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

Respondents' Joint Submission on the *Criminal Appeal Act 1912* (NSW)

Part I:

1. These submissions are in a form suitable for publication on the internet.

Part II:

2. These submissions address the question of whether s.s6(2) and 8(1) of the *Criminal Appeal Act 1912* (NSW) permit the Court to decline to enter a verdict of acquittal and also decline to order a re-trial where an appeal has been upheld. Those provisions are directed to the Court of Criminal Appeal. They are applied by this Court, pursuant to s37 of the *Judiciary Act 1903* (Cth), which provides that this Court, "in the exercise of its appellate jurisdiction may affirm reverse or modify the judgment appealed from, and may give such judgment as ought to have been given in the first instance ...".

3. Section 6(1) of the *Criminal Appeal Act* sets out the circumstances in which the court is to "allow" or "dismiss" an appeal against conviction. Section 6(2) provides:

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> 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.

4. Section 8(1) provides:

> On an appeal against a 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.

5. Section s6(2) applies irrespective of which of the three limbs in s6(1) led to the appeal being allowed. That is, s6(2) applies where the appeal is allowed, but no finding has been made that the verdict was unreasonable or cannot be supported having regard to the evidence. This raises the question of the appropriateness of the entry of a verdict of acquittal in circumstances where there is evidence on which the jury could have convicted but additional considerations militate against the discretion to order a new trial pursuant to s8(1). The respondents submit that in these circumstances the court does have a power to quash a conviction and make no further order. It is, however, further submitted that the court can, in such circumstances, enter a verdict of acquittal and that this will often be the preferable course.

It is open to the Court to quash the conviction and decline to make a further order

6. This Court has on numerous occasions quashed a conviction but made no order for a new trial, without entering a verdict of acquittal.

7. *Maher v The Queen* [1987] HCA 31; (1987) 163 CLR 221 involved a successful appeal against conviction with respect to a count which had been added to the indictment after the jury had been sworn, with the result that the jury were never sworn to try the particular count. The Court observed the failure to comply with the *Jury Act 1929* (Q) "may render a trial a nullity, at least in the sense that the conviction cannot stand" and (with apparent regard to the statutory language) was "such a miscarriage of justice require as to require the conviction to be set aside" (at 233). The Court concluded, that "[a]s there was no power to order or permit [the count] to be added to the indictment, there should be no order for a new trial on that

indictment". The Court did not, however, order an acquittal (which would have suffered from the same difficulty). No order being made, it was left to the prosecuting authorities to present a new indictment charging the same offence.

8. The decision in *Maher v The Queen* highlights a difficulty where the trial is affected by invalidity of the indictment. It is necessary that the conviction be quashed but there can be no order made for a new trial on the indictment the subject of the appeal. See also, in this regard, *R v Halmi* (2005) 62 NSWLR 263 where the indictment failed to properly invoke the jurisdiction of the District Court. The Court of Criminal Appeal (Bell J, with whom Simpson and Buddin JJ agreed) set aside the conviction and sentence but made no order for either acquittal or retrial. The same approach was taken in similar circumstances in *R v Brown and Tran* (2004) 148 A Crim R 268. It is noted that in *R v Janceski* (2005) 64 NSWLR 10 (which involved the same issue as in *R v Halmi*) Howie J, in expressing his conclusion said there "should be a retrial" on one of counts in the indictment (at [286], 57), however it may be doubted that this was an order made pursuant to s8(1) of the *Criminal Appeal Act*, particularly in the light of his what his Honour said at [216], 41. The dilemma was expressly adverted to by Simpson J (as her Honour then was) in *R v Swansson; R v Henry* (2007) NSWLR 406, where her Honour said at ([179]-[180], 435):

> By s 6 of the *Criminal Appeal Act*, this Court is required, where satisfied that any of the grounds has been made out, to "allow the appeal". The inevitable consequence is the quashing of the conviction. By s 8 the Court is empowered, where satisfied that the miscarriage of justice found can more readily be remedied by an order for a new trial than any other order available to it, to make such an order. But how can this Court, in the same breath, declare the trials to have been nullities — never to have taken place — and order that new trials be held?
>
> In my opinion, the Court should merely quash each conviction. It will be a matter for the Director of Public Prosecutions to determine the future course of the allegations against the appellants.

9. This Court has on numerous occasions quashed a conviction but made no order as to retrial. A number of these are demonstrative of the desirability, in some cases, of quashing a conviction but making no order as to acquittal or retrial.

10. In *Gerakiteys v The Queen* (1984) 153 CLR 317 the appellant successfully challenged his conviction in the Court of Criminal Appeal but appealed to this

Court against the Court of Criminal Appeal's order that a new trial be held. This Court allowed the appeal, varying the orders of the Court of Criminal Appeal by deleting the order for a new trial. Notably, the Court did not substitute verdicts of acquittal. The appeal against conviction was allowed on the basis that there was no evidence of the broad conspiracy charged against the appellant. An insufficiency of evidence would ordinarily give rise to a right to an acquittal. In *Gerakiteys* however, the deficiency related to the particulars of the conspiracy charged. There was evidence of narrower conspiracy and no bar to a new trial being held in relation to such a conspiracy. While the entry of an acquittal is unlikely to have given rise to successful plea in bar of autrefois convict, any such issue was avoided by quashing the conviction and making no order for a new trial. See particularly per Gibbs CJ at 321, Murphy J at 322, Deane J at 336.

11. In *Calabria v The Queen* (1983) 151 CLR 670 the situation was similar to that in *Gerakiteys* in that the appellant was not properly convicted of the offence in the indictment but there was evidence of another offence. Again, the conviction was quashed with no orders made as to either retrial or acquittal. See also, in a similar vein, *Andrews v The Queen* (1968) 126 CLR 198, particularly at 211.

12. In *Croton v The Queen* (1967) 117 CLR 326, Barwick CJ, (with whom McTiernan J agreed, forming the majority), held that while there was no evidence to support the charge, there was evidence capable of sustaining an alternative verdict which had not been left to the jury. His Honour relied on a number of factors, including but not limited to the conduct of the case at first instance, to conclude that a retrial should not be ordered. The conviction and sentence were quashed, but no other order made.

13. In *Callaghan v The Queen* [1952] HCA 55; (1952) 87 CLR 115 the appellant was tried on a charge of manslaughter. The jury acquitted him on that charge but found him guilty of the (uncharged but statutorily available) alternative of dangerous driving occasioning death. His appeal to this Court was allowed on the basis that the trial judge was in error to direct the jury that the alternative charge required a lesser degree of negligence (see at 120-121). The Court accepted (at 125) it had the power to order a retrial on the

uncharged statutory alternative but noted "the complicating circumstance that the jury's verdict ought rationally to mean that the appellant was not guilty of the requisite want of care and precaution". That fact together with the portion of the sentence that had already been served led the Court to conclude that "[i]n all the circumstances we think that we ought not to order a new trial, but we ought simply to quash the conviction". While arguably, the verdict was unreasonable on the basis of inconsistency with the acquittal for manslaughter which would warrant an acquittal, this was not the basis on which the Court reasoned.

14. Similar orders were made in *Whitehorn v The Queen* (1983) 152 CLR 657, in the context of a finding the verdict was unreasonable (see Gibbs CJ and Brennan at 660-1 and Dawson J at 690-1). Similarly, *Timbu Kolian v The Queen* (1968) 119 CLR 47, at 55, 56, 70, 71.

15. Consistent with the approach in the above cases, it has not been uncommon in the NSW Court of Criminal Appeal to quash the conviction(s) and sentence(s) of an appellant and either make no further order or decline to order a re-trial and decline to order an acquittal. For example, in *R v O'Donohue* [2011] NSWCCA 458 Bell J (with whom Heydon JA and Dowd J agreed) set aside the verdict and conviction and made no order for a re-trial or acquittal. See also *R v Newhouse* [2001] NSWCCA 294 at [10], *Skondin v R* [2005] NSWCCA 417, *Hamilton* (1993) 68 A Crim R 268). In *R v Love* (1989) 17 NSWLR 608, the Court (comprised of Gleeson CJ, Newman and Loveday JJ) considered there should be no new trial and simply quashed the convictions and sentences.

16. In *R v Giovannone* (2002) 140 A Crim R 1 at [126]-[127] Mason P (with whom Hidden J and Carruthers AJ agreed) considered that, in circumstances where a significant proportion of the custodial part of the sentence imposed in respect of the count affected by the trial judge's error had been served, it was appropriate not to order a new trial (at [126]). The conviction was quashed but no verdict of acquittal was entered in respect of it (at [127]). In *McConnell* (1993) 69 A Crim R 39 the conviction was quashed and no new trial was ordered. Cripps JA did not consider it appropriate to enter an acquittal given that there was evidence upon which the jury

could properly convict and proposed that the conviction be set aside (at 40-41). Wood J said: "While I would not be prepared to direct an acquittal, I am of the view that there should be no order for a new trial" (at 42).

17. It is noted that in *Spies v The Queen* (2000) 201 CLR 603 at [103]-[104], the plurality said:

> If this Court were now to refuse to order a new trial of that charge, the appellant would be acquitted of all charges. Unless the interests of justice require the entry of an acquittal, an appellate court should ordinarily order a new trial of a charge where a conviction in respect of that charge has been set aside but there is evidence to support the charge. In the present case, given the competing considerations, it cannot be said that the interests of justice require that the appellant be acquitted of the s229(4) charge. That being so, it is a matter for the prosecuting authority to determine whether in all the circumstances there should be a further trial of the s229(4) charge.

18. In *Gilham v R* [2012] NSWCCA 131 McClellan CJ at CL expressed a similar view (at [648]):

> ...the discretion [in s8(1)] is only to be exercised if the court determines that the evidence presented at trial was sufficiently cogent to justify a conviction, for if it was not, an acquittal must follow as a matter of course: *Director of Public Prosecutions (Nauru) v Fowler* (1984) 154 CLR 627 at 630; *Gerakiteys v The Queen* (1984) 153 CLR 317 at 322 (Gibbs CJ), 331 (Deane J). For the reasons discussed under the unreasonable verdict ground of appeal, the evidence before the jury was sufficiently cogent to justify the applicant's conviction. It is therefore necessary, in view of the other successful grounds of appeal, to consider whether the applicant ought to be acquitted or retried.

19. McClellan CJ at CL was in the minority in respect of the orders made but Fullerton and Garling JJ do not appear to have doubted his summary of the principles. Each member of the Court was of the view the appeal should be allowed. McClellan CJ at CL would have ordered a new trial. Fullerton and Garling JJ were of the view, having regard to the combination of factors relevant to the discretion, a new trial should not be ordered, and verdicts of acquittal entered.

20. The respondents also note the similar approach in *Pedrana* (2001) 123 A Crim R 1 at [71] where Ipp AJA (with whom Wood CJ at CL agreed) said that ss6(2) and 8(1) of the *Criminal Appeal Act* "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."

21. The respondents note the inconsistency between these cases and those referred to earlier. The decisions in *Spies*, *Gilham* and *Pedrana* do not deal with the difficulty in entering an acquittal or ordering a retrial in circumstances such as where an indictment (or a charge in an indictment) has been found to have been of no effect. While s6(2) is in mandatory terms it must be read with s8. Section 8(1) provides a discretion to order a new trial. Where an appeal is "allowed" pursuant to s6(1), with the necessary result that the conviction is quashed, the choice given by s8(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 s6(2) and order an acquittal where no new trial is ordered.

It is open to the Court to quash the conviction and enter a verdict of acquittal irrespective of the limb of s6(1) of the Criminal Appeal Act which leads to the appeal being allowed

22. While it is submitted, above, that the Court has a power to quash a conviction and make no order as to either acquittal or retrial, the respondents make the further submission that the power to enter an acquittal is not dependent on the particular limb of s6(1) which leads to conviction. In this regard the respondents note the discretionary nature of s8(1). Indeed, the English legislation on which s6 is based had no provision corresponding to s8(1) with the result that the English provision necessarily contemplated the entry of an acquittal upon a successful appeal notwithstanding the verdict was not unreasonable or unable to be supported by the evidence. See the discussion in *Weiss v The Queen* (2005) 224 CLR 300 at [20]-[22], 309-310.

23. For a recent consideration by the Court of Criminal Appeal of factors leading to the entry of an acquittal see *Castagna v R; Agius v R* [2019] NSWCCA 114 at [190] – [205] and the cases there referred to, including relevant decisions of this Court. Note also *Gilham v R*, *McConnell*, referred to above. The Court is referred to the submissions of the respondents (Magennis's submissions at [52]-[65]; A2 and Vaziri's submissions at [26]-[30]) in relation to the factors relevant in the present cases.

Dated: 24 July 2019

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