

HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY AND CALLINAN JJ

MARK FLEMING

APPELLANT

AND

THE QUEEN

RESPONDENT

Fleming v The Queen (S59-1998) [1998] HCA 68
Date of Order: 9 October 1998
Date of Publication of Reasons: 11 November 1998

ORDER

1. *Appeal allowed.*
2. *Set aside the order of the Court of Criminal Appeal of New South Wales. In lieu thereof order that the appeal to that Court be allowed, the convictions be quashed and there be a new trial on all counts on which the appellant was convicted.*

On appeal from the Supreme Court of New South Wales

Representation:

C A Porter QC with S Kaur-Bains for the appellant (instructed by Segal Litton & Chilton)

A M Blackmore with R D Ellis for the respondent (instructed by S E O'Connor, Solicitor for Public Prosecutions (New South Wales))

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CATCHWORDS

Mark Fleming v The Queen

Criminal law – Appeal – Trial by judge sitting alone – Failure by judge to include in reasons for judgment a warning required to be given to jury – Whether failure demonstrates a breach of *Criminal Procedure Act* 1986 (NSW), s 33(3) – Whether failure amounted to a wrong decision on a question of law – Whether, despite failure, no substantial miscarriage of justice occurred.

Criminal law – Appeal under *Criminal Appeal Act* 1912 (NSW), s 6 – Nature of appeal – Relevance of phrase "unsafe and unsatisfactory".

Criminal Appeal Act 1912 (NSW), ss 5, 6.

Criminal Procedure Act 1986 (NSW), Pt 9 (ss 30-33).

- 1 GLEESON CJ, McHUGH, GUMMOW, KIRBY AND CALLINAN JJ. On 9 October 1998, orders were made allowing this appeal. What follows are the reasons of the Court for the making of those orders.

Introduction

- 2 In *Soulemezis v Dudley (Holdings) Pty Ltd*¹, McHugh JA pointed out that until a century ago the judges of the common law courts trying civil actions were not concerned with deciding questions of fact. Facts were the province of the jury which gave no reasons and could not be interrogated as to the facts they found or the principles they had applied². His Honour continued³:

"Speaking generally, neither by way of appeal nor by way of the prerogative writs was there much scope for the common law to raise the question whether the failure by an inferior tribunal to give reasons for its decision was an error of law.

But in the last century the creation of rights of appeal by statute, the enactments of stated case and review procedures, and the transfer to the judges of the power to decide questions of fact have provided a fertile jurisdictional basis for the question to be raised."

- 3 This appeal from the New South Wales Court of Criminal Appeal (Hunt CJ at CL, McInerney J; Sully J dissenting) concerns the construction of legislation which draws the issues to which McHugh JA referred into the field of the criminal law.

- 4 The appeal requires consideration of the construction of Pt 9 of the *Criminal Procedure Act* 1986 (NSW) ("the Criminal Procedure Act") and the relationship between Pt 9 and ss 5 and 6 of the *Criminal Appeal Act* 1912 (NSW)

1 (1987) 10 NSWLR 247 at 277.

2 Further, there was a practice in Chancery before the enactment of legislation in the mid-nineteenth century to send issues of disputed legal rights, titles and interests to the common law courts to be tried before a jury by way of special case: *First Report of the Commissioners into the Process, Practice, and System of Pleading in the Court of Chancery*, (1852) at 10, reprinted in British Parliamentary Papers, *Legal Administration, General*, vol 8, "Court of Chancery" at 54.

3 (1987) 10 NSWLR 247 at 277-278.

Gleeson CJ
McHugh J
Gummow J
Kirby J
Callinan J

2.

("the Criminal Appeal Act"). Part 9 was inserted in the Criminal Procedure Act by the *Criminal Procedure Legislation (Amendment) Act 1990* (NSW) ("the Amendment Act"). Whilst Pt 9 is headed "Trial by jury on indictment", ss 32 and 33 thereof provide in certain circumstances for the trial of persons on indictment to be conducted by a judge alone and require the judgment to include certain matters. Provisions to similar but not identical effect are made in the law of South Australia⁴, Western Australia⁵ and the Australian Capital Territory⁶.

The facts

- 5 The appellant was tried at Gosford before a judge of the New South Wales District Court (Luland DCJ) sitting alone. He was convicted on three charges (counts 1, 2 and 3) of aggravated indecent assault contrary to s 61M(1) of the *Crimes Act 1900* (NSW) ("the Crimes Act")⁷ and on one charge (count 4) of sexual intercourse with a person of or above the age of 10 years and under the age of 16 years, being a person under the authority of the appellant, contrary to s 66C(2) of the Crimes Act⁸. The judge delivered reasons for judgment in which he concluded he was satisfied beyond reasonable doubt that the prosecution had proved each of the offences. His Honour sentenced the appellant on counts 1, 2 and 3 to a fixed term of 12 months imprisonment commencing 18 February 1997

4 *Juries Act 1927* (SA), s 7.

5 *Criminal Code* (WA), ss 651A, 651B.

6 *Supreme Court Act 1933* (ACT), ss 68A-68C.

7 Section 61M(1) states:

"Any person who assaults another person in circumstances of aggravation, and, at the time of, or immediately before or after, the assault, commits an act of indecency on or in the presence of the other person, is liable to imprisonment for 7 years."

8 Section 66C(2) states:

"Any person who has sexual intercourse with another person who:

- (a) is of or above the age of 10 years, and under the age of 16 years; and
- (b) is (whether generally or at the time of the sexual intercourse only) under the authority of the person,

shall be liable to penal servitude for 10 years."

3.

and expiring 17 February 1998, and upon count 4 to a total effective sentence of penal servitude of four years, consisting of a minimum term of two years penal servitude and an additional term of two years, expiring 17 February 2001.

- 6 The case for the prosecution had been that the complainant was a 15 year old female pupil at the school where the appellant was Deputy Principal. He also was the complainant's mathematics teacher. She had visited the appellant in his office almost daily during recesses and lunch breaks to discuss her emotional problems arising from an eating disorder and her stressful family situation. Each of the offences had occurred over a period of about six weeks outside the appellant's office, at places where they had met by arrangement or where they had gone together. The circumstances of aggravation were the age of the complainant and the appellant's position of authority. The prosecution did not have to prove any absence of consent by the complainant. Rather, the prosecution case was that the complainant had been infatuated with the appellant and had been a willing participant in each of the offences which were charged. Both the complainant and the appellant gave evidence and were subjected to detailed cross-examination. As Sully J put it, "this case was essentially one of oath against oath".

The appeal

- 7 Section 5(1)(a) of the Criminal Appeal Act provides that a person convicted on indictment may appeal under that statute against the conviction on any ground which involves a question of law alone. In other cases, there is a requirement of leave (s 5(1)(b), (c)) or a certificate of the trial judge (s 5(1)(b)). Section 33(1) of the Criminal Procedure Act states that a finding by a judge on the question of the guilt of an accused person tried without a jury in proceedings for prosecution on indictment has "for all purposes" the same effect as a verdict of a jury. The result in the present case was to attract the operation of s 5(1)(a) of the Criminal Appeal Act and, in turn, of s 6(1) thereof. That is the assumption upon which the Court of Criminal Appeal appears to have proceeded.
- 8 Section 6(1) of the Criminal Appeal Act provides that, on an appeal under s 5(1) against conviction, the court shall allow the appeal if it is of opinion that any one or more of three conditions is made out. The first is that "the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence". The second is that "the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law". The third is that "on any other ground whatsoever there was a miscarriage of justice". This power to allow the appeal is subject to the proviso that, notwithstanding that the court is of opinion that the point or points raised by the appeal might be decided in favour of the appellant, the court may dismiss the

appeal "if it considers that no substantial miscarriage of justice has actually occurred".

9 Sections 5(1) and 6(1) have a lengthy history predating the Amendment Act and were enacted in a context where proceedings for prosecution on indictment were tried by juries. The large body of case law interpreting, in particular, the phrase "miscarriage of justice" in s 6(1) has developed on the same assumption.

10 In this matter, the Court of Criminal Appeal divided on the question whether the verdicts of guilty entered by the trial judge were "unsafe and unsatisfactory". Reference was made to the statement of principle in the joint judgment in *M v The Queen*⁹. This Court there used the phrase "unsafe or unsatisfactory" to identify circumstances which fell within the first of the three limbs in s 6(1) of the Criminal Appeal Act¹⁰ and went on¹¹ to consider cases in which the phrase "unsafe or unsatisfactory" was indicative of cases falling within the third limb, namely those in which there was a miscarriage of justice.

11 In *Gipp v The Queen*¹², Kirby J pointed to the use of the phrase "unsafe or unsatisfactory" in relation to the separate elements in the first and third limbs of s 6(1) and to the confusion of thought which thereby may be encouraged. Observations by Gaudron J in the same case demonstrate that the development of the case law in this area has been by reference to the conduct of jury trials. Her Honour said¹³:

"The expression 'unsafe and unsatisfactory' has no very precise meaning. It is commonly used to indicate that, although there was evidence to sustain a verdict of guilty, the jury ought, nonetheless, have entertained a reasonable doubt as to guilt. That is the sense in which it was understood by the Court of Appeal in this case. However, it, or an equivalent expression such as 'unjust or unsafe', may be used to indicate that there is some defect in the summing up or 'some feature of the case raising a substantial possibility that,

9 (1994) 181 CLR 487 at 492-495.

10 (1994) 181 CLR 487 at 492-493.

11 (1994) 181 CLR 487 at 493-495.

12 (1998) 72 ALJR 1012 at 1035-1037; 155 ALR 15 at 47-50.

13 (1998) 72 ALJR 1012 at 1016 (footnotes omitted); 155 ALR 15 at 21.

5.

either in the conclusion itself, or in the manner in which it has been reached, the jury may have been mistaken or misled'."¹⁴

12 The fundamental point is that close attention must be paid to the language of s 6(1) of the Criminal Appeal Act. Use of the potentially confusing phrase "unsafe and unsatisfactory" to cover the several different elements in the sub-section is liable to mislead. There is no substitute for giving attention to the precise terms in which s 6(1) is expressed.

13 In the present case, in his judgment in the Court of Criminal Appeal, Hunt CJ at CL (who, with McInerney J formed the majority) observed that success upon the ground that the verdicts were unsafe and unsatisfactory would lead to a judgment of acquittal rather than to a new trial and continued:

"The test to be applied by this Court is the same whether the case was heard by a judge alone or with a jury¹⁵. That test is whether this Court, having made its own independent assessment of both the sufficiency and the quality of the evidence, is persuaded that it was not open to the judge, upon the whole of the evidence, to be satisfied beyond reasonable doubt that the appellant was guilty¹⁶. This is an issue upon which we must look at the evidence for ourselves, just as we would in an appeal from a jury trial, without reference to any particular findings of fact made by the judge."

14 Earlier, in *Kurtic*¹⁷, Hunt CJ at CL referred to cases in which the Court of Criminal Appeal had been considering a ground of appeal that the verdict was unsafe and unsatisfactory and continued:

"In such a case, it is the duty of this Court - whether the appeal is from a jury trial or a judge alone trial - to make its own independent assessment of both the sufficiency and the quality of the evidence, in order to see whether the jury (or judge trying the case alone) *ought* to have a reasonable doubt or whether this Court itself experiences such a doubt or is persuaded that there

14 The quotation is from the joint judgment of Latham CJ, Rich, Dixon, Evatt and McTiernan JJ in *Davies and Cody v The King* (1937) 57 CLR 170 at 180.

15 *R v Kurtic* (1996) 85 A Crim R 57 at 60.

16 *M v The Queen* (1994) 181 CLR 487 at 493-495, 508; *R v McKnoulty* (1995) 77 A Crim R 333 at 338-339.

17 (1996) 85 A Crim R 57 at 60 (original emphasis; footnotes omitted).

Gleeson CJ
McHugh J
Gummow J
Kirby J
Callinan J

6.

is a significant possibility that an innocent person has been convicted. It has nevertheless been accepted by this Court that an appeal against conviction from a trial by a judge alone pursuant to s 33 of the *Criminal Appeal Act* is not an appeal by way of rehearing. In the statutory context to which I have referred, this must be so. As the finding of a judge in such a trial is to be given the same effect as a verdict of a jury for all purposes, error may be demonstrated if there is no evidence to support a particular finding, or if the evidence is all one way, or if the judge has misdirected himself or herself leading to a miscarriage of justice."

More recently, in *Ion*¹⁸, Hunt CJ at CL said that an appeal from a conviction in a trial by judge alone would be allowed:

"only if error had been demonstrated in the sense that there was no evidence to support a particular finding, or that the evidence is all one way, or that the judge had misdirected himself or herself, leading to a miscarriage of justice".

- 15 The appellant challenges in this Court these propositions and the reasoning by which the Court of Criminal Appeal appears to have assimilated the extended operation of s 6(1) of the Criminal Appeal Act, made necessary by Pt 9 of the Criminal Procedure Act, to the pre-existing case law with respect to appeals from convictions upon trial by jury. In particular, the appellant complains that the formulations by the Court of Criminal Appeal do not deal with the consequences of failure to comply with the requirements of Pt 9 itself, especially the content of the obligation in s 33 thereof to give reasons. The justice which the appellant submits has miscarried is justice according to a body of law which at his trial included the requirements of Pt 9 of the Criminal Procedure Act.

The Criminal Appeal Act

- 16 An understanding of the appeal now provided by s 6(1) of the Criminal Appeal Act, in respect of trials on indictment conducted under Pt 9 of the Criminal Procedure Act by judge alone, is assisted by consideration of the changes made in appellate procedure in 1912 by the introduction of the Criminal Appeal Act itself. Section 23(1) of the Criminal Appeal Act provides:

¹⁸ (1996) 89 A Crim R 81 at 85-86.

7.

"Writs of error, and the powers and practice now existing in the Supreme Court in respect of motions for new trials, and the granting thereof in criminal cases, save as aforesaid, are hereby abolished."

Section 23(2) repealed various provisions of the Crimes Act, including s 471. Sub-section (1) thereof had provided that in circumstances where in England, after conviction for felony or misdemeanour, a writ of error might, on the fiat of the Attorney-General, be brought for reversal of the judgment thereon, a like writ might, in respect of any conviction in any court in New South Wales, be issued out of the Supreme Court on the application of the Crown or the prisoner, after cause shown, and be made returnable in the Supreme Court. This was subject to a proviso, the terms of which may be compared with those of the proviso now found in s 6(1). The proviso to s 471(1) stated:

"Provided that no judgment shall be reversed or avoided for any error, unless some substantial wrong appears to have been done, or some other miscarriage of justice occasioned, by reason of such error".

17 Marshall CJ defined a writ of error as¹⁹:

"a commission by which the judges of one court are authorized to examine a record upon which a judgment was given in another court, and on such examination, to affirm or reverse the same according to law".

The writ of error thus is to be seen as an exercise of original jurisdiction by which one court supervised another with respect to questions of law. Story²⁰ distinguished as follows between a writ of error and an appeal:

"An appeal is a process of civil law origin, and removes a cause, entirely subjecting the fact, as well as the law, to a review and a re-trial. A writ of error is a process of common law origin; and it removes nothing for re-examination, but the law. The former mode is usually adopted in cases of equity and admiralty jurisdiction; the latter, in suits at common law tried by a jury."

In respect of a jury trial or a trial by judge sitting alone in a witness action, the right of an "appeal" is not a common law right and must depend on a grant by

19 *Cohens v Virginia* 6 Wheat 264 at 409 (1821) [19 US 120 at 183].

20 *Commentaries on the Constitution of the United States*, 1st ed (1833), vol 3, §1756.

Gleeson CJ
McHugh J
Gummow J
Kirby J
Callinan J

8.

legislation²¹. In England, a general appeal from judges sitting in a witness action in civil litigation was first given by the *Judicature Act* 1873 (UK)²². The nature of the appeal will be dictated by the proper construction of the law in question.

18 *O'Donoghue*²³ was an appeal against conviction and the Court of Criminal Appeal dealt with a submission that the trial judge had made erroneous findings of fact in the course of determining on a voir dire whether certain evidence should be admitted. The Court emphasised that the appeal under the Criminal Appeal Act was "not by way of rehearing". The Court had no power "to substitute its own findings for those of the trial judge" and to demonstrate error it was necessary to show that there was "no evidence to support a particular finding, or [that] the evidence is all one way, or [that] the judge has misdirected himself"²⁴.

19 In the passage from *Kurtic* set out above, the Court of Criminal Appeal distinguished the appeal from verdicts found by judges sitting without a jury pursuant to Pt 9 of the Criminal Procedure Act from "an appeal by way of rehearing". The phrase initially was used in a quite different context to identify the procedure whereby, before a decree or order was enrolled, the decision of a judge of the Court of Chancery was open to correction upon a rehearing by the same or another judge²⁵. A statutory provision that an appeal to a higher court be "by way of rehearing" was said by Sir George Jessel MR to indicate that the

21 *Attorney-General v Sillem* (1864) 10 HLC 704 at 720 [11 ER 1200 at 1207-1208]; *South Australian Land Mortgage and Agency Co Ltd v The King* (1922) 30 CLR 523 at 553; *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 108; *CDJ v VAJ* [1998] HCA 67 at 95.

22 *Paterson v Paterson* (1953) 89 CLR 212 at 218-219.

23 (1988) 34 A Crim R 397.

24 (1988) 34 A Crim R 397 at 401.

25 *In re St Nazaire Company* (1879) 12 Ch D 88 at 97; *Charles Bright & Co Limited v Sellar* [1904] 1 KB 6 at 11-12. After enrolment of the decree or order, a bill of review might be brought, but only upon (i) an error of law appearing on the face of the decree and without further examination of matters of fact or (ii) a newly discovered matter which "could not possibly have been used when the decree was made": Daniell, *The Practice of the High Court of Chancery*, 5th ed (1871), vol 2 at 1422.

appellant was "not to be confined to the points mentioned in the notice of appeal"²⁶. However, the phrase has more frequently been used in statutes, or employed in construing statutes, to indicate, unfortunately in differing senses, the nature of the task to be performed by an appellate court.

- 20 An appeal "strictly so called" was described by Lord Davey as presenting the question whether the order below was correct "on the materials which that Court had before it"²⁷. Of a provision that appeal be "by way of rehearing", Windeyer J said in *Da Costa v Cockburn Salvage & Trading Pty Ltd*²⁸:

"It means that the case is to be determined by the Full Court, its members considering for themselves the issues the trial judge had to determine and the effect of the evidence he heard as appearing in the record of the proceedings before him, but applying the law as it is when the appeal is heard not as it was when the trial occurred".²⁹

A further view, that taken by Mason CJ, is that, on an appeal that is a "rehearing", the appellate court is not restricted to the record below and "may receive additional evidence, including evidence as to matters which have taken place subsequent to that decision"³⁰. In addition, the judgment of Dixon CJ and Kitto J in *Paterson v Paterson*³¹ traces the differing opinions expressed as to what is involved in the appellate "rehearing" of questions of fact found by a primary judge who sat without a jury.

26 *Purnell v Great Western Railway Co* (1876) 1 QBD 636 at 640. See also Stuckey and Irwin, *Parker's Practice in Equity*, 2nd ed (1949) at 119-120.

27 *Ponnamma v Arumogam* [1905] AC 383 at 390. See also *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 109.

28 (1970) 124 CLR 192 at 208-209. See also *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 108-110; *Mickelberg v The Queen* (1989) 167 CLR 259 at 267-268, 277-280.

29 These remarks are not affected by the criticism in *Warren v Coombes* (1979) 142 CLR 531 at 543-545 of what was said in other respects by Windeyer J in *Da Costa v Cockburn Salvage & Trading Pty Ltd* (1970) 124 CLR 192.

30 *Mickelberg v The Queen* (1989) 167 CLR 259 at 267.

31 (1953) 89 CLR 212 at 219-224.

21 The phrase "by way of rehearing" has been used to identify various characteristics of the appellate process and does not necessarily have a fixed or settled meaning. It is best used only when required by a statutory text. The phrase is not found in the legislation with which this appeal is concerned and does not immediately assist as a criterion of differentiation in identifying the incidents of the appellate process for which the legislation does provide.

22 Here one of the questions raised by the appellant turns upon the significance for an appeal of a failure to observe the requirements imposed by Pt 9 of the Criminal Procedure Act. The scope and purpose of that legislation is a matter of first importance. Some insight into those questions is provided by the decision of the New South Wales Court of Appeal in *Pettitt v Dunkley*³². Section 142 of the *District Courts Act* 1912 (NSW) provided for an appeal to the Court of Appeal by a party who was "aggrieved by the ruling, order, direction, or decision of the judge in point of law". It was held in *Pettitt v Dunkley* that the failure of the trial judge, sitting without a jury, to give reasons for his decision made it impossible for the Court of Appeal to determine whether or not the verdict was based on an error of law, and this had the consequence that the failure to give reasons itself constituted an error of law³³. In *Public Service Board of NSW v Osmond*³⁴, Gibbs CJ said that the decision in *Pettitt v Dunkley*:

"that the failure to give reasons was an error in law may have broken new ground".

Even if that be so, and we should not be taken as acceding to the view that new ground was broken in *Pettitt v Dunkley*, the reasoning of the Court of Appeal upon the construction of s 142 should be accepted. Further, in the present case, the obligation to give reasons is specified in the statute itself, namely in the mandatory terms of s 33. Such a provision is an expression of legislative concern not only for the effective exercise by the Court of Criminal Appeal of its jurisdiction conferred by ss 5 and 6 of the Criminal Appeal Act. More fundamentally, s 33 evinces a concern that, in the operation of the new regime established by Pt 9 of the Criminal

32 [1971] 1 NSWLR 376.

33 [1971] 1 NSWLR 376 at 381-382, 385, 388.

34 (1986) 159 CLR 656 at 666.

Procedure Act whereby trial by jury is replaced in certain circumstances by trial by judge sitting alone, justice must not only be done but also be seen to be done³⁵.

The Criminal Procedure Act

- 23 Part 9 of the Criminal Procedure Act comprises ss 30-33. Section 30(1) defines, for that Part, the expression "criminal proceedings" as meaning "proceedings for the prosecution of persons on indictment". Section 31 restates what immediately previously had been the position established by s 19 of the *Jury Act* 1977 (NSW), that trials of such criminal proceedings in the Supreme Court or the District Court be by jury, but adds the qualification "except as otherwise provided by this Part". Provision is then otherwise made by ss 32 and 33. These state:

"32 Trial by Judge in criminal proceedings

- (1) An accused person in criminal proceedings in the Supreme Court or District Court must be tried by the Judge alone if:
 - (a) the person so elects in accordance with this section, and
 - (b) the Judge is satisfied that the person, before making the election, sought and received advice in relation to the election from a barrister or solicitor.
- (2) An election may not be made unless:
 - (a) all other accused persons in the trial also elect to be tried by the Judge alone, and
 - (b) each election is made in respect of all offences with which the accused persons in the trial are charged.
- (3) An election may be made only with the consent of the Director of Public Prosecutions.
- (4) An election must be made before the date fixed for the person's trial in the Supreme Court or District Court.

35 See *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 278.

Gleeson CJ
McHugh J
Gummow J
Kirby J
Callinan J

12.

- (5) An accused person who elects to be tried by the Judge alone may, at any time before the date fixed for the person's trial, subsequently elect to be tried by a jury.
- (6) Rules of court may be made with respect to elections under this section.

33 Verdict of single Judge

- (1) A Judge who tries criminal proceedings without a jury may make any finding that could have been made by a jury on the question of the guilt of the accused person. Any such finding has, for all purposes, the same effect as a verdict of a jury.
- (2) A judgment by a Judge in any such case must include the principles of law applied by the Judge and the findings of fact on which the Judge relied.
- (3) If any Act or law requires a warning to be given to a jury in any such case, the Judge is to take the warning into account in dealing with the matter."

24 Several points of construction may be made. First, s 33 in any particular case of a trial by judge alone may attract the operation of one or more of the limbs of s 6(1) of the Criminal Appeal Act. In all these cases, there will then be the question of the operation of the proviso.

25 Secondly, the "finding" referred to in s 33(1) is not of the same nature as the "findings of fact on which the Judge relied" specified in s 33(2). The finding spoken of in s 33(1) is one "on the question of the guilt" of the accused and, when made by the judge, the finding has "the same effect as", that is to say is of a character that would have been expressed in, "a verdict of a jury". Accordingly, a finding in the sense specified in s 33(1) is a finding of ultimate guilt or otherwise. The sub-section also encompasses as findings "on the question of the guilt of the accused" such matters as the steps by which s 23A of the Crimes Act is applied in cases of substantial impairment by abnormality of mind and s 23 is applied in cases of provocation, in each case to require a conviction of manslaughter rather than murder.

26 Thirdly, the first limb of s 6(1), which deals with the unsatisfactory quality of "the verdict of the jury", must now be seen through the prism of s 33(1). The first limb will address attention to the evidence upon which the trial judge acted, or upon which it was open to the trial judge to act, in reaching the finding as to

ultimate guilt. Approached on that footing, is that finding "unreasonable" or one which "cannot be supported"? It is unnecessary on this appeal to determine whether, in such cases under the first limb or in cases under the more broadly stated third limb, the appellate court will intervene, as it was put in passages from decisions of the Court of Criminal Appeal set out earlier in these reasons³⁶, only where there was no evidence to support a particular finding, the evidence was all the one way or there has been a misdirection, leading to a miscarriage of justice.

27 Fourthly, whilst they are differently framed, the requirements of s 33(2) and (3) are expressed in terms of legal imperatives and a failure to observe either or both of them is to make a wrong decision on a question of law within the second limb of s 6(1) of the Criminal Appeal Act³⁷. Such failure may also mean that justice has miscarried, within the meaning of the third limb, because justice according to law, to which the accused was entitled, included compliance with the mandatory requirements of s 33³⁸.

28 Fifthly, whilst s 33(2), when specifying that which a "judgment" must include, does not use the expression "reasons for judgment", it should not be taken as intending that the requirements of s 33(2) be satisfied merely by a bare statement of the principles of law that the judge has applied and the findings of fact that the judge has made. Rather, there must be exposed the reasoning process linking them and justifying the latter and, ultimately, the verdict that is reached.

29 Sixthly, the judgment may record what the judge regarded as a principle of law which then was applied, but the principle may have been erroneously formulated. There may have been a literal compliance with s 33(2), but by this

36 *Kurtic* (1996) 85 A Crim R 57 at 60; *Ion* (1996) 89 A Crim R 81 at 85-86; *O'Donoghue* (1988) 34 A Crim R 397 at 401.

37 Compare, in the field of judicial review, the treatment in the following decisions of "error of law" by reason of failure adequately to state reasons in accordance with a statutory requirement: *Sullivan v Department of Transport* (1978) 20 ALR 323 at 353; *Collins v Repatriation Commission* (1980) 32 ALR 581 at 594-595; *Algoni Pty Ltd v Secretary, Department of Industrial Relations* (1985) 3 NSWLR 515 at 522-523; *Muralidharan v Minister for Immigration and Ethnic Affairs* (1996) 62 FCR 402 at 413-416.

38 See *Mraz v The Queen* (1955) 93 CLR 493 at 514; *Balenzuela v De Gail* (1959) 101 CLR 226 at 233, 244; *Hembury v Chief of the General Staff* (1998) 72 ALJR 1209 at 1213, 1216, 1225, 1226; 155 ALR 514 at 520, 524, 536, 538.

means there is disclosed an error of law which, without there being a breach of s 33(2), attracts at least the second limb of s 6(1) of the Criminal Appeal Act.

30 Seventhly, if the judgment fails to show that the judge applied a relevant principle of law, two possibilities are presented. One possibility is that, notwithstanding such failure, the principle was applied. Upon that hypothesis, there has been a breach of s 33(2) by reason of the omission from the judgment. The other possibility is that the principle was not applied, with the result that, independently of the question of breach of s 33(2), there has been an error of law which may attract at least the second limb of s 6(1) of the Criminal Appeal Act. The obligation imposed by s 33(2) was to ensure that the judgment included all principles of law which the judge applied. Unless the judgment shows expressly or by implication that the principle was applied, it should be taken that the principle was not applied, rather than applied but not recorded.

31 Finally, there may be a breach of s 33(3) with respect to the requirement to take a warning into account. The present appeal is put as such a case. Section 33(3) is framed in a fashion which differs from that of s 33(2) and which emphasises the particular importance attached by the legislature to the requirements of the law with respect to warnings. Section 33(2) requires the inclusion of principles of law applied and of factual findings relied upon, whilst s 33(3) obliges the judge to take the particular warning into account.

32 The obligation imposed by s 33(3) "to take the warning into account" is not only to be discharged but also to be seen to be discharged. The means by which the obligation may be discharged is that indicated in s 33(2), namely the inclusion in the reasons for judgment of the particular requirement for a warning among the principles of law applied by the judge. The various requirements that warnings be given have been expressed as rules of law or practice³⁹. The failure to give such a warning does not always lead to the setting aside of a conviction. But that does not mean that it is not a principle of law within the terms of s 33(2). The judge is obliged by s 33(3) to take the warning into account and in doing so the judge applies a principle of law.

33 The result is to require the recording and heeding of a warning, if one is called for in the particular case, and the giving of effect to it in a real sense by stating reasons why, notwithstanding the warning or as a consequence of it, a particular verdict is reached. A mere recording or statement of it, without more, would

39 See, for example, *Longman v The Queen* (1989) 168 CLR 79 at 89; *McKinney v The Queen* (1991) 171 CLR 468 at 474.

amount to an empty incantation. If these criteria are not satisfied in a particular case, then the judge is to be taken as not discharging the obligation imposed by s 33(3) that the warning be taken into account.

The present case

34 With respect to the appellant's reliance upon s 33 in the present case, in our view (i) there was a failure by the trial judge to observe the requirements of s 33(3), (ii) there is attracted the second (and, although it is not necessary to decide it, probably also the third) limb of s 6(1) of the Criminal Appeal Act, and (iii) the appeal should not have been dismissed by the Court of Criminal Appeal on the footing that no substantial miscarriage of justice had actually occurred.

35 The appellant's primary ground of appeal is that this was a case of serious crime where a judge would have been required to stress to the jury that, there being only one witness asserting the commission of the offences, the evidence of that witness was to be scrutinised with great care before a conclusion was arrived at and a verdict of guilty brought in⁴⁰. In *Longman v The Queen*⁴¹, McHugh J said that if:

"the evidence discloses any circumstance which suggests that the evidence of the complainant may be unreliable, the trial judge has a duty to make the jury aware of the dangers concerning that person's evidence. As in any case where the prosecution depends solely upon the evidence of one witness, the trial judge is entitled to point out that the evidence of the complainant requires careful scrutiny before acting upon it. But cases will frequently arise where the circumstances will require a stronger warning. The terms of that warning will depend upon the particular circumstances of the case: *Carr [v The Queen]*⁴²."

36 The submission is that in this case a warning should have been regarded and recorded by the trial judge of the need to assess the reliability of the complainant by reason of her age, emotional instability and infatuation with the appellant. The respondent pointed to a statement in the following form by the trial judge as

40 *R v Murray* (1987) 11 NSWLR 12 at 19.

41 (1989) 168 CLR 79 at 107.

42 (1988) 165 CLR 314 at 318.

representing such a sufficient warning and emphasised the use by his Honour of the word "solely":

"The Crown case relies solely upon the complainant. If I am unable to accept her evidence beyond reasonable doubt, I must acquit the accused."

There may be cases where an examination of the reasons given, although they do not contain express reference to a warning, sufficiently discloses that the judge has had regard to the warning. However, the statement just referred to does not satisfy any such criterion.

37 No doubt consciousness of the importance of such a warning will be of second nature to many judges. However, as we have said, an animating principle which lies behind the requirements of s 33 is that criminal justice not only be done but also be seen to be done. The judgment must show expressly or by necessary implication that the warning was taken into account. If the judgment does not do so, a breach of s 33(3) has occurred. It is no answer that the trial judge is an experienced judge who was well aware of the requirement of a warning and that he or she must have taken the warning into account.

38 It follows that, in the present case, there was a failure by the trial judge to include in his judgment reference to the warning which was required to be given to a jury and this demonstrates a breach of the requirement of s 33(3) that the judge "take the warning into account". This failure involved a wrong decision on a question of law and the second limb of s 6(1) of the Criminal Appeal Act was attracted. The requirement of s 33(3) being mandatory in the sense discussed earlier in these reasons, there also was a miscarriage of justice within the third limb of s 6(1)⁴³.

39 With respect to the application of the proviso, it has been held in this Court that not every wrong decision on a question of law will lead to the quashing of the conviction or a new trial⁴⁴ and that "[t]here is no rigid formula to determine what constitutes such a radical or fundamental error" as to preclude the application of the proviso⁴⁵. There may be cases where the failure to satisfy the requirements of

43 cf *Hembury v Chief of the General Staff* (1998) 72 ALJR 1209; 155 ALR 514.

44 *Krakouer v The Queen* (1998) 72 ALJR 1229 at 1233-1234, 1241-1242; 155 ALR 586 at 592, 603.

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

17.

s 33 involves errors that are so trivial that the Court of Criminal Appeal may conclude that there has been a trial according to law, notwithstanding that failure⁴⁶. However, given the importance of the subject-matter of the warning demanded by this case, the miscarriage of justice was a substantial one. This was not a case for the application of the proviso.

40 Further, there was considerable force in the appellant's submission that the trial judge in approaching the matter in stark terms of belief or disbelief of the complainant or the appellant did not give the complainant's evidence the sufficiently careful scrutiny which the warning, carried into effect, would have required.

41 The following example will illustrate the point. The trial judge observed that there was a lot of evidence given about the appellant's office and whether he took steps to make secret the presence of the complainant in that office. None of the alleged offences was said to have occurred in the office but his Honour said:

"an assessment of the evidence in this regard is important upon [*sic*] the credibility of the witnesses".

By this statement, we take it that the trial judge was making it plain that he regarded the assessment of the evidence in regard to what was said to have occurred in the appellant's office as important for the conclusion which he would reach on the credibility of the witnesses, most importantly of the appellant.

42 The trial judge referred to evidence by the complainant that the doors were always shut and said that the evidence of the appellant had been that the complainant was never in the room with him when the doors were shut. His Honour did not refer to the statement by the appellant in cross-examination that it was possible that, on occasions, the complainant had closed the door behind her when entering his office. His Honour observed that on this issue there was conflicting evidence from third parties. Some witnesses said that on the occasions they saw the complainant in the accused's office the doors were always open. Another said that sometimes the door to the administration office would be closed but that the outside door was mostly left open. Other witnesses gave evidence of occasions when the complainant was in the appellant's office the doors were shut.

46 cf *Krakouer v The Queen* (1998) 72 ALJR 1229 at 1241-1242; 155 ALR 586 at 602-603.

- 43 The trial judge concluded that "[o]n the totality of [the] evidence" he had come to the view that there were "a number of occasions when the complainant was in the accused's office with the doors closed". From that conclusion, the trial judge took the step that he was "satisfied that the accused was not being truthful when he said the doors were never closed when the complainant was in his office" and the final step that "I accept the complainant's evidence in this regard". However, the complainant's evidence had been the opposite of the appellant's evidence. She had said that the doors were always shut whilst the conclusion drawn from the evidence of the third parties was no higher than that there had been "a number of occasions" when the doors were closed whilst the complainant was in the appellant's office. To find, as an important matter going to the credibility of the witnesses, that the complainant was to be believed and the appellant to be disbelieved both appears illogical and emphasises the importance that the warning both be stated and acted upon.

Other grounds

- 44 In the Court of Criminal Appeal, the appellant pressed a ground of appeal to the effect that "the verdicts are unsafe and unsatisfactory". It is clear that this ground was treated by counsel, and by the Court of Criminal Appeal, as meaning that the nature and quality of the evidence at the trial was such that, although there was evidence to sustain a verdict of guilty, the trial judge ought to have entertained a reasonable doubt as to the guilt of the appellant. The Court of Criminal Appeal responded to this ground by making an examination and analysis of the evidence and of the reasoning of the trial judge. It was on this issue that the Court divided: the majority held that the ground had not been made out; Sully J resolved the issue in favour of the appellant. The differences between the majority and Sully J turned largely upon their respective views of the significance of particular aspects of the evidence and the inferences to be drawn from such evidence. One of the grounds of appeal in this Court is that the majority in the Court of Criminal Appeal erred in determining that, on all the available evidence, the verdicts finding the appellant guilty of the four charges brought against him were not unsafe and unsatisfactory. It is also asserted that the majority failed to make a proper analysis and evaluation of the whole of the evidence.

- 45 Although we have upheld a different ground of appeal, it is necessary to refer to these further grounds because, if upheld, they would warrant an acquittal of the appellant rather than an order for a new trial. The submission that the majority in the Court of Criminal Appeal failed to make a proper analysis and evaluation of the whole of the evidence should not be upheld. Whilst we do not necessarily prefer every aspect of the factual reasoning of the majority to the reasoning of Sully J, we see no sufficient cause to reject the ultimate conclusion at which the

majority arrived. In this respect, we note in particular that the trial judge was satisfied that the complainant was a witness of truth. He accepted her evidence beyond reasonable doubt and rejected the evidence of the appellant.

- 46 In dealing with the ground of appeal upon which the appellant succeeds, we have found fault with the process by which the trial judge came to that conclusion. However, with respect to the grounds of appeal to the effect that the appellant is entitled to an acquittal, it has not been established that, in the light of the whole of the evidence, it was unreasonable to believe the complainant or that the majority in the Court of Criminal Appeal erred in rejecting the submission that the nature and quality of the evidence at the trial was such that, acting reasonably, the trial judge ought to have had a doubt as to the guilt of the appellant.

Orders

- 47 For these reasons, orders were made allowing the appeal, setting aside the order of the Court of Criminal Appeal and, in place of that order, allowing the appeal to that Court, quashing the verdict and ordering a retrial on all of the counts. Whether, having regard to the time already served by the appellant, there should be a retrial is a matter for the appropriate authority.