IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S43 of 2019
No. S44 of 2019
No. S45 of 2019

BETWEEN:

The Queen
Appellant

and

A2
Kubra Magennis
Shabbir Mohammedbhai Vaziri
Respondents

APPELLANT'S SUBMISSIONS ON QUESTION NOTIFIED BY COURT ON 12 JULY 2019

Part I:

1. The appellant certifies that this note is in a form suitable for publication on the internet.

Part II:

2. On 12 July 2019, the Senior Registrar notified the parties that the Court would be assisted by submissions on the question whether ss 6(2) and 8(1) of the *Criminal Appeal Act 1912* (NSW) permit the New South Wales Court of Criminal Appeal (**CCA**), if of the view that there has been a miscarriage of justice in any respect but that a new trial is not appropriate, *not* to order that a verdict of acquittal be entered, i.e. to make no further order than to quash the conviction.

3. In the appellant's submission, properly construed ss 6 and 8 of the *Criminal Appeal Act* do not permit the CCA to allow an appeal against conviction; quash the conviction; and make no further order. It follows that it would not be open to this Court to take that course in the present appeals.

4. Where the CCA allows an appeal pursuant to s 6(1) of the *Criminal Appeal Act*, s 6(2) provides:

> "Subject to the special provisions of this Act, the court shall, if it allows an appeal under section 5(1) against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered."

5. Section 6(2) is in mandatory terms: "the court *shall* ...". It establishes what has been described as a "default position" as to the orders of the court where an appeal against conviction is allowed.[1] That default position does not apply where orders are made pursuant to the "special provisions" of the *Criminal Appeal Act*. Those special provisions include s 7, which allows for the entry of a substituted verdict, and s 8, which empowers the court to order a new trial.

6. Section 8(1) provides:

> "On an appeal against conviction on indictment, the court may, either of its own motion, or on the application of the appellant, order a new trial in such manner as it thinks fit, if the court considers that a miscarriage of justice has occurred, and, that having regard to all the circumstances, such miscarriage of justice can be more adequately remedied by an order for a new trial than by any other order which the court is empowered to make."

7. The respondents' argument as to the construction of these provisions is that (Respondents' Joint Submissions (**RS**) [21]):

> "[w]here an appeal is 'allowed' pursuant to s 6(1), with the necessary result that the conviction is quashed, the choice given by s 8(1) is between an order for a new trial and the making of no order. It is not necessary in these circumstances to revert to s 6(2) and order an acquittal where no new trial is ordered."

8. The appellant submits that this understanding of the provisions should be rejected, for two main reasons.

9. *First*, it is the command in s 6(2) that the court make orders including the entry of a verdict of acquittal that is subjected to the special provisions of the Act – i.e. relevantly for present purposes, s 8. If an order for a new trial is made under s 8(1), the command in s 6(2) ceases to operate. If, however, no order for a new trial is made, s 6(2) provides that the court "shall" enter a verdict of acquittal.

---

[1] *R v Giam* (1999) 104 A Crim R 416; [1999] NSWCCA 53 at [42] per Spigelman CJ (Abadee and Adams JJ agreeing).

10. *Secondly,* s 8(1) does not provide a self-contained discretion, such that there is no reference back to s 6(2). The clearest indication in the statutory language that s 8(1) does not operate in that way is the reference in s 8(1) to the identified "miscarriage of justice" being "more adequately remedied by an order for a new trial than by any other order which the court is empowered to make". The comparative assessment that s 8(1) requires directs attention to the other orders the court may make, namely, an order for the entry of a verdict of acquittal under s 6(2) or, in an appropriate case, an order for the entry of a substituted verdict under s 7. This point was made by Spigelman CJ (Sully and Ireland JJ agreeing) in *R v Johnston* (1998) 45 NSLWR 362 at 380 (emphasis added):

> "Considering what order should be made the Court must have in mind the interconnection between s 6 and s 8 of the *Criminal Appeal Act 1912*. Section 6(2) states that the court "shall" direct a judgment and verdict of acquittal, but this is "subject to the special provisions of the Act". Section 8 is such a "special provision" and provides that a new trial may be ordered if the miscarriage of justice "can be more adequately remedied by an order for a new trial than by any other order", *relevantly, a verdict of acquittal.*"

11. The respondents submit that, once a court undertakes to consider whether a new trial ought be granted in the terms of s 8(1), the relevant choice is between making that order or making no order at all. The difficulty with this submission is that it omits the entry of a verdict of acquittal from the court's consideration at that time. The court may determine, for example, that no order for a new trial should be made and that, instead, a verdict of acquittal should be entered. The comparison called for by s 8(1) envisages that the court may determine that an order, other than an order for a new trial, more adequately remedies the identified miscarriage of justice. If such a view were reached, the court would be directed back to s 6(2), for the purpose of making orders including the entry of a verdict of acquittal. The respondents' submission requires that, in those circumstances, s 6(2) be read otherwise than in accordance with its mandatory terms in order to preserve the possibility that the court makes neither order.

12. The construction of ss 6 and 8 of the *Criminal Appeal Act* that the appellant advances accords with analysis in this Court that has proceeded on the basis of the grant of a new trial and the entry of a verdict of acquittal being alternatives. For example, in *R v Taufahema* (2007) 228 CLR 232, Gummow, Hayne, Heydon and Crennan JJ said

(at [51]): "The question is whether an order for a new trial is a more adequate remedy for the flaws in that trial than an order for an acquittal". As the respondents have noted (RS [17]), Gaudron, McHugh, Gummow and Hayne JJ said in *Spies v The Queen* (2000) 201 CLR 603 (at [103]) that "[i]f this Court were now to refuse to order a new trial of that charge, the appellant would be acquitted of all charges."

13. The appellant acknowledges that there are cases in which, on an appeal against conviction under the *Criminal Appeal Act*, a conviction has been quashed and no order for either the entry of a verdict of acquittal or for a retrial has been made. The cases cited by the respondents at RS [15]-[16] do not, however, involve any stated analysis of the proper construction of ss 6 and 8.

14. Other decisions of the CCA have regarded cases involving the omission of an order for the entry of a verdict of acquittal (where no order is made for a new trial), as an "oversight" on the part of the court in question.[2] In *R v Pedrana* (2001) 123 A Crim R 1; [2001] NSWCCA 66, Ipp AJA (Wood CJ at CL agreeing) said (at [71]):

> "Section 6(2) empowers this Court to quash the conviction, direct a judgment and verdict of acquittal to be entered. Section 8(1) empowers this Court, in the alternative, if it considers that a miscarriage of justice has occurred, to quash the conviction and to order a new trial. In my opinion, the sections do not empower the Court to order that no new trial should be held. Nor do they empower the Court to quash the conviction and make no other order."

15. Against what is, in the appellant's submission, the more natural construction of ss 6 and 8 of the *Criminal Appeal Act*, the respondents draw attention to the difficulty of disposing of appeals where the indictment has been found to be defective (RS [8], [21]). Such cases do not, however, require the acceptance of the construction that the respondents advance. Section 8(1) empowers the CCA to "order a new trial *in such manner as it thinks fit*" (emphasis added). In the appellant's submission, the CCA could, in accordance with the emphasised words, order that a new trial proceed in relation to an alternative charge;[3] on the basis of an amended indictment;[4] or, generally, on an indictment presented according to law.[5]

---

[2] See *R v Pedrana* (2001) 123 A Crim R 1; [2001] NSWCCA 66 at [71]-[77] per Ipp AJA (Wood CJ at CL agreeing); *ST v Regina* [2010] NSWCCA 5 at [7]-[8] per Basten JA.
[3] See, for example, *Sio v The Queen* (2016) 259 CLR 47.
[4] See *Gerakiteys v The Queen* (1984) 153 CLR 317 at 330-331 per Brennan J.
[5] See *R v Swansson; R v Henry* (2007) 69 NSWLR 406 at [95] per McClellan CJ at CL. See also at [60]-[73] per Spigelman CJ.

16. To the extent the respondents make a separate submission that, in circumstances where there is evidence to support a conviction but factors militating against a new trial, an order for the entry of a verdict of acquittal is "often … preferable" (RS [5], [22]), that submission is contrary to the position stated in *Spies* (2000) 201 CLR 603 at [104], and restated in *Sio* (2016) 259 CLR 47 at [75]. But the appellant does not understand this to be within the scope of the Court's request for submissions. If this understanding is mistaken, further submissions, on this aspect, can be provided if sought.

Dated: 7 August 2019

David Kell SC
Crown Advocate of New South Wales

Eleanor Jones
Counsel Assisting the New South Wales Solicitor General & Crown Advocate