



Western Australia and the High Court
Centenary:
A Reason To Celebrate?

*The High Court on Crime in
Western Australia*

Saturday, 29 November 2003

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Ladies and Gentlemen,

The High Court Centenary

I am honoured and delighted to have been invited to speak today on a topic of immense interest to me, *The High Court on Crime in Western Australia*. The Supreme Court of Western Australia and the High Court share an intrinsic connection which encompasses more than the celebration of 100 years together. The first appeal from Western Australia to the High Court was in a civil case, namely, *D & W Murray & Co Ltd v The Collector of Customs*¹. It was heard in Melbourne on 8 and 9 December 1903, just two months after the inaugural sitting in Melbourne on 6 October 1903. The effect of the decision was that while Western Australia retained the capacity to tax goods by way of customs duty, the Commonwealth had the exclusive power to impose customs duty on goods imported from outside Australia. In doing so, the High Court upheld the decision at first instance of McMillan J (as he was then) which had been overruled by the Full Court.

Pilkington and Northmore (later Chief Justice) appeared for the appellant, and Septimus Burt KC, the Solicitor General, and FM Stone appeared for the State, representing the Collector of Customs. The

¹ (1903) 1 CLR 25



solicitors for the appellants were Stone and Burt and the solicitors for the respondents were James and Darbyshire. The appeal was dismissed.

In 2003, we have celebrated two centenaries in the administration of justice. In Western Australia we have celebrated the centenary of the completion of the Supreme Court building which was opened on 8 June 1903. We have also celebrated the first sitting of the High Court at the Supreme Court of Victoria in Melbourne. I am privileged to have been invited to present a paper which examines the impact of decisions of the High Court on the development of the criminal law in Western Australia by particular reference to decisions relating to the *Criminal Code (WA)*. Naturally, because the High Court has made decisions on appeal from Queensland and Tasmania, both being Code States, decisions on appeals from Queensland and Tasmania have also influenced the development of the criminal law in Western Australia. This paper is not intended to be fully comprehensive, but a review of a selection of some of the significant decisions which have impacted upon the criminal law in Western Australia.

In 1903, some were of the opinion that the High Court would prove to be a redundant tribunal, with little work to do and no status². This was quickly proved wrong by the work of the inaugural bench consisting of the Chief Justice, Sir Samuel Griffiths, Sir Edmund Barton, our first Prime Minister, and Richard O'Connor, the first Leader of the Government in the Senate.

² High Court of Australia homepage, *History of the High Court*, <http://www.highcourt.gov.au/>



Early Appeals

It was not until 1905 that the High Court heard the first appeal against conviction in a criminal case in *Slattery v The King*³. The appeal was from a decision of the Supreme Court of New South Wales on a special case stated by Pring J. An agent who had a general authority to collect debts under a power of attorney to act for his principal also had instructions to make various payments on behalf of the principal and account to her every quarter. For several years, he received rents and made payments on behalf of the principal, but failed to properly account and fraudulently converted to his own use the balance which should have been paid to his principal. The High Court held that he was not liable to be convicted of larceny under s 125 of the *Crimes Act 1900* (NSW) and reversed the decision to the contrary of the Supreme Court. The appellant should have been convicted of fraudulent misappropriation rather than larceny. In so doing, Griffiths CJ delivering the judgment of the Court said that:

" ... in England the general rule was, as stated by *Sir James Stephen* in his *General View of the Criminal Law of England* pp 51, 52, 53, that fraudulent misappropriation of property was not a criminal offence if the possession of it was originally honestly obtained."

Incidentally, when looking through the first volumes of the CLR to read the reports of early criminal cases, I was reminded that my private set of the CLRs was originally owned by R S (Dickie) Haynes who was a leading criminal lawyer in the last years of the 19th century through to the 1940s, later by Fred Curran (a divorce and criminal lawyer) and still later

³ (1905) 2 CLR 546



Fred Curran's former partner, Serge Ferrier, who was one of the founding Judges of the Family Court of Western Australia.

Stealing and Receiving

It was not until 20 August 1906 that the High Court heard its next substantial criminal appeal in *Trainer v The King*⁴. Priscilla Trainer had been charged at Quarter Sessions with stealing or, alternatively, receiving three lambs, the property of a person unknown. Some young lambs went missing from a sheep run within a few miles of Ms Trainer's house. Despite a thorough search, they were not found. Very shortly afterwards, three lambs of similar age and breed, but not identified as them, were found in Ms Trainer's possession. The missing lambs and the lambs found were the same breed as nearly all the other sheep in the surrounding district.

Ms Trainer was questioned by police about how the lambs came into her possession. At the trial she tried to support one of the statements by producing receipts which were alleged by the Crown to be fraudulent. The Judge directed the jury that if they were satisfied beyond reasonable doubt that Ms Trainer was in possession of the lambs and that they were not honestly come by, they could convict her on either count on the indictment unless she had in her defence proved to their satisfaction that the lambs were honestly acquired. She was convicted of receiving after the trial Judge refused to withdraw the case from the jury on the ground "that there was no evidence of ownership in any one else but the prisoner".

The High Court held that the evidence was not sufficient to support the conviction on the basis that on an indictment for larceny or receiving, no presumption adverse to the accused may be drawn from the fact that the



goods alleged to have been stolen or "feloniously received" were found in her possession, unless there was proof that the relevant property had been stolen.

Attitudes to the Grant of Special Leave

Kirby J has noted⁵ that, in the early years, the High Court did not see its role as being one to interfere with the criminal law, which was categorised as matters for the State Supreme Courts. In the very first criminal appeal before the High Court, as if to apologise that the national court was intruding upon matters of the State's jurisdiction, Griffiths CJ stated⁶:

"The question is not whether the appellant was guilty of fraudulent misappropriation, but whether he was properly convicted of larceny. This is a dry technical question, and in order to answer it we must deal with the Statutes as we find them."

This attitude with regard to criminal appeals was maintained well into the 1930s. As Starke J said in 1936 in *Sodeman v R*⁷:

"This Court has an unfettered discretion to grant [special leave] where special circumstances are shown to exist, but I repeat the opinion I hold that this Court should only interfere where it is shown that substantial and grave injustice has been done. All the States have now, I think, constituted special tribunals for hearing appeals in criminal cases, and interference by this court in such cases, unless

⁴ (1906) 4 CLR 126

⁵ Kirby J (2003) *Why has the High Court become more involved in criminal appeals?*, Australian Bar Review 23(1), p.23

⁶ *Slattery v The King* (1905) 2 CLR 546

⁷ (1936) 55 CLR 192 at 207



under the circumstances mentioned, is calculated to lead to mischief and inconvenience in the administration of criminal justice."

Today, the High Court regularly hears criminal appeals following the grant of special leave. Kirby J has noted that "the impression borne out by statistics [is] that [the] appeals in criminal matters constitute a growing proportion of the High Court's business".

On average, criminal appeals and applications for leave to appeal are more frequently dismissed than allowed. But it is those cases which are decided on appeal by the High Court which finally determine the scope and content of the criminal law of Western Australia in the interpretation and application of the *Criminal Code* and other statutes which embody the criminal law in Western Australia, as supplemented by the common law. In this paper I propose to refer to a number of cases decided by the High Court which have impacted upon the interpretation and application of the criminal law in Western Australia.

Origins of Our Criminal Law System

The origins of Australian criminal law lie in Judge-made common law. "Common law jurisdictions" describes those States who still rely substantially upon the common law as a basis for their criminal law supplemented by statute. This is distinct from the Code States, such as Queensland, Western Australia and Tasmania where the Codes were intended to substantially replace the common law. As every law student knows, Sir Samuel Griffiths, Chief Justice of Queensland in the late 19th century, prepared a draft *Criminal Code*, which was adopted in Queensland by the *Criminal Code Act 1899* (Qld), and was later substantially adopted by Western Australia in 1902. The Code attempts to draw upon the lengthy



history of criminal law through its development at common law, and synthesise this into comprehensive statutory statements of the criminal law. The Code is not exhaustive, however, and where there are gaps, it is necessary to refer to the common law.

Western Australia and Queensland are in the unique position of being the only two States to use the Griffiths Code as the basis of their criminal law. This also means that we can borrow and learn from each other's experiences in the interpretation and application of the criminal law system in our respective States. This is not to say that we blindly follow the judgments of superior courts in Queensland, but our common Code background means that decisions of the Supreme Court of Queensland and more recently, relevant decisions of the Court of Appeal of Queensland are fully taken into account.

The differences between the Code jurisdictions and the common law jurisdictions are markedly apparent in relation to the interpretation of criminal legislation. Given that the Code jurisdictions are based on the assumption that codification marks a break from the past, the interpretation of the Codes is based in the ordinary meaning of the language without any prior assumption that the previous common law should impact upon its interpretation. For example, in *Brennan v The King*⁸ in an appeal from the Court of Criminal Appeal in Western Australia, Dixon and Evatt JJ at 263 described the correct approach to the interpretation of section 8 of the Code as follows:

"Section 8 provides that when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is



committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence"

After suggesting that the section appeared to be based in some respects on comments in English texts, their Honours went on to say that:

"But it forms part of a code intended to replace the common law, and its language should be construed according to its natural meaning and without any presumption that it was intended to do no more than restate the existing law. It is not the proper course to begin by finding how the law stood before the Code, and then to see if the Code will bear an interpretation which will leave the law unaltered"

This approach still represents the law today.

The Appeal system

The Court of Criminal Appeal hears appeals against conviction and applications for leave to appeal against sentence from decisions of Judges of the Supreme and District Courts. Appeals or applications for leave to appeal against decisions of Magistrates are heard by a single Judge with a possibility of a further appeal to the Full Court of the Supreme Court.

Currently, the Court of Criminal Appeal sits each month in Perth with three Judges of the Supreme Court, presided over by the Chief Justice or the senior Judge present.

The High Court of Australia is at the apex of the Australian legal system and the ultimate source of law for Western Australia in relation to the interpretation of the Code and the conduct and application of the

⁸ (1936) 55 CLR 253



criminal law, both in terms of statute law and as supplemented by the decisions of the Courts.

Whilst the Court of Criminal Appeal has provided much guidance in the interpretation and application of the criminal law in Western Australia, the High Court has also played a very significant role in shaping the current landscape of criminal law practice and interpretation of the law.

Statistics

The High Court can hear appeals from the Western Australian Supreme Court and also has a special appellate jurisdiction enabling it to take an appeal directly in relation to Commonwealth offences, by virtue of ss 35, 39(2)(c) of the *Judiciary Act 1903* (Cth). There are no further appeals once a matter has been decided by the High Court, and the decision is binding on all other courts throughout Australia. All appeals to the High Court require a grant of special leave by the Court itself. The criteria for special leave are described in s 35A of the *Judiciary Act 1903* (Cth). Special leave is only granted in exceptional circumstances. In essence, the High Court will grant special leave where the Court is required to consider a question of law of public importance, or where special circumstances are shown⁹. The High Court also has a general discretion to grant leave in "the interests of the administration of justice".

In the High Court's most recent sittings in Perth in October, nine applications for special leave from decisions of the Western Australian Court of Criminal Appeal were dealt with. Special leave was refused in eight of the cases. Special leave was granted on limited grounds in *Coates*

⁹ *R v Shaw* (1915) 20 CLR 315; *Eather v The King* (1915) 20 CLR 147; *Ross v The King* (1922) 30 CLR 246; *R v Howe* (1958) 100 CLR 448; *Ugle v The Queen* (1989) 167 CLR 647



v The Queen and *Nicholls v The Queen* being two of the appellants in *Hoy v The Queen*¹⁰.

In 2002, of the 103 criminal special leave applications filed with the High Court, 22 were appeals from decisions of the Court of Criminal Appeal. Of the 17 Western Australian special leave applications decided, special leave was granted in only three cases. This is consistent with previous years where special leave applications were predominantly refused.

In 2002, the Western Australian Court of Criminal Appeal heard 143 criminal appeals and applications for leave to appeal. These included a number of lengthy and complex appeals. The number of appeals against conviction and applications for leave to appeal against sentence from cases in the Supreme Court was the lowest in some years. There were 24 applications for leave to appeal against sentence imposed in the Supreme Court, of which 10 were allowed and 14 dismissed. There were eight appeals or applications for leave to appeal against conviction of which five were allowed and three were dismissed. There were 71 applications for leave to appeal against sentence from the District Court, of which 20 were allowed and 51 were dismissed. There were 35 appeals against conviction from the District Court, of which 13 were allowed and 22 were dismissed. After two years with no appeals from the Children's Court, the Court heard two appeals against sentence, both of which were allowed, and two appeals against conviction, with one allowed and one dismissed. Since 1996, there had been only two successful appeals against conviction from the Children's Court to the end of 2002. In addition, there was also one reference from the Attorney General.

¹⁰ [2002] WASCA 275



Appeals and Applications for Leave to Appeal to Courts of Criminal Appeal

The basic principles upon which the grounds for an appeal are based are common to all appellate courts at the level of the Court of Criminal Appeal. There is an appeal as of right on a question of law: s 668(1)(a) of the *Criminal Code*. Leave to appeal is required on other matters relating to the conviction, including questions of fact and of mixed law and fact: s 688(1)(b) of the *Criminal Code*. An appeal against sentence requires the leave of the Court: s 688(1a)(b) of the *Criminal Code*.

An appeal against sentence can be brought by the offender by leave or by the Crown which has a right of appeal. In either case, the grounds upon which an appellate court will interfere with the sentence imposed are necessarily limited. Because sentencing involves the exercise of a discretion, an appellate court will not interfere merely because, in its view, the sentence was inadequate or excessive; or the appellate court would have exercised its discretion in a manner different from the manner in which the sentencing Judge exercised his or her discretion¹¹. Because sentencing involves the exercise of a judicial, rather than an unfettered, discretion, an appellate court will interfere if it is shown that the sentencing Judge acted on a wrong principle, failed to take into account a material consideration or misunderstood or wrongly assessed some salient feature of the evidence. Error in the exercise of a sentencing discretion may appear in the sentencing Judge's sentencing remarks. Alternatively, as the High Court

¹¹ *Lowndes v The Queen* (1999) 195 CLR 665 at 15 per Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ



has made clear, the sentence itself may be so excessive or inadequate as to manifest an error of principle¹².

There is no distinction between the general principles to be applied in a Crown appeal against sentence as against an offender's appeal against his or her sentence. The limitations on the discretion to interfere apply in each class of case. The appellate court will not interfere merely because the members of the Court think that they would have imposed a lesser or different sentence or that they think the sentence was too severe. The Court only interferes if the discretion of the lower court was improperly exercised. It needs to be shown that there was some error or mistake of fact or law. Something which should have been taken into account may not have been taken into account. Something may have been taken into account which should not have been. The Judge may have expressed views about the case which were extreme or misguided.

It is not always necessary that a specific error needs to be identified. The nature or severity of the sentence may be such as to constitute of itself evidence that the sentencing discretion miscarried or otherwise itself was evidence of error.

Sentencing: Credit for Plea of Guilty

In *Cameron v The Queen*¹³, the appellant sought leave to appeal to the Court of Criminal Appeal on the ground that insufficient credit had been given for an early plea of guilty. It was contended that the circumstances justified a discount of 20 to 25 per cent. The Crown

¹² see *House v The King* (1936) 55 CLR 499 at 505 per Dixon, Evatt & McTiernan JJ; *R v Tait* (1979) 46 FLR 386 at 387-88 per Brennan, Deane & Gallop JJ; *Chan v The Queen* (1988) 38 A Crim R 337 at 342 per Malcolm CJ

¹³ [2002] HCA 6; (2002) 76 ALJR 382



opposed the appeal on the ground that although a plea of guilty was entered, it was not entered at an early stage and the sentencing Judge had allowed a reduction of 10 per cent reducing a sentence of imprisonment from 10 years to 9 years.

The appellant had originally been charged with possession of a quantity of the drug commonly known as "ecstasy". On analysis, the drug was found to be the drug commonly known as "speed". The charge was amended seven months after the appellant had been originally charged. Seven days later, the appellant informed the prosecution through his solicitors that he would plead guilty to the charge if the complaint was amended. This occurred on 18 November, a plea of guilty was entered and was committed to the District Court for sentence.

On 12 January 2000, he entered the plea and was convicted in the District Court. It was contended that he should be given credit and sentenced on the basis that he had pleaded guilty "at the earliest opportunity" on a fast-track plea. Prosecuting counsel did not oppose that contention. This was consistent with decisions in such cases which supported a practice of reducing a sentence between 20-25 per cent up to 30-35 per cent depending upon the circumstances¹⁴. In *Cameron* in the Court of Criminal Appeal, Pidgeon J had said that the particulars had referred to drugs of equal seriousness and suggested that Cameron could have pleaded guilty earlier and saved a number of remands. It was also said that while there had been savings of time and administration in the District Court, there was no saving to the Magistrates Court.

¹⁴ *Miles v The Queen* (1997) 17 WAR 518 at 521 per Malcolm CJ; *Verschuren v The Queen* (1996) 17 WAR 467



Gaudron, Gummow and Callinan JJ made it clear at [11] – [14] that a plea of guilty was properly to be taken into account in mitigation because, first, there is usually some evidence of remorse and, second, the community is spared the expense of a contested trial¹⁵. In the same passage, their Honours pointed out that the plea may indicate acceptance of responsibility and willingness to facilitate the course of justice. At the same time, a person may not be penalised for insisting on his or her right to a trial¹⁶.

Their Honours held at [13] – [14] that it was not the saving of the trial, but a willingness to facilitate the cause of justice which was the relevant consideration. It followed that the provision in s 8(2) of the *Sentencing Act 1995* (WA) which provides that an early plea of guilty is a mitigating factor must be reconciled with the provision in s 7(2)(a) which gives effect to the common law rule that a person should not be penalised for exercising the right to a trial. Their Honours pointed out at [19]:

"... the relevant question is not simply when the plea was entered but, as was accepted by the Court of Criminal Appeal in this matter, whether it was possible to enter a plea at an earlier time."

This point had been made clear by Ipp J in *Atholwood*¹⁷ in a passage approved by their Honours in the High Court in *Cameron* at [22].

In *Cameron*, Kirby J at [70] – [71] was the only member of the High Court to endorse the approach of articulating approval of the practice which had been adopted in the Court of Criminal Appeal and consequently by sentencing Judges expressly stating the fact and measure of the discount for a plea of guilty.

¹⁵ *Siganto v The Queen* (1998) 194 CLR 656 at [22] per Gleeson CJ, Gummow, Hayne and Callinan JJ

¹⁶ *Siganto*, (*supra*)



Detention during the Governor's Pleasure

The High Court has provided substantial guidance in relation to provisions such as s 661 of the *Criminal Code* which authorises detention of an habitual criminal during the Governor's pleasure. The former s 662 also provided that:

"When any person is convicted of any indictable offence ... the court ... may, if it thinks fit, having regard to the antecedents, character, age, health or mental condition of the person convicted, the nature of the offence or any special circumstances of the case – (a) direct that on the expiration of the term of imprisonment then imposed upon him, he be so detained during the Governor's pleasure ..."

Section 40C(1)(b) of the *offenders Probation and Parole Act 1963* (WA) empowered the Parole Board, in its discretion, to order the release of a prisoner detained pursuant to a direction under the former s 602(a) of the Code. Section 29(1) of the *Mental Health Act 1962* (WA) empowered a judicial officer to order the detention in an approved hospital of a person suffering from a mental disorder.

Mitchell pleaded guilty four counts of wilful murder, three counts of unlawfully interfering with a dead body by sexual penetration and one count of sexual penetration of a child under the age of 13 years. Section 40D(2a) of the *Offenders Community Corrections Act 1963* (WA) then provided that where a sentence of strict security life imprisonment was imposed, "the court may, if it considers that the making of an order under [that] section is appropriate, order that the person is not to be eligible for parole". Subsection (1) enabled orders to be made, on receipt of a report

¹⁷ (1999) 109 A Crim R 465 at 468



from the Parole Board, that certain prisoners, including prisoners undergoing a sentence of strict security life imprisonment, be released on parole. Subsection (2) prohibited the making of an order under subsection (1) in the case of a prisoner undergoing a sentence of strict security life imprisonment, other than one in respect of which an order was made under subsection (2a), within 20 years of the date of sentencing except where the Governor was of the opinion that special circumstances existed.

Subsection (2b) provided that, in the case of a prisoner undergoing a sentence of strict security life imprisonment in respect of which an order was made under subsection (2a), an order should not be made under subsection (1) at any time. Owen J declined to make an order under s 40(1)(2a). The conclusion reached by Owen J was that:

“On balance I have decided that I will not make an order under s 40D (2a). This means that you will be eligible for parole on the sentences of strict security life imprisonment. I have imposed the most severe sentence that I can, namely strict security life imprisonment. *On the other hand, the unchallenged expert evidence is that you would not constitute a danger to the public (drug taking to one side) and that you have a constructive attitude to the future.* I take this to mean that there is at least a potential for your rehabilitation.

What factor, in the mix of the goals of punishment, would be served by, to use the vernacular, throwing away the key? I cannot undo the devastation that you have wrought on everyone concerned, alive and dead. So far as I am concerned you will never be released. That is the function of strict security life imprisonment. If, at a time in excess of 20 years, the executive arm of government, based on facts which are



unascertainable now but which will be apparent then, takes the view that you do not constitute a danger to the public and are otherwise deserving of release on licence, then that is a decision that it will take. The Parole Board is required to consider the circumstances of the offence in making a recommendation. If the board looks at it in the same way as I do it could be many, many years greater than 20 before you would merit consideration. The fulfilment of the goal of public safety lies in that decision. In the meantime you are incapacitated. In a case such as this deterrence is of only the most minimal relevance. That leaves retribution. I have imprisoned you for life. I believe that I should do no more.” [emphasis added]

The Court of Criminal Appeal reversed the decision of Owen J in *Mitchell*¹⁸. Kennedy and Ipp JJ allowed the appeal. Their Honours acknowledged that once parole had been declined under s40(2a) of the *offenders Community Corrections Act*, the effect is that the prisoner may not be released on parole at any time. This did not, however, affect the operation of the royal prerogative of mercy. The result was that the fate of Mitchell rested with the Executive. The Parole Board, however, was required to make periodic reports and recommendations to the Minister. The horrific nature of these murders was said to be among the very worst series of murders ever committed in this State.

Murray J dissented. While acknowledging that the sentencing Judge was at large in considering whether an order under s40D(2) was appropriate, Murray J held the making of such an order would require a case of the clearest kind. The effect of the order was the withdrawal of all hope of release when the trial Judge concluded that on the material before



him he could not envisage what the position would be 20 years into the future.

Mitchell was granted special leave to appeal to the High Court. In *Mitchell v The Queen*¹⁹, the High Court held that s 40D(2)(a) did not confer a discretion but a power, the exercise of which depended upon proof of the particular case out of which the power arose. The task for the Court of Criminal Appeal was to determine whether the sentencing Judge had been in error in the construction and application of the facts to the term "appropriate" in s 40(2)(a). The legislation did not identify any overriding factor. Murray J held that Owen J was correct to assess the balance to be struck between the circumstances of the offence and the factors militating in favour of parole, such as potential for rehabilitation and whether the prisoner would constitute a danger to the community at any material time.

The decision of the Court of Criminal Appeal was reversed. Dawson, Toohey, Gaudron, McHugh and Gummow JJ said at 347:

"There is no substance in the submission that the sentencing Judge did other than strike a balance between the competing outcomes for which the legislation provided."

The decision in *Mitchell* when read with the earlier decision of the High Court in *Chester v The Queen*²⁰ made it clear that the powers to order detention at the Governor's pleasure under ss 661 and 662 of the *Criminal Code* should be reserved for very exceptional cases for which s 29(1) of the *Mental Health Act 1962* (WA) was unlikely to be appropriate. The powers should not be exercised unless the sentencing Judge was satisfied that the offender was by reason of his antecedents, character, age health or mental

¹⁸ (1994) 72 A Crim R 200

¹⁹ (1995) 184 CLR 333



condition, the nature of the offence, or any special circumstances so likely to commit further crimes of violence (including sexual offences), that he constituted a constant danger to the community. The decision of the majority in the Court of Criminal Appeal, with Burt CJ dissenting, dismissing Chester's appeal against his sentence for detention during the Governor's pleasure in *Chester v The Queen*²¹ was reversed.

In practice, the Court rarely hears the application for leave and the appeal against sentence separately. Full argument on the merits of the proposed appeal is heard at one sitting. If the Court is of the opinion that the proposed appeal is without merit, leave will be refused with detailed reasons. If the Court is of the opinion that the appeal has merit and should be allowed in full or in part, the Court will give a judgment setting out the detailed reasons for the grant of leave and allowing the appeal. In some cases on the borderline, leave to appeal may be granted, but the appeal dismissed.

In determining an appeal against sentence, the Court of Criminal Appeal is constantly reminded of the advantages possessed by the court of trial, particularly when the findings made in the court below extend to the evaluation of primary fact. Evaluation is based upon many things falling outside the written record of proceedings.

The prosecution has a right of appeal against sentence and any order arresting judgment, quashing an indictment or staying proceedings on an indictment. The prosecution also has a right of appeal against verdicts of acquittal that have been directed by the Judge rather than decided by the jury as well as against a verdict of acquittal in a trial by Judge alone.

²⁰ (1988) 165 CLR 611

²¹ (1988) 32 A Crim R 401



However, there is no right of appeal against other acquittals. Where the prosecution is entitled to appeal, the appeal is as of right without the leave of the Court. Section 693A of the *Criminal Code* provides for the Attorney General to refer to the Court of Criminal Appeal any question of law which arose at trial. The Court then gives its opinion on the question of law but the answer does not affect the verdict.

The principles to be applied in the determination of an appeal by the prosecution against sentence are the same as the principles to be applied in the determination of an appeal brought by a convicted person against sentence on the ground that the sentence was excessive. Such an appeal is an appeal from a discretionary judgment. Hence there is a strong presumption in favour of the correctness of the decision appealed from, and that the decision should therefore be affirmed unless the court of appeal is satisfied that it is clearly wrong.

Quashing Conviction

The *Criminal Code* sets out three precise grounds on which a conviction should be quashed. First, that the verdict was "unreasonable or cannot be supported having regard to the evidence"; second, that there was "a wrong decision of any question of law"; or third, that on any ground there was a "miscarriage of justice".

When a conviction is quashed, a verdict of acquittal can be entered by the appeal court. If a conviction has been quashed and the appellant is guilty of a lesser offence, the appeal court can enter a conviction of the lesser offence. The quashing may leave no clear answer as to the disposition of the case so the appeal court has the power to order a new trial.



Verdict "Unsafe or Unsatisfactory"

Where an appellate court is called upon to consider whether a verdict ought to be set aside because it would be unsafe or dangerous to allow it to stand, the question is whether the appellate court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. It is not for an appellate court to disturb a verdict of conviction simply because it disagrees with the jury's conclusion²².

The phrase "unsafe or unsatisfactory" does not appear in the *Criminal Code*. The phrase embraces two of the powers given to the Court of Criminal Appeal by s 689(1), namely to allow an appeal if the court considers that the verdict is unreasonable or cannot be supported having regard to the evidence or, alternatively, that the court considers that on any other ground there was a miscarriage of justice. Care should be taken in any appeal to identify the power which is exercised, so as to both acknowledge and recognise the essential part played by juries in the administration of criminal justice. The verdict of a jury should not normally be set aside on the expressed ground that it was unreasonable, or could not be supported having regard to the evidence, unless the trial was free of any other source of error, or the verdicts were inconsistent, in the sense that it was not logically possible for the appellant to be convicted on one particular offence in the indictment as well as another offence. If there is some other source of error, the appropriate ground on which to allow the appeal is that there has been a miscarriage of justice because in some other sense the trial has miscarried.



Onus of Proof

In *Thomas v The Queen*²³, the Court of Criminal Appeal held that a direction to a jury that they could convict if they come to a feeling of comfortable satisfaction that the accused is guilty" was not necessarily a misdirection on the onus of proof. When the words were considered in the context of the direction, they did not amount to a misdirection. In *Thomas v The Queen*²⁴, the High Court stressed the importance of the absolute right of an accused to have his case decided by a jury which was given clearly to understand that the accused was to be acquitted unless satisfied of his guilt beyond reasonable doubt. In this respect, the decision of the High Court was unanimous. The views expressed by Kitto J at 594 – 596 are representative. In particular, Kitto J said at 595:

"It is also clear that the onus was to satisfy the jury beyond a reasonable doubt. Nothing in English recent cases should be taken as impairing this principle."

This appears to have been a reference to the objective test of intention applied in *R v Ward*²⁵ which asked the jury to decide whether a reasonable man would have anticipated that death or grievous bodily harm was likely the result of what he did in order to determine whether a person accused of murder intended to kill, rather than a subjective test. Later, the decision in *Ward* was relied on in *Smith v DPP*²⁶ to hold that it was immaterial what the accused actually contemplated. The only thing that could rebut the presumption that an accused intended the natural and

²² see *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521

²³ [1960] WAR 102

²⁴ (1960) 102 CLR 584

²⁵ [1956] 1 QB 351



probable consequences of his acts was to prove that he was insane or that it was a case of diminished responsibility. The presumption became known by the expression "An accused is presumed to intend the natural consequences of his acts" for the purposes of the criminal law. This has never been part of the law in Australia.

Corroboration in Sexual Offence Cases

In *Longman v The Queen*²⁷, the High Court considered the provision in s 36BE(1) of the *Evidence Act 1906* (WA) which provided that on the trial of a person for a sexual offence:

"(a) the judge is not required by any rule of law or practice to give in relation to any offence of which the person is liable to be convicted on the charge for the offence a warning to the jury to the effect that it is unsafe to convict the person on the uncorroborated evidence of the person upon whom the offence is alleged to have been committed; and

(b) the judge shall not give a warning to the jury of the kind described in paragraph (a) unless satisfied that such a warning is justified in the circumstances.

(2) Nothing in subsection (1) affects the operation of any law that provides that a person cannot be convicted of an offence upon the uncorroborated testimony of one witness or upon the evidence of a child whose evidence is admitted under section 101."

²⁶ [1961] AC 291

²⁷ (1989) 168 CLR 79



The High Court unanimously held that par (a) of the s 36BE(1) dispensed only with the requirement to warn of the general danger of acting on the uncorroborated evidence of alleged victims of sexual offences as a class and did not affect the requirement to give a warning whenever necessary to avoid a perceptible risk of a miscarriage of justice arising from the circumstances of the case. In so doing, the Court approved *Pahuja v The Queen*²⁸; *R v Murray*²⁹; and *Williams v The Queen*³⁰. The decision of the Court of Criminal Appeal in *Longman v The Queen*³¹ was reversed. The Court had held that s 36BE did not apply to an offence of unlawful and indecent assault under s 328 of the Code and the common law ruling requiring a corroboration warning was applicable. In the meantime, s 36BE was repealed in 1988 and replaced by s 50 which provides that on a trial on indictment for an offence:

"The trial of a person on indictment for an offence –

- (a) the judge is not required by any rule of law or practice to give a corroboration warning to the jury in relation to any offence of which the person is liable to be convicted on indictment; and
- (b) the judge shall not give a corroboration warning to the jury unless the judge is satisfied that such a warning is justified in the circumstances."

The special feature of *Longman* was that the complainant had accused Longman of the sexual offences some 25 years prior to her

²⁸ (1987) 30 A Crim R 118

²⁹ (1987) 11 NSWLR 12

³⁰ (1987) 26 A Crim R 193

³¹ [1989] WAR 374



disclosure to the relevant authorities. While s 36BE abolished the requirement for the warning, Brennan, Dawson and Toohey JJ pointed out at 87 that a warning may be required "because of the circumstances of the case other than, albeit in conjunction with, the sexual character of the issue which the alleged victim's evidence is intended to prove". Furthermore, s36BE abolished the requirement to give a warning, but not the discretion of a Judge to comment on the circumstances of the case in a way which would not breach the prohibition in s 36BE(a).

In *Suresh v The Queen*³², the question of the admissibility of evidence of complaint in the context of sexual assaults on a child was raised in a judgment which affirmed the decision of the Court of Criminal Appeal. In the Court of Criminal Appeal, an appeal against conviction was dismissed on the basis that while the point was raised in the appeal, no substantial miscarriage of justice had actually occurred³³. The evidence of two school friends of the child was that over six months after the alleged event, her "uncle" had sexually abused her. The uncle was not identified, but there was evidence that the complainant habitually called the appellant "Uncle Suresh". No objection was taken to any of this evidence at the trial. Counsel for the accused contended at the trial that the evidence was relevant as evidence of recent complaint. The concession was made as a matter of tactics seeking to establish that the complainant was referring to a blood relative not "Uncle Suresh", as the basis that her testimony amounted to a prior inconsistent statement.

The Court of Criminal Appeal had held by a majority that the complaint evidence was not admissible as part of the Crown case because

³² (1998) 72 ALJR 769

³³ *Suresh v The Queen* (1996) 16 WAR 23



there was ample reasonable opportunity to have made the complaint earlier. Further, the jury could not have been influenced by the evidence of complaint in a way adverse to the accused. This was because of the strong emphasis throughout the trial on the absence of immediate protest and the negative effect on the complainant's credibility. Hence the admission of the evidence was not unfairly prejudiced to the defence.

The High Court concluded that while it was not clear that the relevant evidence was correct in holding that the relevant evidence was inadmissible, especially in the absence of any objection by the defence, the fundamental point was that the receipt of the evidence had not denied the appellant a chance of acquittal that was reasonably open. Consequently, there had been no miscarriage of justice. Significantly, there were pertinent observations made regarding the doubtful validity of the assumption that the victim of a sexual offence will complain at the first opportunity, particularly in cases of child sexual assault. As Gaudron J explained in *M v The Queen*³⁴, the assumption that the victim of a sexual offence will complain at the first reasonable opportunity is an assumption of "doubtful validity" now frequently called into question, requiring directions to a jury that there may be good reason for delay in making a complaint.

Non-insane Automatism

*Falconer v The Queen*³⁵ involved an appeal by Mrs Falconer who was convicted of the wilful murder of her husband. The main issue at the trial was whether or not Mrs Falconer had intended to kill her husband by shooting him. The next most important issue was whether, assuming the

³⁴ (1994) 181 CLR 487 at 515 – 517

³⁵ (1989) 46 A Crim R 83



jury found that she shot her husband intending to kill him, the killing was provoked. The jury were directed that if they were not convinced beyond reasonable doubt that the killing was unprovoked, then their verdict would be manslaughter. During the course of the trial, counsel for Mrs Falconer sought to raise the issues of non-insane automatism or disassociated state and accident. Two psychiatrists were called and examined on a *voir dire*. The learned Commissioner ruled that the evidence was insufficient to put either automatism or accident to the jury. It was contended on the appeal to the Court of Criminal Appeal that the Commissioner erred in refusing Mrs Falconer leave to adduce evidence that would support a contention that at the time of the shooting she was not acting voluntarily. The basis for this contention was in s23 of the *Criminal Code* (WA) which provides that:

"Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminal responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident."

There was expert evidence that in a state of automatism, the person acts involuntarily. Such a state can occur suddenly in previously normal people who have been exposed to sharply occurring emotional strain, stress or trauma. The expert evidence was to the effect that there was a progressive worsening of Mrs Falconer's distress and general mental state in the period leading up to the shooting. On the day in question, Mr Falconer had made a sexual advance to her, coupled with a taunt that "the Court won't believe the girls; won't believe you and the girls", could have caused her to panic. The expert evidence of Dr Schioldann-Nielsen was that this "could have been the mechanism which released the full-blow



disassociative state ... ". This opinion was supported by Dr Finlay-Jones who also found Mrs Falconer to be sane. His opinion was that automatism could be induced by external force such as a blow to the head. Psychological factors could also induce automatic behaviour, and that such behaviour could also be caused without any evidence of internal or external stress. Dr Finlay-Jones also noted that the deceased laughed at Mrs Falconer saying, "They won't believe you and the girls because they did not believe Erin". This was said to be "crucial". It was the third and most immediate example that she could not longer avoid the conclusion that her husband was "sexually corrupt". This evidence was severe stress combined with conflict because Mrs Falconer still loved her husband. It was in that setting that Dr Finlay-Jones described her as "faced with an intolerable dilemma" at that moment. Her inability to remember what happened next was consistent with her losing control of her mind and acting in an automatic way. Her behaviour was consistent with reports of people who had been in disassociated states. Such persons are seemingly conscious, but mentally unaware, "In that particular way, the mind of a person in a dissociated state does not go with his or her act."

The learned Commissioner ruled the evidence inadmissible on the basis that:

"It seems to me clear on the evidence of the doctors that there was no external factor or factors in evidence on 9 October 1988 which caused the psychological conflict within the accused, which was capable of causing her to act in an automatic way."



The Commissioner relied upon *R v Tsigos*³⁶; *R v Joyce*³⁷; *R v Isitt*³⁸; *R v Sullivan*³⁹; and *R v Hennessy*⁴⁰, in which Lord Lane LCJ said at 294 that:

"In our judgment, stress, anxiety and depression can no doubt be the result of the operation of external factors, but they are not, it seems to us, in themselves separately or together external factors of the kind capable in law of causing or contributing to a state of automatism. They constitute a state of mind which is prone to recur. They lack the feature of novelty or accident, which is the basis of the distinction drawn by Lord Diplock in *Reg v Sullivan* [1984] AC 156, 172. It is contrary to the observations of Devlin J., to which we have just referred in *Hill v Baxter* [1958] 1 QB 277, 285. It does not, in our judgment, come within the scope of the exception of some external physical factor such as a blow on the head or the administration of an anaesthetic."

The Commissioner rejected a submission by counsel that the relevant external factors were not limited to factors such as a blow on the head, but included, for example, suffering a series of shattering emotional experiences which brought on a disassociated state. The Commissioner concluded that Mrs Falconer's disassociated state, if it existed, was a consequence of entirely internal factors and not external factors. The reason for the distinction between external and internal factors is to be found in the definition of "legal insanity" in the "M'Naghten Rules" as

³⁶ [1964] NSW 1607

³⁷ [1970] SASR 184

³⁸ [1978] Cr App R 44

³⁹ [1984] AC 156

⁴⁰ [1989] 1 WLR 287



stated in M'Naghten's Case⁴¹, which require two alternative effects of the disease of the mind which must occur to establish the defence. They are not knowing the nature and quality of the act that the person was doing or, if the person did know it, the person did not know that what was being done was wrong. These rules are reflected in ss 26 and 27 of the *Criminal Code*. The principal difference between the M'Naghten Rules and the Code is that the latter makes no reference to the capacity of an accused to control his or her actions⁴².

In the context of automatism, if the accused did not know the nature and quality of his act because of something other than a defective reason from a disease of the mind, then his act may not properly be defined as voluntary. In such a case, the accused would be entitled to be acquitted because the prosecution had failed to prove beyond a reasonable doubt that the act was voluntary. This is the significance of non-insane automatism. Where the accused did not know the nature and quality of his act because of a disease of the mind, then according to the M'Naghten Rules, the verdict would be not guilty but insane⁴³.

When Falconer went to the High Court on a Crown appeal, it was contended on behalf of Mrs Falconer that the rejected evidence supported a defence of non-insane automatism of a transient nature produced by some specified external factor⁴⁴. Mason CJ, Brennan and McHugh JJ held that Mrs Falconer would be criminally responsible for discharging the gun only

⁴¹ (1843) 10 Cl. & Fin 200

⁴² *Way v R* (1920) 33 WALR 67

⁴³ *cf Bratty v Attorney-General for Northern Ireland* [1963] AC 406 per Lord Denning at 409 – 410 as approved and explained by Barwick CJ in *Ryan v The Queen* (1967) 121 CLR 205 at 215; *R v Wiseman* (1972) 46 ALR 412; *R v Pantelic* (1974) 1 ACTR 1; *R v Sproule* (1975) 26 Can CC (2d) 92; *Rabey* (1980) 54 CCC (2d) 15 CR (3d) 225; *R v Radford* (1985) 42 SASR 266 at 272 – 276 per King CJ; and *Hall* (1988) 36 A Crim R 368

⁴⁴ *cf Rabey, supra*, at 477 – 478



if that act were "willed", that is, if she discharged the gun "of [her] own free will and by decision"⁴⁵; or by "making a choice to do so"⁴⁶.

As their Honours also said in *Falconer* at 43:

"When an act is done by an apparently conscious actor, an inference that the act is willed must be drawn – not as a matter of law but as a matter of fact – unless it can be shown that the actor, being of sound mind has been deprived of the capacity to control his actions by some extraordinary event or unless the actor, being of unsound mind, has thereby lost the capacity to his actions. The accused bears no ultimate onus of proving that his act was not willed, but he bears the evidential onus of rebutting the inference that his act was willed, and there is no occasion for the jury to consider the possibility of an unwilled act unless that onus is discharged."

The issue for the jury was said by their Honours at 58 – 59 to be whether an ordinary woman of Mrs Falconer's age and circumstances, who had been subjected to the history of violence which she alleged, who had recently discovered that her husband had assaulted their daughters, who knew that criminal charges had been laid against her husband and who was separated from her husband as a result of his relationship with another woman, would have entered a state of disassociation with the result of the incidents which occurred on the day of the shooting.

It was held by the High Court that the evidence of the doctor should have been admitted and that the Court of Criminal Appeal were correct in upholding the appeal and ordering a retrial. It was noted that if, on the retrial, Mrs Falconer were to prove no more than the disassociated state

⁴⁵ *Valance v The Queen* (1961) 108 CLR 56 at 64 per Kitto J

⁴⁶ *Timbu Kolian v The Queen* (1968) 119 CLR 47 at 53 per Barwick CJ



occasioning an incapacity to control her actions in discharging the gun, she would merely be entitled to a qualified verdict of acquittal under s 653 of the Code. If she did not prove any of the facts referred to in this paragraph, she would not be entitled to an acquittal under s 23 or s 653. In the result, while the Crown was granted special leave to appeal, the appeal was dismissed.

Directions to the Jury Regarding Possible Verdicts in Wilful Murder Trials

In *Stanton v The Queen*⁴⁷, the Court of Criminal Appeal held by a majority that a direction to the jury in a case where the accused was charged with wilful murder, it was wrong to direct the jury that they must consider the possible verdicts in any particular order. The trial Judge had directed the jury that they must first consider wilful murder. If they were unanimously of the opinion that the accused was not guilty, they should then proceed to consider whether he was guilty of murder, saying:

"You can't come to consider alternative verdicts of murder and manslaughter unless you are unanimously of the view that he is not guilty of wilful murder."

Malcolm CJ, Murray and Owen JJ held that the jury were not required by law to consider the possible verdicts in any particular order. Malcolm CJ and Murray J held that the proper issue for determination by the jury was whether they were unanimously satisfied of guilt of an offence on the indictment beyond reasonable doubt. They were entitled to acquit of any more serious offence simply because they were not persuaded that the

⁴⁷ [2001] 24 WAR 233



accused was guilty of it⁴⁸. Malcolm CJ and Murray J concluded that, despite the error of law in the direction, there was no miscarriage of justice and the proviso should be applied. As Murray J pointed out at [30], the jury must not be told that it is beyond their power to return a lesser verdict which is open on the indictment⁴⁹.

While Owen J dissented in *Stanton*, Murray J agreed with him in the following passage at 240:

"I turn briefly then to the question of the order in which the jury were told to address the question of their verdicts in relation to the particular offences open on the indictment. On this part of the case I am grateful to be able to associate myself with the reasons of Owen J. It seems to me, with respect, that they are consistent with general principle and with the view that has been taken by this Court in the context of the question of insanity affecting criminal responsibility, leading to a special verdict under the Code, s 653. In my opinion, the decision of the High Court in *Hawkins v The Queen* (1994) 179 CLR 500, the decision of this Court in *Garrett v The Queen* [1999] WASCA 169 and the decision of this Court constituted by a bench of five Judges in *Ward v The Queen* [2000] WASCA 413 all establish that beyond the point that there is no need to consider the question of insanity affecting criminal responsibility before the jury are satisfied that the accused has unlawfully killed the deceased without having

⁴⁸ *Ibid*, per Malcolm CJ at [10] and Murray J at [28] – [31]

⁴⁹ *cf MacKenzie v The Queen* (1996) 190 CLR 348 at 367 per Gaudron, Gummow and Kirby JJ; *Bevan v The Queen* (1954) 92 CLR 660 and *Gammage v The Queen* (1969) 122 CLR 444



regard to the question of unsoundness of mind, there is no requirement of law to direct the jury that they should consider the question of guilt or innocence of the particular forms of homicide open on the indictment in any particular order.

With respect, it seems to me that one of the strongest arguments in favour of that proposition is that presented by Owen J when his Honour points out that the practical reality of the jury's deliberations will be that, having unanimously satisfied themselves that the accused has unlawfully killed the deceased, and being then at the point of needing to address the issue of intention to determine which guilty verdict is to be returned, that question and the evidence bearing upon it will be addressed as one issue upon the same body of evidence to determine whether the jury are unanimously persuaded beyond reasonable doubt that the accused intended to kill, that whether or not some jurors would be so persuaded all are unanimously of the view that at least he intended to do grievous bodily harm, or they remain unable to form a unanimous view beyond reasonable doubt that one or other intention has been established, are left with unanimity only upon the question of the unlawful killing and so return a verdict of guilty of manslaughter.

In those two aspects of the direction therefore, it seems to me that error occurred in this case. It was an error of law. But the question is whether to so conclude involves a miscarriage of justice, in which case I would respectfully agree with Owen J



that no question of the application of the proviso would arise, or whether, despite the error of law, the appeal should be dismissed."

Joinder of Charges and Similar Fact Evidence

One of the most difficult areas for the administration of criminal justice is in relation to the issues of joinder of charges and joint trials, particularly in relation to similar fact evidence. Recent examples include *Stickland v The Queen*⁵⁰ and *Tweedie v The Queen*⁵¹. Judgment in the second of these cases was delivered on Thursday, 27 November 2003. Both of these cases involved multiple charges of sexual offences involving a number of complainants. *Stickland* involved 63 counts of sexual offences involving nine complainants. The accused was convicted of 20 counts of indecent dealing, six counts of indecent assault and 15 counts of gross indecency. The issues raised by the appeal were, first, whether and to what extent separate trials should have been ordered in respect of the alleged offences. Secondly, whether and to what extent it was permissible to rely on similar fact evidence in a context where the alleged similar facts were disputed. Thirdly, whether and to what extent the application was prejudiced by the joinder and, fourthly, whether there was a reasonable possibility of concoction either at the time that an order was made for joint trials or in the light of the evidence given at the trial.

In *Stickland*, the Crown relied upon a chart which identified a range of similarities each of which were said to demonstrate a striking similarity

⁵⁰ [2002] WASCA 339

⁵¹ [2003] WASCA 282



in relation to the nature of the offences and the circumstances in which they were committed sufficient to justify joinder. Stickland was a storekeeper and scout master in a country town. On a number of occasions, a pornographic video or magazine was shown prior to the commission of an offence. On a number of occasions, Stickland was said to have pulled down the pants of the victim. There were alleged similarities in terms of the places where the offences were alleged to have been committed. The nature of the offences themselves was relied upon. There were three different categories of sexual offences in this context. The details are irrelevant. There was also reliance on similar things said at the time of the alleged offending. Alcohol was supplied to a number of the complainants.

The complainants were all young boys of a similar age. All but two of them were scouts and the appellant was their scout leader. All but two of them were employees at the appellant's store. The places where the offences occurred were said to demonstrate a common thread in the allegations.

In my judgment, with whom Wallwork and Steytler J agreed, I said at [8] – [9]:

"The starting point is that each count charged the commission of a criminal offence and, unless the evidence in respect of each offence was admissible in relation to the other offences charged, separate trials should be ordered: *Hoch v The Queen* (1988) 165 CLR 292 at 294 per Mason CJ, Wilson and Gaudron JJ; *Pfennig v The Queen* (1995) 182 CLR 461; *De Jesus v The Queen* (1986) 68 ALR 1. These decisions have been considered and applied in this State in a number of cases,



including *Hamilton v The Queen*, unreported; CCA SCt of WA; Library No 970082; 4 March 1997; and *Von Porebski v The Queen* [1999] WASCA 15.

In the present case, the direct evidence of the commission of each offence charged was held to be admissible as similar fact evidence in respect of the other offences charged, and an application for separate trials was refused by Macknay DCJ: *The Queen v DJS* [2000] WADC 43. It was not contended that the 63 counts in the indictment were improperly joined, having regard to s 585 of the Code. The sole issue was whether there should have been separate trials of the offences involving each of the respective complainants."

I also said at [111] – [113]:

"In my opinion, it is apparent from the case put by the Crown that there was not a single set of facts and circumstances which was common to all of the alleged offences, save that there were numbers of alleged offences which had one or more aspects in common, so that there might be said to be several different groups of offences which had some similarities. In the context of determining whether all of the offences had common features that were common to each so as to enable the evidence of the commission of one or more alleged offences admissible in respect of one or more of the other offences alleged, however, a close degree of analysis of the evidence is required.



On analysis, there were at best varying degrees or categories of similar fact evidence that the prosecution attempted to rely upon at the one trial. While a significant number of the offences involved oral sex, others involved fondling. Some involved both. In a number of cases there was the scuffing of semen on the floor. In many cases, the victim's pants were pulled down, but not always to the same degree. The offences were said to have occurred at different locations, although a significant number were said to have occurred at the store, the Scout hall, during excursions and at the applicant's house in Harvey.

In my opinion, to the extent that there were differing categories of similar offences, there was a substantial risk of prejudice to the fair trial of the applicant because the evidence of some of the offences for which he was tried fell into different categories and was not admissible in relation to other offences in a different category."

On the issue of concoction, Senior Counsel for the appellant had disavowed any suggestion of concoction at the preliminary hearing in the Magistrates' Court. There was also a specific disavowment by Senior Counsel before Macknay DCJ in the District Court. His Honour held that there was no reasonable possibility of concoction. None had been alleged in the written submissions made to him, but counsel had submitted orally that there was a "high probability of concoction".

In my judgment at [127] I said:



"In my opinion, particularly having regard to the way in which the issue of concoction was dealt with at the preliminary hearing, Macknay DCJ was clearly entitled to reach the conclusion that he did. However, given that there were various categories of offences, some of which had striking similarities with others, the combination of several different categories in the one trial was not open. It may have been possible to combine a number of counts involving different complainants where the facts were strikingly similar, but the necessary degree of similarity was not present so as to justify a joint trial of all of the counts on the indictment. It follows that the applicant has not had a fair trial according to law. The right to a fair trial is fundamental. It follows that the convictions should be quashed and a new trial ordered in respect of all of the counts on the indictment. It is clear from the reasons, however, that there are various series of counts which could be tried together. In my view, it would be desirable for counsel to confer in the light of the reasons for judgment of the Court in an attempt to agree on the counts which could be tried together at one or more joint trials and, in default of agreement, apply to a single Judge of the District Court for directions."

Real Possibility of Concoction

In addition to relying on the matters to which I have already referred, senior counsel for the applicant also submitted that the trial Judge should



have discharged the jury and ordered separate trials. It was contended that this was so because it emerged at the trial that there was a real possibility that there had in fact been concoction of evidence or collusion between the complainants. In this context the applicant relied, first, on the oral evidence of Detectives Harty and Branchi, as well as police records and telephone calls made to the police. Secondly, the applicant relied on evidence of discussions between various of the complainants.

In *Hoch*⁵² Mason CJ, Wilson and Gaudron JJ at 296 referred to *R v Boardman*⁵³ in which Lord Wilberforce said at 444 in relation to concoction:

"This is well illustrated by *Reg v Kilbourne* where the judge excluded 'intra-group' evidence because of the possibility, as it appeared to him, of collaboration between boys who knew each other well."

This is, in my respectful opinion, the right course rather than to admit the evidence unless a case of collaboration or concoction is made out.

Applications to discharge the jury were made on two occasions. Both applications were rejected by the trial Judge. It was submitted on the appeal that the second application should have been granted. The reasons advanced were summarised in my judgment as follows:

"It was submitted that the second application to discharge the jury should have been granted. It was contended that the situation which had been developed was not capable of salvage by way of jury direction. This was said to be so because the

⁵² *Hoch v The Queen* (1988) 165 CLR 292

⁵³ [1975] AC 421



potentially overwhelming weight of the evidence compelled the conclusion that there was a real possibility that a number of the complainants had concocted their evidence and/or colluded in an attempt to present a uniform set of complaints against the applicant and establish a "uniform front" at the trial. The possibility of concoction and/or collusion was said to have been based on a sound factual foundation rather than one which was "fanciful". It was contended that the mere possibility of concoction was sufficient because the use of the word "possibility" had not been qualified by their Honours in *Hoch* by the adjective "reasonable". Further, it was submitted that the conclusion of the learned trial Judge, that he did not "accept that the possibility of concoction is such that it makes it necessary to discharge the jury", contained within it a concession that there was such a possibility."

Following a detailed review of all the evidence, I concluded that:

"In my opinion, having carefully examined all of the relevant evidence, including the nature of the contact between the various complainants; the time when that contact occurred in relation to how then complaints were subsequently made to family members and to the police; where the various complainants were located at the time the complaints were made; the manner in which the complaints came to be made to the police; and the location of complainants at the material times, lead me to the conclusion, as a matter of commonsense



and experience, that the evidence does not justify a finding or a conclusion that there was a reasonable possibility of concoction."

Inconsistent Evidence

It was also contended on behalf of the appellant that the verdicts of guilty in respect of the counts on which the appellant was convicted were inconsistent with the verdicts of acquittal on 22 of the 63 counts on the indictment. In my judgment at [269] – [272] I said:

"Counsel for the applicant made it clear at the outset of his submissions on ground 3 that it was not contended in the present case that the verdicts of conviction were excluded by the verdicts of acquittal which had been reached on a significant number of the counts in the indictment. It was accepted that there may have been some grounds in some cases where the verdicts reflected some particular evidence in the given case, such that the jury found some particular aspect of the evidence unsatisfactory. In other words, this was not a case where all the evidence was one way on either side. Of the nine complainants, there were seven of them in respect of whom there were a combination of convictions and acquittals. Two of the 22 acquittals were directed acquittals.

It was submitted that this was a case in which the Crown case depended exclusively on the evidence of each of the complainants. In such circumstances a conviction may be unsafe and unsatisfactory where he or she is believed in



relation to one count but not on another. This is particularly so where credit is clearly in issue: *cf M v The Queen*, unreported; CCA SCt of WA; Library No 980452; 12 August 1998; and *Eastough v The Queen*, unreported; CCA SCt of WA; Library No 980108; 12 March 1998. It was submitted that the verdicts may be unsafe or unsatisfactory where the quality of the evidence was intrinsically unsafe: *M v The Queen* (1994) 181 CLR 487; and *Jones v The Queen* (1997) 191 CLR 439. It was also submitted that the acquittals sat very uneasily or, alternatively, almost impossibly with the convictions. This submission appears to directly contradict the concession that the verdicts of conviction were not excluded by the verdicts of acquittal.

Counsel specifically acknowledged in his written submissions that the factors which the jury may have attributed significance to in not accepting beyond reasonable doubt the evidence of the complainant on each charge may have included the constant denials of the applicant; his previous good character; and specific inconsistencies in the evidence of the witnesses called by the Crown.

Finally, it was submitted that on the whole of the evidence it was not reasonably open for the jury to be satisfied beyond reasonable doubt that the applicant was guilty of any of the alleged offences."

On this aspect of the case I also said at [278] – [279]:



"It may be acknowledged that where there was some fundamental inconsistency between the verdicts of conviction and verdicts of acquittal in relation to individual complainants, then, even in the absence of error on the part of the trial Judge, or any problem with admissibility or reception of evidence or exclusion of evidence, a conviction may nonetheless be overturned if the Court is convinced that, on the whole of the evidence, it was not reasonably open for the jury to be satisfied of the guilt of the accused: *cf M v The Queen* (1994) 181 CLR 487 per Mason CJ, Deane, Dawson and Toohey JJ at 494 – 495 where their Honours said:

'It is only where a jury's advantage of seeing and hearing the evidence is capable of resolving a doubt experienced by a Court of Criminal Appeal that the Court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the Court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the Court of Criminal Appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent



person has been convicted, then the Court is bound to act and to set aside a verdict based upon that evidence (*Chamberlain v The Queen* [No 2] (1984) 153 CLR at 618 - 619; *Chidiac v The Queen* (1991) 171 CLR 432 at 443 - 444). In doing so, the Court is not substituting trial by a court of appeal for trial by jury, for the ultimate question must always be whether the Court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty (*Chidiac v The Queen* (1991) 171 CLR 432 at 443, 451, 458, 461 - 462). Although the proposition stated in the four preceding sentences have been very expressed in judgments of members of the Court in previous cases, we have put aside those differences in expression in order to provide authoritative guidance to Courts of Criminal Appeal by stating the propositions in the form in which they are set out above.'

See also the judgment of Brennan J at 501 - 504."

In the end result, after an exhaustive examination of all of the evidence, it was concluded that none of the verdicts was inconsistent. In the result, while grounds 1 and 3 of the grounds of appeal failed, the appellant was entitled to succeed on ground 2 on the basis that there should have been separate trials of the counts where reliance was placed on the same or common aspects of similar fact evidence. All of the convictions were quashed and a new trial ordered. Counsel were directed to endeavour to agree on the counts which should be tried together at one or more



separate trials and in default of agreement apply to a single Judge of the District Court for the necessary directions.

In *Tweedie v The Queen*⁵⁴, for the reasons which were published on 27 November 2003, similar questions arose in relation to joinder of counts and joint trial of 18 counts involving eight complainants. There were 10 counts of indecent assault, six counts of deprivation of liberty and two counts of sexual penetration without consent. The issues were:

- (a) whether and to what extent reliance was placed on similar fact evidence;
- (b) whether and to what extent the application was prejudice by joinder; and whether evidence of similar assaults in a nearby area which could point to another offender being involved in the offences charged was wrongly excluded.

The second of these points involved reliance by the defence of similar fact evidence by way of defence.

The applicant contended, first, that the trial Judge wrongly refused an application to sever the indictment because the offences were not sufficiently similar in character and conduct to make the evidence in relation to each complainant admissible in relation to the offences alleged by each of the other complainants. Secondly, it was contended that the learned Judge wrongly excluded evidence of two sexual attacks in the Port Kennedy foreshore area because they were factually significantly different from the offences charged on the indictment. The complaint was that evidence which tended to show that there was at least one and possibly two other offences "offending in the same area" was wrongly excluded.

⁵⁴ [2003] WASCA 282



Immediately following the applicant's plea of not guilty to the indictment, an application was made by counsel for the applicant pursuant to s 585 of the Code to sever the indictment so that the allegations made by each of the complainants would be the subject of separate trials.

The question raised by the first ground was whether the applicant was likely to be prejudiced by the joinder and the prosecutor should have been called upon to elect upon which of the offences charged in the indictment he would proceed or whether the Judge should have directed a separate trial or trials on one or more charges on the indictment. The ground had to be considered in the light of the evidence and materials as they stood prior to the commencement of the trial proper, bearing in mind that the application was made after the jury had been empanelled and the application had pleaded to the indictment.

In this case, as in *Stickland*, the starting point was that unless the evidence of each offence was admissible in relation to the other offences charged, separate trials should be ordered⁵⁵. In *Tweedie*, the similar fact evidence was not disputed.

In *Hoch v The Queen*, their Honours went on to say that in these cases, similar fact evidence has two functions. First, as circumstantial evidence, it serves to corroborate or confirm "the veracity", namely, the truth of the evidence given by other complainants. Secondly, again as circumstantial evidence, it tends to prove the happening of the event or events in issue. In relation to both functions, because the evidence is circumstantial, it has probative value only if it bears no reasonable explanation other than the happening of the events in issue. In this case,



there was no suggestion of concoction. The trial Judge noted that the learned Judge noted that this was not a case in which the Court needed to concern itself about any possibility that the complainants had got their heads together and concocted similar stories. None of the eight separate complainants were acquainted with each other and the offences occurred on different occasions. There was no connection between the complainants of the kind referred to in *Hoch*. In the result, having referred to the relevant authorities, the learned Judge concluded that:

"Having reviewed all the evidence, I am satisfied that in this case the evidence has a special probative value because it is highly improbable – I'm sorry, because it reveals what to me is a peculiar *modus operandi* – an underlying unity.

The nature of the evidence in each of these cases, the experience of each of the complainants, in my view, does provide the basis from which the jury, having considered the evidence, could quite properly draw the inference and find that it's highly probable that whoever committed the offences alleged in counts 1, 2 and 3 committed all of the other offences.

Likewise, whoever committed the offences in counts 4 and 5 also committed the other offences in the indictment and so on through each of the groups of charges in relation to each. Because of that underlying unity, that striking similarity, and I believe that it goes beyond what the defence says. I accept

⁵⁵ *Hoch v The Queen* at 294 per Mason CJ, Wilson and Gaudron JJ and the other authorities to which I have already referred, including *Von Porebski v The Queen* at [3] – [5] with which Ipp J agreed, and see *Pfennig v The Queen* at 482 per Mason, Deane and Dawson JJ



that the mere fact that there are eight complainants isn't it, the mere fact that in isolation there are similarities doesn't do it, but it's the overall picture, the time frame, the increase in seriousness that has gone on. It's later in the piece that the sexual penetration, digital sexual penetration, takes place. The increase in seriousness and violence and the stories that these complainants tell in my view does create this underlying unity so compelling that a jury would be entitled to find that it's highly probable that all of this was committed by the same person.

In those circumstances, the prejudice engendered by a trial involving eight complainants is overridden by the probative force of the similar fact evidence and therefore it would not be unfair to this accused in my view for him to be tried in one trial on this one indictment. Those are my reasons therefore, Mr Roth, for refusing your application for separate trials."

On appeal, it was concluded that, given that there was never any basis for any suggestion of concoction in this case, the similar fact evidence was both admissible and compelling. Any prejudice to the application was far outweighed by the probative value of the three items of identification evidence in the context of similar fact evidence.

Subsequently, a second application for separate trials was made. Statements were produced by police on subpoena from two complainants who alleged that they had been sexually assaulted in similar circumstances in the Port Kennedy area. It was sought to adduce the evidence of such complainants to show that there was one or possibly two individuals



committing offences near both areas where the applicant was said to have committed the offences alleged to have been committed by him. This was raised as a further objection to reliance on the similar fact evidence sought to be relied upon by the Crown.

In broad terms, these individual offences occurred in a similar area, namely, on beaches between Fremantle and Rockingham, although the further offences were committed a significant distance further south than those alleged on the indictment. The learned Judge rejected the evidence on the ground that while each involved an attack by a naked male on a lone female beach walker and the description of the man roughly matched the description of the accused, there were distinguishing features. First, the attacker or attackers on the additional offences in each case walked along with the victim and spoke to her before the attack. That was different from each of the offences on the indictment. Secondly, the two recent victims described their assailant as naked with a deep tan all over his body. The applicant was described by five complainants as white or fair skinned. No-one described him as heavily tanned, although he was tanned. Four of the five complainants described seeing white buttocks or a white backside as he ran off.

Thirdly, and, as the Judge considered the most important, the person committing the alleged offences in the Port Kennedy area pursued the complainant for a short distance after each assault. This did not occur in relation to any of the alleged offences the subject of the indictment. In each case, the complainant said that the man ran off immediately the complainant screamed.

Fourthly, there was DNA evidence linking the application to the offences the subject of counts 1, 2 and 3. There was also DNA evidence



linking him to counts 6, 7 and 8. In relation to counts 18, 19 and 20, there was evidence that the applicant's motor vehicle was parked in the beach parking area at the time those offences were alleged to have been committed.

Fifthly, counts 1 to 5 were committed at beaches adjacent to Hamilton Hill. At the relevant times, the applicant was employed at a business approximately one kilometre east of the relevant beach. The remaining offences were committed on beaches in Warnbro Sound, just south of Safety Bay, within a few kilometres of the applicant's residence at Shoalwater.

The subsequent offences sought to be relied on by the defence were committed on a beach about five kilometres south of Warnbro Sound between Port Kennedy and Secret Harbour. The Court of Criminal Appeal held that the location and circumstances of the offences committed at Port Kennedy did not detract from the putative force of the similar fact evidence relied upon by the Crown, to the extent that the putative force of the evidence was outweighed by its prejudicial effect.

Conclusion

In the time available for the preparation of this paper, it has not been possible to conduct a broad survey of the impact of the High Court on the development of criminal law in Western Australia. The cases to which I have referred provide some evidence of the comprehensive and significant contribution made by the High Court to the interpretation and application of the Code and the criminal law of the State. In the context of evidence and the conduct of criminal trials, there has been a very significant contribution.