, having arisen in a concluded trial, may arise again and requires authoritative curial determination. It is a mistake to apply to such a context decisions reached in different contexts for quite different purposes.

4. It would be unacceptably artificial to treat the prosecution's tender of no evidence (referred to in the case stated) separately from the events which are also there described and which preceded that course. If the appellant is correct, the primary judge had no authority to refuse to accept the nolle prosequi tendered by him. If that be right, and if there was no jurisdiction in

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85 See eg *Newell v The King* (1936) 55 CLR 707; *R v Talia* [1996] 1 VR 462 at 471. See also *Bond v The Queen* (1992) 62 A Crim R 383 at 394-395; *R v His Honour Judge Noud; Ex parte MacNamara* [1991] 2 Qd R 86 at 100.

86 *A-G Reference No 1 of 1988* (1988) 49 SASR 1 at 5-6.

87 *Tonner v The Queen* (1984) 80 Crim App R 170 at 182.

> the judge except to discharge the respondent, all that followed in the purported "trial" was, as a matter of law, completely unauthorised. There was no power in the judge to grant the application to reinstate the request for trial by judge alone. There was no power to rearraign the respondent. There was no power to conduct the abbreviated trial. Nor was there power to find the respondent not guilty on all counts. A clearer case of questions of law "arising at the trial" could hardly be imagined. The narrow view would construe the section as if it empowered the court to "consider and determine any question of law reserved after the commencement of the trial". But that is not what s 350(1a) says. If the transcript of the actual exchanges between the primary judge and counsel at the trial may be used to remove any suggested ambiguity of the case stated, it is worth recalling that the primary judge, after the rearraignment, prefaced his verdicts with the phrase "In those circumstances". The "circumstances" referred to were clearly the decision of the prosecutor to tender no evidence at the trial. That event can itself only be understood by reference to the immediately preceding refusal of the judge to "accept a nolle prosequi".

50 Considerable time and cost has already been incurred by this appeal. Special leave was afforded by this Court to permit it to pass upon the correctness of the decision of the Full Court. The point in issue is one of importance to the administration of criminal justice throughout Australia. Upon the point there are conflicting State decisions. Significant public moneys have been expended in the argument of the appeal and the provision of representation for the respondent to afford a contradictor. Subject to what follows, this Court should discharge its function[88]. It should not disclaim it on the basis of an unnecessarily narrow view of the power afforded by s 350(1a) of the Act.

Jurisdiction points

51 This conclusion leaves three additional points remaining as to the jurisdiction of the Full Court. Although neither party embraced these points, it is appropriate to say something about them. This is because, if they were good, they would prevent this Court's entering upon the merits of the appeal even if the Court accepted that the questions contained in the stated case were questions of law arising at the trial. I can deal quite briefly with these points because, in my view, they are settled by authority and without substance. In any case, at the conclusion of argument, the Court indicated that, if it reached a view that the issue of its jurisdiction to entertain the appeal needed argument, the matter would be relisted.

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88 cf *South-West Forest Defence Foundation Inc v Department of Conservation and Land Management* (1998) 72 ALJR 837 at 838-840; 154 ALR 405 at 407-410.

Such a procedure would have been necessary to permit notices of additional constitutional questions to be given[89].

52 Questions were raised during argument relating to the authority of this Court concerning the judicial power of the Commonwealth with which it is vested[90]; the requirement that its appellate jurisdiction should arise, relevantly, from a judgment, decree, order or sentence of the Supreme Court of a State[91]; and the longstanding resistance of the Court to attempts to confer upon it functions viewed as involving the provision of advisory opinions. Nearly eighty years ago the Court held that the Parliament could not "confer power or jurisdiction upon the High Court to determine abstract questions of law without the right or duty of any body or person being involved"[92]. Views may differ about the precise extent of the prohibition[93]. However, the resistance of the Court to becoming involved in the making of declarations of law "divorced from any attempt to administer that law"[94] is of longstanding. It is grounded in the constitutional text itself[95].

53 In *Saffron v The Queen*[96], the Court held that the decision of the Court of Criminal Appeal of New South Wales, given upon a question reserved under s 5A(2) of the *Criminal Appeal Act* 1912 (NSW) did not result in a judgment, decree, order or sentence within s 73 of the Constitution. The reason given for that conclusion was that such decision could not "affect the rights of the person who

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89 As required by the *Judiciary Act* 1903 (Cth), s 78B.

90 By s 71 of the Constitution.

91 By s 73(ii) of the Constitution.

92 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 267.

93 See eg *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 665-668.

94 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 266.

95 For example (a) in the nature of the "judicial power" referred to in s 71; (b) in the nature of appeals from all judgments, decrees, orders and sentences in s 73; (c) in the nature of "matters" as referred to in ss 75, 76, 77 and 78 of the Constitution; and (d) in the implications derived from the language, structure and purposes of Ch III of the Constitution with its establishment of an independent judiciary.

96 (1953) 88 CLR 523.

has been acquitted, or his liabilities"[97]. It was in the nature of an advisory opinion[98] from which an appeal would not lie. Over the years, doubts were expressed about the correctness of this holding[99]. In *Mellifont v Attorney-General (Q)*, the Court overruled *Saffron,* there being but one dissenting voice[100]. The ruling was explained as resting on a return to the basis of the prohibition against advisory opinions, viz the inadmissibility of the making of declarations of law "divorced from any attempt to administer that law"[101]. A provision permitting the correction of errors of law that have taken place in an actual criminal trial, made for the purpose of preventing their repetition in future such trials, did not have the prohibited quality. Such proceedings were stamped as an exercise of the judicial power. They came from a decision which was a judgment or order within the meaning of s 73 of the Constitution. They were made in the course of providing authoritative decisions on questions of criminal law for the better administration of justice. No persuasive reason of law or policy existed as to why an appeal from such decisions, formulated, as in this case in an order of the court concerned, should not fall within the words "judgments, decrees, orders" in s 73[102]. In a bold stroke, in *Mellifont*, the Court swept aside past authority which suggested that no appeal lay to it from answers given to a special or stated case where those answers did not actually determine the parties' rights[103]. The Court expressly contemplated the application of its holding to the case of an acquittal where, as here, the ruling on the reference had no legal consequence for the acquittal[104]. The majority stated that the constitutional construction which they preferred did not rely on the fact that, in *Mellifont*, "it was foreshadowed to the applicant that a fresh indictment would be presented against him"[105].

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97 (1953) 88 CLR 523 at 528.

98 (1953) 88 CLR 523 at 527.

99 *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232 at 284-285. But cf *Fisher v Fisher* (1986) 161 CLR 438 at 450.

100 (1991) 173 CLR 289 at 305-306 per Mason CJ, Deane, Dawson, Gaudron and McHugh JJ, at 327 per Toohey J, at 319 per Brennan J (diss).

101 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 266.

102 *Mellifont v Attorney-General (Q)* (1991) 173 CLR 289 at 305.

103 (1991) 173 CLR 289 at 304.

104 (1991) 173 CLR 289 at 304.

105 (1991) 173 CLR 289 at 306.

54 Therefore, whilst *Mellifont* stands, no objection could be raised to the appeal to this Court from the Full Court of the Supreme Court of South Australia. Its decision was relevantly, as it purported to be, a "judgment" or "order" within s 73 of the Constitution. The determination of the appeal does not offend the requirement that this Court must exercise the judicial power of the Commonwealth. The fact that the respondent's acquittal is not invalidated[106] does not deprive the decision of the Full Court of the necessary concreteness to engage the judicial power. Nothing in the legislative scheme for the stated case procedure in South Australia is relevantly distinguishable from that of Queensland decided in *Mellifont.* Nothing in that scheme is so inconsistent with the purposes and structure of Ch III of the Constitution as to forbid an appeal to this Court by a party discontented with the decision. Being confined to a question of law, it is especially suitable for judicial determination by appellate judicial procedure.

55 I am satisfied that the Court has jurisdiction to hear and determine the appeal. The contrary opinion would involve overruling *Mellifont* which no party asked and which I would regard as unthinkable.

Deprivation of jurisdiction point

56 I turn from the arguments concerning the jurisdiction of this Court and of the Full Court to those which relate to the jurisdiction of the primary judge. The threshold argument for the appellant was that, when the prosecutor announced "the Crown enters a nolle prosequi", by that action the prosecution of the accused on the indictment was instantly terminated[107]. The judge then had no jurisdiction to proceed as he did. Specifically he had none to enter a verdict of acquittal. The entry of a nolle prosequi was an act of the Executive government. No particular formality was necessary so long as it was clearly and distinctly communicated to

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106 *Criminal Law Consolidation Act* 1935 (SA), s 351(2a), as the section then stood.

107 See *Broome v Chenoweth* (1946) 73 CLR 583 at 599.

the court[108]. The procedure followed had a long history in England[109]. In its detail, it varied from one Australian jurisdiction to another[110]. Whereas in Queensland a practice has developed whereby the prosecutor, in some cases, foreshadows an intention to enter a nolle prosequi and asks the judge to return the indictment for endorsement to that effect[111], this is not the practice in other Australian jurisdictions. In South Australia the practice is described by Debelle J as one "marked by informality"[112]:

> "Prosecuting counsel usually announces that he has been authorised by the Attorney-General (or since the *Director of Public Prosecutions Act*, by the Director) to enter a nolle prosequi. The information would then be endorsed by the Clerk of Arraigns or the judge's associate to the effect that a nolle prosequi has been entered. There is no prescribed form for the endorsement ... Once a nolle prosequi had been entered, the court can no longer proceed with the trial of those matters charged in the indictment to which the nolle prosequi relates".

57 At common law, a nolle prosequi could be entered at any time before verdict but only after the indictment or information had been presented[113]. A measure of confusion appears to have occurred in this case because the nolle prosequi, announced by the prosecutor, presumably related to the indictment found, upon which the respondent was originally arraigned in the District Court. No record appears, either in the case stated or in the transcript of what took place, suggesting that the prosecutor presented the same indictment for the purpose of the

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108 *R v Howard* (1992) 29 NSWLR 242 at 248. See also *Gouriet v Union of Post Office Workers* [1978] AC 435 at 487; McDermott, "Nolle Prosequi - The Law and Practice in Queensland" (1993) 17 *Criminal Law Journal* 319 at 324-328; "Nolle Prosequi" [1958] *Criminal Law Review* 573 at 574-575; Kidston, "The Office of Crown Prosecutor" (1958) 32 *Australian Law Journal* 148 at 150.

109 *Goddard v Smith* (1704) 6 Mod 261 [87 ER 1008]; *Goddard v Smith* (1705) 11 Mod 56 [88 ER 882]; *R v Dunn* (1843) 1 Car & K 730 [174 ER 1009]; *R v Colling* (1847) 2 Cox CC 184; *R v Allen* (1862) 1 B & S 850 [121 ER 929].

110 See (1996) 66 SASR 450 at 457.

111 *R v Saunders* [1983] 2 Qd R 270; *R v Doyle* [1988] 2 Qd R 434; *R v Ferguson; Ex parte Attorney-General* [1991] 1 Qd R 35; *R v Jell; Ex parte Attorney-General* [1991] 1 Qd R 48; *Gipp v The Queen* [1998] HCA 21.

112 (1996) 66 SASR 450 at 457.

113 *R v Economou* (1989) 51 SASR 421 at 425; Edwards, *The Law Officers of the Crown* (1964) at 237; "Nolle Prosequi" [1958] *Criminal Law Review* 573 at 576. But cf *R v Radford* [1951] Tas SR 1 at 2.

rearraignment of the respondent so that his pleas to the counts of the indictment could once again be taken. There is no doubt, as the transcript shows, that the prosecutor was present throughout the proceedings which followed. No objection was apparently taken that rearraignment was impossible without presentation of a new indictment or re-presentation of the old one.

58 Because the appellant, who had an interest to do so, was present by his counsel but took no point on this sequence of events, I must assume that the prosecution acquiesced in the procedure of rearraignment. An indication that this is so appears in the case stated by the trial judge which records "I invited the prosecution to tender no evidence. The prosecutor adopted this course". The rearraignment is not reproduced in full in the transcript. There simply appears the reporter's summary "Plea: Not guilty all counts", followed by the prosecutor's statement "I tender no evidence". Consistent with the prosecutor's attempt to enter a nolle prosequi, the proper course, upon the reconstitution of the court for trial of the respondent by judge alone, would have been for the prosecutor to decline to present or re-present an indictment. Then indeed there would have been no initiating process upon which the respondent could have been tried for a criminal offence. However, in the events which occurred, that course was not followed. Moreover, no nolle prosequi was entered or even offered in relation to the indictment upon which the respondent was rearraigned. That indictment was simply treated as the same indictment as that earlier found which had been previously presented to the District Court. The nolle prosequi was treated as equally applicable to it.

59 It is one thing to accept that the modern Australian practice in relation to a nolle prosequi is (save for some cases in Queensland) quite informal and inattentive to the history that developed when matters of pleading (civil and criminal) were more precise and technical than they tend to be today. It is quite another to ignore completely the rudiments of criminal procedure by which the serious step is taken of putting a person on trial for criminal offences; identifying by the finding and presentation of an indictment each of the offences charged; proceeding to arraign the person named in the indictment and to take a plea thereon; and putting the person who so pleads in the hands of the court as lawfully constituted to conduct the trial[114]. Under the DPP Act, the substitution of the appellant for the Attorney-General for the conduct of most criminal prosecutions in South Australia was intended to enhance the independence and manifest integrity of the criminal process[115]. It was not intended to sweep away centuries of criminal procedure.

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114 See *Criminal Law Consolidation Act* 1935 (SA), ss 275, 276, 284.

115 See DPP Act, s 9; cf *Price v Ferris* (1994) 34 NSWLR 704 at 707-708.

60 One change which the establishment of the office of Director of Public Prosecutions produced was, however, important to this case. Whereas the Attorney-General exercised in Australia, as in England, the prerogatives of the Crown to bring, or to terminate, criminal proceedings in the name of the Sovereign and whereas the Attorney-General's decision to enter a nolle prosequi could by conventional authority not be called into question by the courts[116], the appellant, as Director of Public Prosecutions, is in a different legal position. So are those to whom his powers or functions under the DPP Act are delegated[117]. Like any other donee of statutory powers, such office-holders must conform to the legislation granting their powers. They may be required by the courts to do so.

61 The appellant's argument proceeded on the footing that the nolle prosequi tendered in relation to the first indictment applied equally to that upon which the respondent was rearraigned. He further submitted that, by the use of the words "nolle prosequi", and by the reference to the powers which he enjoyed, all of the history which had traditionally attached to the Attorney-General's powers in that regard was enacted and conferred upon him. He submitted that the same injunctions against blurring the functions of prosecutors and judges[118] applied, whether a prosecution was brought by the Attorney-General or by a Director of Public Prosecutions. He rejected the suggested distinction that a Director is not politically accountable to Parliament, as the Attorney-General is for such decisions[119]. He emphasised that, in terms, the power conferred upon him by the DPP Act was "to enter a *nolle prosequi* or otherwise terminate a prosecution in appropriate cases"[120]. It was not to seek a court's permission to do so. Where, as in South Australia, the procedure was concededly informal, the announcement by the prosecutor (who is taken to have acted under delegation from the appellant) amounted to the entry of a nolle prosequi terminating the proceedings. There was then no process before the Court to afford jurisdiction to the judge to do anything. Specifically, there was no proceeding to stay, whether for abuse of process or otherwise. This was because such proceeding as had been initiated was terminated by executive act in which, according to history and legal principle, the courts were not concerned.

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116 *R v Prosser* (1848) 11 Beav 306 at 314 [50 ER 834 at 838]; *R v Allen* (1862) 1 B & S 850 at 854 [121 ER 929 at 931]; *R v Comptroller-General of Patents* [1899] 1 QB 909 at 914. See also *Barton v The Queen* (1980) 147 CLR 75 at 90-91.

117 DPP Act, s 6A; cf *Kolaroff v The Queen* (1997) 192 LSJS 308.

118 *Barton v The Queen* (1980) 147 CLR 75 at 95; *Maxwell v The Queen* (1996) 184 CLR 501 at 534. See also *R v Sang* [1980] AC 402 at 454-455.

119 *Barton v The Queen* (1980) 147 CLR 75 at 117.

120 DPP Act, s 7(1)(e).

62 This is an attractive argument. It has the support of a strong minority opinion when the question of principle now before this Court arose for decision in State courts[121]. However, as it seems to me, it ignores the important change which came about when the traditional powers of the Attorney-General were re-expressed by an Australian Parliament and conferred upon a statutory office-holder such as the appellant. Moreover, it gives no work to the phrase "in appropriate cases" which appears in the relevant head of power in the DPP Act[122]. The express mention of this limitation, although stated in general terms, appears to invite judicial supervision. What is more, the submission that an office-holder such as the appellant may conclusively determine whether a case is "appropriate" (and thereby place himself beyond judicial scrutiny) smacks of the old law stated in *Liversidge v Sir John Anderson*[123]. It suggests a reversal of fifty years of administrative law[124]. It ignores the development within that time of the "necessary powers to prevent an

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121 *R v Lorkin* (1995) 15 WAR 499 at 531 per Murray J.

122 DPP Act, s 7(1)(e). See also par (f).

123 [1942] AC 206. Subsequently disapproved in *George v Rockett* (1990) 170 CLR 104 at 112; *R v Inland Revenue Commissioners; Ex parte Rossminster Ltd* [1980] AC 952 at 1011.

124 Some of the principal cases are mentioned in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1007; *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342. Decisions of Ministers of the Crown in the exercise of statutory powers have been regularly reviewed in both English and Australian courts. In *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170, Mason J observed, at 220 "The continued application of the Crown immunity rule to the exercise of prerogative power is a legal fiction." The review of the prerogative has lately come under judicial consideration. See *R v Foreign Secretary; Ex parte Everett* [1989] QB 811. The House of Lords in *CCSU* decided that the fact that a decision was made or an action taken in the exercise of the prerogative was no reason why such a decision or action should not be amenable to the supervision of the courts by way of judicial review: *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374; cf *R v Civil Service Appeal Board; Ex parte Bruce* [1988] 3 All ER 686 at 691-692. It is important to recognise the expansion of supervisory jurisdiction of the courts marked by *CCSU* and *Minister for the Arts, Heritage and Environment v Peko-Wallsend* (1987) 15 FCR 274; 75 ALR 218. As Lord Scarman stated in *CCSU* (at 407), "the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter." See also Wheeler, "Judicial Review of Prerogative Power in Australia: Issues and Prospects" (1992) 14 *Sydney Law Review* 432.

abuse of process and to ensure a fair trial"[125]. Such a power also exists in England[126], Canada[127] and New Zealand[128].

63 In these circumstances, given that the power relied upon in these proceedings was a statutory one, afforded to the appellant subject to conditions established by the DPP Act[129], I would not be prepared to import into the appellant's statutory entitlement all of the hitherto unreviewable prerogative rights of the Crown formerly enjoyed by the Attorney-General. In particular, I would not accept that the incantation by the prosecutor of the words "the Crown enters a nolle prosequi" placed that decision, made under the DPP Act, beyond judicial scrutiny as to its lawfulness or beyond a judicial response necessary to defend the court from abuse of process or to ensure a fair trial. These are inherent powers of any Australian superior court[130]. Their protection cannot be left solely to the decision of the prosecution once proceedings are before a court[131]. Courts with the requisite power may, in proper cases, protect themselves. One of their means of doing so is to stay the proceedings[132]. However, it is not the only means.

64 I would therefore reject the argument that the prosecutor's announcement that "the Crown enters a nolle prosequi" terminated at that instant the jurisdiction of the primary judge. Doubtless, in most cases, as a matter of practicality, the proceedings initiated by the presentation of the indictment would come to an abrupt halt. In most cases, the accused would welcome that result on the footing that a new indictment might not be found and fresh proceedings might not be commenced. But in other cases, it has been held that the circumstances of the

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125 *Barton v The Queen* (1980) 147 CLR 75 at 96.

126 *R v Connelly* [1964] AC 1254 at 1296, 1360-1361; *R v Humphrys* [1977] AC 1 at 46, 55.

127 *R v Velvick* (1976) 33 CCC (2d) 447; *Re W A Stephenson Construction (Western) Ltd* (1991) 66 CCC (3d) 201 at 204, 206; *Kostuch (Informant) v Attorney-General (Alberta)* (1995) 128 DLR (4th) 440 at 450-451; Law Reform Commission of Canada, *Controlling criminal prosecutions: the Attorney-General and the Crown Prosecutor. Working Paper 62* (1990) at 110.

128 *Moevao v Department of Labour* [1980] 1 NZLR 464 at 481-482.

129 Most importantly that the power only be exercised in "appropriate cases".

130 *Walton v Gardiner* (1993) 177 CLR 378 at 392-393.

131 *Ridgeway v The Queen* (1995) 184 CLR 19 at 87.

132 *Ridgeway v The Queen* (1995) 184 CLR 19 at 87.

attempted entry of a nolle prosequi can be an abuse of process, giving rise to a reserve power to refuse to accept the nolle prosequi[133].

65 Having rejected the appellant's assertion that no occasion would arise to consider the existence of any such power, it is necessary to turn to whether such power exists and when and how it might be invoked. This was the central question which the parties originally came to argue in this appeal.

Refusal of nolle prosequi point

The question: The first question posed in the stated case is "Do I have the power to refuse to accept a nolle prosequi entered by the Director of Public Prosecutions[?]" Because the question is asked in the context of a case stated pursuant to s 350(1a) of the Act, and therefore relates to a person "tried on information and acquitted", it must be assumed that it is directed to ascertaining whether the judge *did* have the power of such refusal. Similarly, because the question must arise "at the trial", it is reasonable to read the question as relating to the circumstances of the trial of the respondent in the way in which the purported entry of the nolle prosequi was announced. Conventionally, once the entry was perfected, the proceedings were closed. That this was the view of the primary judge is seen by his statement:

> "I am not prepared to accept a nolle prosequi in the circumstances of this case."

The first question in the case stated is therefore designed to ascertain whether, in the circumstances specified, such a power existed in the judge or whether he had no discretion and was duty-bound to accept the entry of the nolle prosequi.

Arguments against the power: I accept that there are a number of arguments which support a conclusion that no such power exists, including where the nolle prosequi is proffered by the Director of Public Prosecutions pursuant to statute.

1. To the extent that some features of the Attorney-General's nolle prosequi have been carried over to the statutory power afforded to the appellant, most earlier legal authority suggests that no power or discretion to refuse the entry of a nolle prosequi exists in a court. In such respects, the act being that of the executive government, a court was conventionally viewed as wholly passive: having no functions save to conclude the hearing and discharge the

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133 See eg *R v Saunders* [1983] 2 Qd R 270 at 274; *Rona v District Court (SA)* (1995) 63 SASR 223 at 228-229, 234; *R v Lorkin* (1995) 15 WAR 499 at 518-519, 522; *R v Jell; Ex parte Attorney-General* [1991] 1 Qd R 48 at 54, 63; *R v Ferguson; Ex parte Attorney-General* [1991] 1 Qd R 35.

accused[134]. At least in South Australia, where there was no procedure of handing back the paper indictment for endorsement, there was no immediately following action which the trial court was obliged to take. Just as the Crown had an unfettered right to commence criminal proceedings, it traditionally had an unfettered right to conclude them. One way of doing so, where the indictment had been found and presented to a court, was by entry of a nolle prosequi. The use in the DPP Act of the term of art suggested that the essential features of a nolle prosequi by the Director remained the same. One of these was that a decision to enter a nolle prosequi was previously not reviewable by the courts.

2. A reason of principle for adhering to this approach may be sought in the removal of the courts from involvement in prosecutorial decisions. Although not universal this is considered desirable in our legal tradition for the independence and manifest impartiality of the courts[135]. The restraints proper to the courts in this connection are acknowledged by recent decisions of this Court[136]. Adherence to that principle and a general refusal to invade decisions derived, historically, from the Crown's prerogative[137], were urged as reasons of legal authority, policy and principle for rejecting the existence of the power which the primary judge asserted in this case.

3. The procedural difficulties of declining to accept the entry of a nolle prosequi were also emphasised. If the Crown refused to proceed with its process, a court could scarcely take over the role of the prosecutor. It would ill-become a court to insist that a person be prosecuted and to require that evidence be tendered against that person if the prosecutor declined to do so. Either the matter would proceed to an inadequate or half-hearted prosecution or no evidence would be called or the judge would be placed in the intolerable position of calling evidence in a way inappropriate to a criminal trial as

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134 Maitland, *The Constitutional History of England*, (1908) at 303; *Gilchrist v Gardner* (1891) 12 NSWR (Law) 184. See Archbold, *Criminal Pleading, Evidence and Practice* (1998) at par 1-251; McDermott, "Nolle Prosequi - The Law and Practice in Queensland" (1993) 17 *Criminal Law Journal* 319 at 324.

135 *Maxwell v The Queen* (1996) 184 CLR 501 at 534.

136 See eg *Barton v The Queen* (1980) 147 CLR 75 at 96, 104, 107, 109; *R v Apostilides* (1984) 154 CLR 563 at 575; cf *Chow v Director of Public Prosecutions* (1992) 28 NSWLR 593 at 604-605.

137 See eg *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 24, 41, 61 (appointment of judicial officers). But cf *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342 (renewal of workers' compensation insurance licences). See also Wheeler, "Judicial Review of Prerogative Power in Australia: Issues and Prospects" (1992) 14 *Sydney Law Review* 432.

conventionally conducted in this country. Moreover, once the prosecutor had announced an intention not to proceed on the indictment before the court, the remedy of a stay of proceedings, at least if directed to proceedings upon that indictment, would be futile. There would be no point of providing a stay given the announced intention not to proceed upon the indictment anyway.

4. Further practical difficulties arise from a purported refusal to accept a nolle prosequi. In the present case, the respondent's trial, if it had begun at all, was in its earliest phase. Cases can arise where a nolle prosequi is proffered at an advanced stage in a trial. Indeed, these are the cases in which the worst suggested abuses of process could potentially arise. A case where a jury's request for redirection may have signalled a likely verdict unfavourable to the prosecution; one where the case has gone badly for the prosecution; one where the prosecutor has taken the risk of proceeding without a witness whose evidence, in retrospect, appears vital[138]. But allowing trial judges to refuse to accept a nolle prosequi places a heavy burden upon them. Because a prosecutor cannot be required to give reasons for the decision to proffer a nolle prosequi, a court may often be unaware of the complex considerations which have resulted in this course, even in the midst of a trial. If the court refuses to accept a proffered nolle prosequi, the possibility of a guilty verdict in a trial by jury cannot be excluded[139].

5. To hold that the court has no power to prevent the entry of a nolle prosequi, including by a statutory office-holder such as the appellant, does not leave the courts entirely without remedy where further prosecution would constitute an abuse of process or an unacceptable departure from fairness to the accused[140]. It would still be open to the accused, in the event of a fresh prosecution, to argue that the circumstances in which the nolle prosequi was entered involved an abuse of process or a departure from fair trial requirements. In this way, the intervention of the courts would be reserved to cases where intervention was strictly necessary. There would then be proceedings in a court which could properly be the subject of a stay order directed at the process initiated by the new indictment[141]. Short of refusing to accept the entry of a nolle prosequi, a judge could properly make plain an

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138 *R v Jell; Ex parte Attorney-General* [1991] 1 Qd R 48 at 54, 62.

139 As occurred in *R v Williams and Kokles* unreported, Circuit Court, Mackay, Queensland, 2 October 1935. The convictions were quashed on appeal: *Williams v The Queen* [1936] QWN 3; *Kokles v The Queen* [1936] QWN 22.

140 See *Jago v District Court (NSW)* (1989) 168 CLR 23 at 30 citing *Moevao v Department of Labour* [1980] 1 NZLR 464 at 481.

141 This was the view favoured by Murray J (diss) in *R v Lorkin* (1995) 15 WAR 499 at 535.

> opinion that, in the absence of significantly new evidence, the commencement of fresh proceedings would constitute an abuse of process. The purported assertion of a power to refuse the entry of a nolle prosequi would therefore ordinarily, be unnecessary. As in this case, refusing the entry of a nolle prosequi might punish the Crown for inadequate preparation in ensuring the attendance of its witnesses (and send a signal for other like cases). But it might do so at a price of denying the community's interest in having serious criminal charges heard on their merits and, if proved, those found guilty punished according to law[142].

Arguments for the power: These arguments are obviously significant. Weight might be given to them. However, a number of competing arguments support the proposition that, in rare and exceptional circumstances, an Australian court is empowered to refuse to accept the entry of a nolle prosequi. At least it is so empowered where tendered by a statutory office-holder such as the appellant, and where the court is convinced that, if entered, the nolle prosequi will be, or will be the first step in, an abuse of process of the court or an unacceptable infringement of the accused's right to fair trial:

1. The power of Australian courts to prevent and remedy abuse of their process or serious infringements of an accused person's right to fair trial is now much more clearly perceived and strongly asserted than was formerly the case. In *Rona v District Court (SA)*[143], King CJ put the present problem into the context of legal history:

> "It may be that the development in Australia of a deeper understanding of the inherent power of the criminal courts to prevent abuse of their processes leads to the conclusion that the courts have power to act in a way which achieves what is now achieved by practice in England, by refusing to act on a nolle prosequi where to do so would permit an abuse of process. In *R v Saunders*[144], the court refused to act on a nolle prosequi entered during trial and directed an acquittal. In *R v Jell; Ex parte Attorney-General*[145], the Full Supreme Court held that a trial judge has a discretion to refuse to accept a nolle prosequi if to do so would be an abuse of process.

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142 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 49-50; *Williams v Spautz* (1992) 174 CLR 509 at 519.

143 (1995) 63 SASR 223 at 228.

144 [1983] 2 Qd R 270.

145 [1991] 1 Qd R 48.

> If the reasoning and decision in *Jell* are sound, and they certainly accord with my sense of justice, there is no reason why the same should not apply where the trial has not begun but the date for trial has been fixed in accordance with the regular procedures of the court. When the accused appears for trial on that date, the interests of justice may demand that, if the prosecution does not wish to proceed and there is no valid reason why the accused should remain exposed to prosecution in respect of the alleged conduct, there be a verdict of not guilty by direction."

2. Exercising such power does not, as such, constitute a novel review of the prosecutor's discretion to enter a nolle prosequi. Instead, it may be characterised as action on the part of a court to defend its own processes. It ensures that minimum requirements of a fair trial of persons accused of criminal offences are observed in the courts of this country. The inescapable duty of courts to secure fair treatment of those who are brought before them was recognised in England in *Connelly v Director of Public Prosecutions*[146], in New Zealand in *Moevao v Department of Labour*[147] and by this Court in a series of cases following *Jago v District Court (NSW)*[148]. Courts cannot surrender these functions to an officer of the executive government, such as a Director of Public Prosecutions. Once a person is before a court, in the sense that that court's jurisdiction has been engaged in relation to him or her, the court's protective powers are attracted. This is especially so in the case of superior courts which have large inherent powers to protect their own processes[149] which, in recent years, they have been more ready than previously to exercise.

3. It would be offensive to principle, at least in respect of the exercise of powers such as those conferred on the appellant by the DPP Act, to suggest that his decision to enter a nolle prosequi was beyond judicial scrutiny if, for example, it could be shown that it was exercised for a malicious purpose, corruptly or otherwise contrary to law. Not only has Parliament expressly reserved the use of the appellant's power to "appropriate cases" but it has afforded that power, in the ordinary way, to be used to achieve the proper objects of the DPP Act. A court might be slow to question the use of the power. It would be slower still to embark upon conduct which risked calling into question its own neutrality. But the submission that a court is completely

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146 [1964] AC 1254 at 1354 per Lord Devlin.

147 [1980] 1 NZLR 464 at 476, 481-482.

148 (1989) 168 CLR 23. See for example *Walton v Gardiner* (1993) 177 CLR 378 at 392; *Ridgeway v The Queen* (1995) 184 CLR 19 at 33.

149 *Maxwell v The Queen* (1996) 184 CLR 501 at 514.

powerless to defend its processes and to uphold the right of persons before it to fair trial in extreme and obvious cases is quite unconvincing. It is unnecessary, and probably impossible, comprehensively to catalogue what such extreme cases will be[150]. But a clear instance would be where criminal proceedings, in which the accused was ready for trial, were repeatedly unready because of inadequate or incompetent preparation by the prosecution. In such cases, if the prosecution were denied a further adjournment after argument of the merits, the appellant could, if his argument were accepted, procure the same result by unilateral entry of a nolle prosequi. An extreme example arose in *Richards v Jamaica*[151]. There, the accused was charged with murder and pleaded guilty to manslaughter. The plea was accepted by the prosecution. Subsequently, however, a nolle prosequi was entered. He was then again charged with murder, and this time convicted and sentenced to death. The United Nations Human Rights Committee found that[152]:

> "The nolle prosequi was used not to discontinue proceedings against the [accused] but to enable a fresh prosecution against the [accused] to be initiated immediately, on exactly the same charge in respect of which he had already entered a plea of guilty to manslaughter, a plea which had been accepted. Thus, its purpose and effect were to circumvent the consequences of that plea, which was entered in accordance with the law and practice of Jamaica. In the Committee's opinion, the resort to a nolle prosequi in such circumstances, and the initiation of a further charge against the [accused], was incompatible with the requirements of a fair trial within the meaning of [the International Covenant on Civil and Political Rights].

Were the prosecution allowed an unfettered right to enter a nolle prosequi in either of the above circumstances, the result would be offensive to justice and to the function of a court as such. The processes of the court would be seriously threatened. The accused would be deprived of the right to a fair trial, including one conducted in a timely fashion. The appellant would, in effect, put himself above the judicial direction exercised by the court for the fair conduct of proceedings before the court. The public's confidence in the

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150 See McDermott, "Nolle Prosequi - The Law and Practice in Queensland" (1993) 17 *Criminal Law Journal* 319 at 338 where a list is offered based upon examples given in decided cases.

151 United Nations Human Rights Committee, Communication No 535/1993; cf *Richards v The Queen* [1993] AC 217.

152 United Nations Human Rights Committee, Communication No 535/1993 at 8.

courts would thereby be undermined[153]. The power of the courts to ensure even-handedness as between the individual and the prosecution would be eroded. The courts are not obliged to allow this to happen.

4. Although the assertion of a power such as I have mentioned, in relation to the conduct of the appellant and his delegates, undoubtedly involves a departure from the old legal authority which denied to a court any authority to refuse to accept the entry of a nolle prosequi by the Attorney-General, that refusal must itself be seen in the context of the assumptions then prevailing in the law concerning judicial examination of the exercise of prerogative powers. It must be re-examined in contemporary circumstances in the light of the beneficial developments of recent decades in the judicial review of the decisions of statutory office-holders. The endeavour to import historical prohibitions and immunities once applied in relation to the decisions of the Crown made by the Attorney-General, to the exercise of statutory powers by a statutory office-holder such as the appellant is unconvincing. It should be rejected. If it is beyond question that Australian courts have full power to prevent abuse of their process[154], they have a duty, where necessary, themselves to protect the integrity of that process[155]. It is not sufficient simply to trust, without question, the propriety of every decision of a statutory office-holder to enter a nolle prosequi. Nor is it necessarily sufficient, the matter being before a court, to leave defence of the court's process or of the accused's fair trial right to a future court, should a fresh prosecution be brought. In a given case, that might deprive an accused person of an entitlement to a verdict of acquittal. It could burden him or her unjustifiably with the odium of an unresolved criminal accusation. It could involve injustice and serious oppression. Most importantly, it could defeat the expectations of the accused, the community and the court itself that once the proceedings are before an independent court of justice no party to those proceedings can, in defiance of the court's rulings on the justice of the case, unilaterally terminate the matter. Least of all may the appellant do so given that Parliament has confined his power to enter a nolle prosequi to

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153 *Williams v Spautz* (1992) 174 CLR 509 at 519-520; *Walton v Gardiner* (1993) 177 CLR 378 at 395-396; *Maxwell v The Queen* (1996) 184 CLR 501 at 534; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 124; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 16; *Nicholas v The Queen* (1998) 72 ALJR 456 at 467, 503-504; 151 ALR 312 at 326, 376-377.

154 *Barton v The Queen* (1980) 147 CLR 75 at 96.

155 *Ridgeway v The Queen* (1995) 184 CLR 19 at 87; *Maxwell v The Queen* (1996) 184 CLR 501 at 514.

"appropriate cases" and those, by implication, for the purposes of advancing the objects of the DPP Act.

5. Where a court concludes that conduct of any party is, or if permitted would be, an abuse of its process or, in a criminal trial, diminishes the accused's right to a fair trial which is the hallmark of the criminal law of this country[156], it is for the court to fashion the remedy (if any) that is appropriate. In some cases it may be sufficient to order the expedition of any subsequent proceedings or to lay down conditions for their conduct[157]. In some cases it will be appropriate to leave the provision of relief to be decided if a prosecution is revived. But in rare and exceptional cases the court will have the power and authority to fashion an order staying further proceedings on the indictment. In other cases, particularly where the nolle prosequi is proffered at an advanced stage in the trial, the court may require the matter to proceed to verdict, at least where that is the wish of the accused and the defence of the court's process as well as fairness to the accused suggests that it is proper. Once it is accepted that a court may, in rare and exceptional circumstances, refuse to enter a nolle prosequi, although proffered for the prosecutor, it must be expected that the prosecutor would accept the judicial ruling and conform to its consequences so far as these affected the ensuing conduct of the trial.

6. Like the Full Court, I refrain from commenting on the appropriateness of the refusal to accept the entry of the nolle prosequi in the present case. It is enough to say, with every respect to all involved, that neither in its substance nor in its procedure is the case a model for what should happen where a court entertains a concern that entry of a nolle prosequi would constitute an abuse of process or a derogation from the accused's fair trial right. However, because the primary judge did have a power to refuse to enter a nolle prosequi proffered on behalf of the appellant, the Full Court's affirmative answer to the first question was correct. Subject to what follows, the appeal from the Full Court's order that the first question be so answered should therefore be dismissed.

The judicial review point

66 Having regard to the parties named and to the procedures adopted, the suggestion that the primary judge was actually engaged in the judicial review of the appellant's decision to enter a nolle prosequi cannot be accepted. The only relevance of the suggested susceptibility of that decision to conventional judicial review is that it calls attention to the differentiation between decisions of the

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156 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 56-57 per Deane J.

157 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 31.

Attorney-General exercising a vestige of the royal prerogative and decisions of the appellant which must in every case conform to the DPP Act. As Debelle J correctly discerned[158], this differentiation affords a court different, and larger, powers of scrutiny in relation to the appellant than were conventionally exercised by courts in relation to decisions of the Attorney-General. Whether the latter might also now be subject to examination by a court is a question which does not have to be considered in these proceedings.

The constitutional point

67 As expressed, the constitutional point raised by the respondent would arise only if s 7(1)(e) of the DPP Act were construed as conferring upon the appellant the power to enter a nolle prosequi, acceptance of which could not in any circumstances be refused by a court of justice to which it was presented. Because, in my opinion, the Full Court correctly held that s 7(1)(e) should not be so construed, the constitutional challenge falls away. I will say no more of it.

The form of the questions point

68 Finally, before this Court a number of objections were expressed to the form of the questions contained in the case stated. It was suggested that the generality in which they were framed gave rise to abstract questions unrelated to the facts. I agree that their expression (at least in the second question) is far from ideal. However, in the context of the Act which permits consideration of the circumstances in which the question arose[159], and as that has been elaborated by the transcript placed before the Court, I see no insuperable difficulty in considering and determining the first question, as the Full Court did.

69 Courts, not least under the procedure enacted by Parliament in s 350(1a) of the Act should be constructive and useful in the discharge of their jurisdiction. On the brink of the twenty-first century, we can leave an approach of excessive technicality in pleading to the legal history of the nineteenth century where it properly belongs[160]. Otherwise, courts will deserve the criticism that they frustrate the purposes of Parliament and reject the opportunity to be useful in resolving serious, practical and concrete problems which have arisen for the administration of criminal justice. In the present case the problem was far from abstract. It was not theoretical. It did not arise in hypothetical circumstances. It was presented in

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158 (1996) 66 SASR 450 at 471-472.

159 See s 351(1) of the Act.

160 Dickens, *Bleak House* (1853), Ch 5 where the then legal procedure was described: "[I]t's being ground to bits in a slow mill; it's being roasted at a slow fire; it's being stung to death by single bees; it's being drowned by drops; it's going mad by grains."

the very real context of actual proceedings against the respondent upon criminal charges. As a consequence of what occurred, those charges were never determined on their merits. If the appellant's primary submission was correct, a serious mistake had occurred. The principle, at least, was susceptible of judicial correction. Even if the appellant was not correct, a real issue was tendered upon which the opinion of the courts was important. Depending upon the answer given, and any constitutional limitations, legislators might wish to clarify and define the respective roles of Directors of Public Prosecutions and the courts. In my respectful view, an unconstructive and unhelpful response ill-becomes the courts, as a branch of government, in contemporary Australia. The law should not "draw up its skirts and refuse all assistance"[161].

70 The second question in the case stated is excessively wide. The answer given to it by the Full Court is not surprisingly unhelpful. But it is not inaccurate. To ascertain its purport, it is necessary to read the reasons of the Full Court. Clearly, there are limitations to the exercise of the power to refuse to accept a nolle prosequi. Defining those limitations with accuracy must await future cases. The merit of these proceedings was that they tendered the appellant's basal proposition that a court could *never* refuse to accept a nolle prosequi proffered by or for the Director of Public Prosecutions for entry in criminal proceedings before that court. For the reasons which I have now given, that proposition should be rejected.

Conclusion and order

71 The Full Court correctly answered both questions presented to it. The appeal should be dismissed.

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161 *Saunders v Edwards* [1987] 1 WLR 1116 at 1134; [1987] 2 All ER 651 at 666 per Bingham LJ applied in *Reeves v Commissioner of Police* [1998] 2 WLR 401 at 416; [1998] 2 All ER 381 at 395 per Buxton LJ.