ANNOTATED

ORIGINAL

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No B28 of 2011

BETWEEN

and

ADAM JOHN HARGRAVES
Appellant

THE QUEEN
Respondent

APPELLANT'S REPLY

Part I: Internet publication

1. This reply is in a form suitable for publication on the Internet.

Part II: Reply

2. The central issue in the trial of the appellant was whether he held a dishonest state of mind in relation to the taxation scheme and the claiming of deductions.[1] This required findings of fact to be made by a (necessarily inscrutable) jury on what he knew, understood or believed, and whether on that account his conduct was to be characterised as dishonest[2].

3. The Notice of Appeal and the Notice of Contention raise three distinct matters. First, whether the "interest" direction given to the jury by the trial judge was an error occasioning a miscarriage of justice. That was decided in the appellant's favour by the Court below and is disputed in the Notice of Contention. Secondly, the appeal concerns whether the terms of the proviso, in light of the understanding given to such terms by the authorities, gave the Court below a jurisdiction to confirm the conviction. Thirdly, even if that jurisdiction was prima facie open, whether section 80 of the *Constitution* entrenched certain essential requirements of a jury trial that prevented the operation of the proviso in the circumstances of this case.

The interest direction

4. It is convenient to turn directly to the issue of whether the principle in *Robinson v The Queen* was infringed by the direction given by the trial judge. The direction is set out at [10] of the appellant's submissions in chief[3]. The direction was made *explicitly* for the purpose of assisting the jury to assess the credibility of all witnesses, necessarily including the appellant. It is difficult to see how a direction that the jury take into account that the appellant had an interest in "self-protection" in giving his evidence could be referring to anything other than an interest in the outcome of the trial i.e. protecting himself from an adverse verdict. The respondent does not suggest what else it could mean. The unfairness in such a direction was highlighted by the NSW Court of Criminal Appeal in *Asquith v The Queen* (1994) 72 A Crim R 250. In

[1] Indictment: AB2 2-6; Particulars: AB6 1970; Schedule of Overt Acts.
[2] *Peters v The Queen* (1998) 192 CLR 493 at 504 [17]-[18], 508 [29], 509-510 [33], 526-531 [75]-[86], 533 [93].
[3] AB6 2115.50-2116.5. It was confirmed by the "slides" that the trial judge handed to the jury: AB6 2085 at 2099.

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upholding an appeal despite the lack of objection at trial, Hunt CJ at CL, with whom Smart and Badgery-Parker JJ agreed, said at 260:

> It is true, as the Crown has submitted, that the jury would have been aware of the obvious temptation of an accused person to commit perjury in order to avoid conviction, even without this direction. That temptation, as [Chief Justice Gleeson] remarked in [*R v Reeves*] is only human nature, and the jury will usually be mindful of that fact when considering whether the evidence of the accused raised a reasonable doubt as to the accuracy of the evidence of the Crown witnesses. What the High Court has said in *Robinson (No 2)*, and has underlined in *Stafford*, is that, where attention is drawn (directly or indirectly) to that basic fact of human nature, it is likely to be understood by the jury as an invitation to discount the evidence of the accused, other than in exceptional circumstances when (it would seem) it is necessary to do so in fairness to the accused, and in those circumstances it becomes necessary to give to the jury the warning described in *Stafford*.

5. Such a breach invariably results in a miscarriage of justice. The Court of Appeal of Western Australia reiterated in *De Rosa v Western Australia* (2006) 162 A Crim R 344 at 355 that the unfairness in such a direction lies in the notion that the evidence of an accused may have to be given particular scrutiny because he or she is the accused, which undermines the presumption of innocence, and the unfairness from such a direction may not be overcome by otherwise impeccable directions on the onus and standard of proof, so that the principle is to be "rigorously applied" and not "eroded" by Courts of Appeal or trial judges "failing to faithfully apply the prohibition".

6. The respondent makes an erroneous submission about what the Court below found in relation to the interest direction. The respondent asserts that the Court below found that the direction did *not* invite an assessment of the credit of the accused by means of comparison of interest in the outcome of the trial: RS in *Stoten* appeal at [47(4)], [50], [75]-[76]. The respondent cites [102] {AB6 2305} of the reasons for judgment below as supporting that proposition. That paragraph in the reasons can only be seriously understood as the Court reciting the submissions of the respondent below – see the context from [100] {AB6 2305}. When it comes time for the Court below to state its reasons (see [126]-[129], esp [129] {AB6 2312-2313}), it is apparent that Muir JA holds that the direction *did* focus attention on the appellants' interest in protection against conviction, and invited the jury to evaluate the reliability of their evidence on that basis. Thus the ultimate (and correct) conclusion of the Court below was grounded squarely in the exposition of the principles by this Court in *Robinson* and as summarised in the first paragraph of the reasons in *Stafford v The Queen* (1993) 67 ALJR 510 at 510.

7. Whilst in some respects the vice in the present direction may not prima facie seem as extreme as that in *Robinson* – as the direction did not expressly invite attention to the relativity of witnesses' interests in the outcome – it was enough that the accused's interest in the outcome was invoked: see the first sentence in *Stafford*, and the citation from *Asquith* at [4] above.

8. Nor can the direction be explained away as being required by "exceptional circumstances": cf RS in *Stoten* appeal at [77]. There were none. In any event, the actual direction was *not* given in the terms required by *Stafford* at 510-511, where those factors are present.

9. Accordingly, rather than find a direction inconsistent with the principles in *Robinson,* but then continue to doubt whether the misdirection gave rise to a miscarriage of justice (CA [129]-[130] {AB6 2313}), the Court below should have concluded at this

point in the inquiry that there was a miscarriage of justice within section 668E(1) of the Code, which subject to any other matter required the appeal to be allowed, because the misdirection concerning interest meant that the appellant was deprived of a the decision of a properly instructed jury on the central issue of the trial. That issue involved a disputed question of fact that could not be resolved without forming an assessment of the credibility of the evidence given by the appellant, and moreover was an issue requiring the application of community standards. The misdirection went to the fairness of the trial, undermined the presumption of innocence and deprived the verdict of the character of one reached under trial by jury as that institution has been understood by the law. It is against *that* miscarriage so identified (the "Miscarriage") that the subsequent issues concerning the operation of the proviso and the effect of section 80 must be considered.[4]

The "Proviso"

10. The thrust of the respondent's argument on the application of the proviso (absent section 80 considerations) appears to be this[5]:

    a) CA [151]-[159] {AB6 2317-2318} is simply an application of the principles in *Weiss* without any legal error, and more specifically;

    b) a direction that infringes *Robinson* does not necessarily preclude the application of the proviso;

    c) the proviso permits an appellate court to form a view that the prosecution case was so strong that, whatever evidence the accused gave about their state of mind and however they gave it, it had to be rejected;

    d) this Court should be satisfied, from a recitation of some of the evidence, that this case fell within the range where the intermediate appellate court could comfortably conclude that neither the nature of the error (the *Robinson* principle) nor the outcome visited upon the appellant (having their credibility judged only by the appellate court) were sufficient bases to justify a new trial.

11. As to (a), the Court below has treated the negative proposition derived from *Weiss* as the only matter it had to address under the proviso, which is an erroneous approach as pointed out by Gummow and Hayne JJ in *AK v Western Australia* (2008) 232 CLR 438 at 455 [53]. Moreover, the Court below seems not to have even considered whether, in light of the central importance of credibility, it ought to have exercised great caution before forming a view that the appellant was proven guilty beyond reasonable doubt, lest trial by jury be substituted by trial by judge: cf *Spies v The Queen* (2000) 201 CLR 603 at 620-621 [47]-[48].

12. As to (b), if there is truly a direction that has infringed the *Robinson* principle, as there has been here, a substantial miscarriage of justice has actually occurred.

13. Rather than contradict the argument of the appellant, the respondent's submissions elucidate why the credibility of the appellant and his co-accused was so crucial to the verdict and why the breach of the *Robinson* principle was so determinative. The respondent does not identify any path to conviction in the evidence that can be

[4] *AK v Western Australia* (2008) 232 CLR 438 at 456 [55] per Gummow and Hayne JJ.
[5] RS in *Stoten* appeal at [6]-[40], [43]-[57], RS in *Hargraves* appeal at [6], [13]-[18].

reasonably supposed to be free of the error or independent of the credibility of the appellant.[6] The Miscarriage identified at [9] above was both real and substantial.

14. As to (c), it follows that this was not a case where such an inquiry was warranted, or could justify refusing the appeal, whatever views were formed on it.

15. That leaves (d), which is an appeal to the facts. Whilst pursuing that line is not apposite or appropriate to the resolution of the appeal, some response is warranted by the approach taken by the respondent.

16. The respondent's submissions fail to grapple effectively with one important aspect of the jury verdicts in the present case – that Glenn Hargraves chose not give evidence but was acquitted on both charges and yet the appellant and Mr Stoten, who gave evidence, were acquitted on one and convicted on another. Further, the appellant's trial was not his first. There was a hung jury in his first trial. A hung jury in the first trial and an acquittal on four of the six counts across the three accused in the second trial hardly paints a picture of the overwhelming case the respondent seems so certain of. It is reasonable to suppose that the breach of the *Robinson* principle in the second trial may explain the inconsistency in the verdicts.

17. The approach of the respondent confirms the fact that the question of the guilt or otherwise of the appellant depends entirely on an assessment of the evidence given by the appellant. According to the respondent's submissions at [6], the appellant's evidence was "inconsistent with, and did not account for, the objective evidence...". Also, his evidence was allegedly "unresponsive" and "evasive" on a number of topics. The respondent then proceeds to list a number of topics upon which this Court is asked to infer there was some unidentified vice in the appellant's answers given in cross-examination. The initial point can be made that the respondent does not deign to deal with the appellant's evidence-in-chief, which ran for a day and a quarter[7], nor relate it to the cross-examination, nor to the balance of the evidence. The Court below did not even attempt this task, contrary to *Weiss* on any view.

18. The list of topics with cross-referencing to the transcript in no way explains why his evidence was unresponsive or evasive and why the jury was compelled to reject it, particularly in light of the appellant's evidence-in-chief. Moreover the submission almost consciously avoids the very point of this appeal – whether (under the proviso as submitted by the appellant or because of the added operation of section 80) the question of the appellant's credibility in giving such evidence should be determined by an appellate court in response to written and oral submissions of both sides' legal representatives, in preference to the matter being left with a properly instructed jury.

19. The appellant's case was that he believed that at all times the tax scheme was a legitimate means of tax minimisation, and therefore his conduct was not dishonest.[8] This was no back alley, dark of night enterprise. The appellant had been introduced to the key overseas architect of the scheme, Mr Philip Egglishaw, by Mr Feddema (a man who was in a romantic relationship with, and married, the aunt of the appellant's then wife), who was the former accountant (1995-1998) for the appellant's business, having prepared its financial statements, tax returns, and attended board meetings, and

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[6] *Darkan v The Queen* (2006) 227 CLR 373 at 402 [95], 403 [101], 405 [107] per Gleeson CJ, Gummow, Heydon and Crennan JJ; *Dietrich v The Queen* (1992) 177 CLR 292 at 338 per Deane J.

[7] AB3 857-945

[8] At the risk of abbreviation, see the appellants' "slides" given to the jury at AB6 2018-2019 and 2058-2067 and compare the respondent's "slide" at AB6 2080 summarising the alleged dishonesty. The relevant part of the summing up is at AB6 2175-2179.

whom the appellant relied upon for tax advice.[9] Mr Feddema had worked for Coopers & Lybrand in London before becoming a partner in the Brisbane firm of Cranstoun & Hussein in 1990 and suggested to the appellant that if he wanted to operate offshore [he] had to establish a legitimate business offshore. He discussed with the appellant the nature of the offshore business that would need to be operated and faxed the appellant a copy of Mr Egglishaw's business card.

20. Mr Egglishaw, and the firm for which he worked, Strachans, were represented by Mr Feddema to be international tax planning experts, and a firm in which the appellant could have confidence. He described the referral of the appellant to Strachans as "...a referral from one established firm of chartered accountants to another firm of reputable chartered accountants". He never suggested or even hinted to the appellant that what he was doing was improper, let alone dishonest.[10] Indeed, it was he that recommended that the appellant consider Jersey, a known tax haven, as an appropriate base for an offshore structure. To the appellant, the firm of Strachans was a "posh" group of Englishmen who headed a "high tier accounting firm with offices in various locations" and had clients all around the world and specialised in taxation advice. He trusted these men because they referred by Mr Feddema, that they were a "big deal", they'd been used before by Mr Feddema's firm, he'd met the principals at Tattersall's or the Brisbane Club, that he understood them to be one of the biggest companies in the world in this area of specialisation and that it was a "...privilege for us to be involved with them".[11]

21. Further, it was his understanding that the scheme was set up so that they did not have control, this being one of the "pillars". He didn't like this, but accepted it as necessary for the scheme to work. In reality, this lack of control was realistic and realised: Strachans have never returned a substantial part of the money under their control.[12]

22. It is of crucial importance that the learned trial judge told the jury that the same verdict on each count was to be expected, but that a finding of dishonesty after 14 February 2004 meant that different verdicts "would theoretically be possible": see CA at [160] {AB6 2318}. That finding was sought to be explained on the basis that dishonesty may have arisen after the appellant became aware that Mr Egglishaw had been detained and searched by the authorities on 14 February 2004. That crucial date was accepted by the Court below (it formed the basis for the reduction in sentence: CA [183] {AB6 2322}), and by the respondent: CA [161] {AB6 2318}. However, the unchallenged evidence[13] was that the appellant had ceased to have active involvement in the day to day running of the business long before 14 February 2004, when Mr Egglishaw was detained and searched. The appellant also gave evidence that he was not troubled by this news because Mr Feddema assured him that it had nothing to do with them – it involved unrelated work of Mr Egglishaw for a different client.[14] Compare this with Mr Glenn Hargraves, who chose not to give evidence, was described by the prosecution in its address to the jury as being involved "up to his eyeballs" in the running of the business at that time. The prosecution had relied

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[9] AB3 875, 877, 884, 885, 889.45-890.10, 894.39-894.41, 895
[10] AB3 894.24-894.41
[11] AB3 889-890, 894.39-895.10
[12] AB3 908.20-909, 910.40-911.20, 921.50-922.10, 923.30-923.40, 941.30-942.50; and in cross-examination AB3 961.30-961.50, 962, 973-974, 985-986.
[13] AB3 915.30, 919.10, 930.5, 932.50-932.60.
[14] AB3 937-939 esp 937.15-938.01; and in cross-examination AB4 1007-1008.

heavily against Glenn Hargraves on evidence of his conduct after February 2004[15]. Further, Glenn took significant amounts out of the scheme even in 2004-2005: {AB6 1962}.

23. The acquittal of Mr Glenn Hargraves, and the conviction of the appellant for a period where he had no active involvement in the running of the business, where the jury found no guilt in the earlier period, may reasonably be supposed to be affected by the appellant being deprived of the decision on count two of a properly instructed jury on the central issue in the trial, which raised the question of dishonesty and the application of community standards, and required an assessment of his credibility.

10 24. In conclusion on the operation of the proviso and the facts, by drawing explicit reference to the evaluation of the appellant's credibility, the direction given by trial judge undermined the presumption of innocence and Mr Glenn Hargraves' acquittal on both counts confirms that it went to the fairness of the trial. One cannot with the certainty expressed by the Court below hold the view that the appellant must have thought that the scheme was dishonest after 14 February 2004, because the constitutionally mandated jury acquitted his brother for the same period, when he also held the knowledge of the search of Mr Egglishaw.

Section 80

25. There is a clear division in principle between the appellant and the respondent and
20 interveners on the constitutional point. In part this arises from the common vices in the submissions against the appellant that they skirt over both the actual miscarriage of justice that occurred (see the Miscarriage identified above) and the nature of the task which the Court below purported to carry out under the proviso in the particular circumstances of this case. In their common submissions, those arrayed against the appellant also tend to gloss over the particular way that the appellant Hargraves puts the section 80 point.

26. But even if one is to approach the matter at the level of generality with which the interveners deal with the topic, the following gulf between the parties presents itself. The interveners give no content to the substantive functional role of the jury when
30 discussing section 80. For the interveners, questions concerning section 80 are forever to be concerned solely with *procedural* and *formation* aspects of the jury. The debate is limited to matters such as whether section 80 applies to an offence, how many are in the jury, whether the verdict need be unanimous, and whether the jury trial may be waived by the accused when it applies. The rest is left to the winds of statutory change. In other words, according to all the submissions supporting the respondent, the Constitution does not entrench as an essential feature any *substantive* aspects of the role of the jury – what the jury does as opposed to what it is and when it is required.

27. Many of the submissions against the appellant are concerned with re-tracing the
40 ground that this Court identified in *Conway* and *Weiss* as if that is an end in itself (the respondent and the Victorian Attorney seem to be almost exclusively concerned with these matters). The appellant acknowledged in his submissions in chief that he did not cavil with the history or principles established in those authorities. This appeal raises an open issue – does section 80, where it applies, impose any additional requirements? For this reason, the appellant traced in chief the historical understanding, in relevant

[15] "Slides" at AB6 2081; Summing up AB6 2169-2170.

common law jurisdictions, of the role of the jury on such an issue as the present in 1900.

28. Not one intervener or the respondent is able to point to any instance prior to 1900 (nor indeed any clear instance thereafter) where the approach taken by the Court below in the present case could or would have occurred in any of the common law jurisdictions identified by the appellant in his submissions in chief. Indeed, what the appellant's submissions in chief made clear is that whatever the status of the Exchequer Rule in those jurisdictions (including in New Zealand where the Rule was *never* adopted), no Court would have interfered with the right of a properly instructed jury to determine issues of credibility which were central to the question of alleged guilt (cf NSW [12]).[16]

29. There are very few issues, if any, in either the criminal justice system or on the civil side, that have generated more evocative rhetoric from judicial officers and legal commentators in the written word. The safeguard of a jury trial and the elements of protection for an accused it provides have prompted even relatively taciturn individuals to wax lyrical. Very few issues in the law generate more public debate than tampering with expectations of a jury trial by State legislatures within their area of competence. The idea of the jury is a central philosophical concept in our criminal law and lore.

30. Yet we are faced with an argument that section 80 does nothing to protect the key function of the jury – to, properly instructed, express its judgment on the community's view of the conduct of an accused, including assessing the credibility of his or her testimony. Section 80 is supposedly silent on the core issues of the jury's role – it seems to be concerned with relatively more cosmetic issues. Whilst other implications have been drawn against Commonwealth and State legislative competence from Chapter III, this express command as part of the constitutional structure is relatively toothless it would seem, at least in the eyes of those against the appellant.

31. The submissions of the Queensland Attorney, at [5] and [27], seek to place restrictions on the proviso, which are so ample, that they basically assert that section 80 could never be offended. Those restrictions are at such a high level of generality that they do not grapple with the precise nature of the Miscarriage here, identified by the appellant, and do not assist with an understanding as to whether the proviso can be applied here (at [29]). To say that *Glennon*[17] did not rule out the possibility of the proviso applying where there is an issue of credibility, does not address the section 80 issue. Also, *Glennon* was a case where the proviso was not applied for the very reason that there *were* issues of credibility, which were central to the question before the jury. One cannot turn its prudent reservation into any affirmative principle that assists in resolving this case, and Queensland's Attorney certainly does not proffer one.

32. The Commonwealth Attorney proceeds from a different proposition of generality which is that at federation, the nature and limits of appellate statutory intervention into criminal trials was a work in progress both here and overseas [5.3 in *Handlen* and *Paddison* appeals], as well as the curiously circular argument that because an appellate judge could have applied the proviso if the offence had been tried summarily (if the legislation was different and didn't provide for trial on indictment) then it should be

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[16] In this regard, while the various reasons for judgment in *R v Snow* (1915) 20 CLR 315 displayed differences in opinion on what section 73 permitted the High Court to do if there was a directed acquittal, even Isaacs J (at 352) and Higgins J (at 356-357) were clear that section 80 required the jury to be the fact finder.

[17] *Glennon v The Queen* (1994) 179 CLR 1 at 9.4, 13.5.

fine to do so here [12]. The New South Wales Attorney, similarly, but from a different tack, argues essentially that the appellant must live with the proviso because it is a qualification on the appellant's right to appeal which he only gets from the legislature: [16]-[18].

33. Three things, at least, may be said about this. First, section 80 is concerned with the structural command by the Constitution to receive a trial where a properly instructed jury passes its view. The appellant is entitled to that trial. One cannot leap from the idea that because section 80 does not entrench any particular appellate procedure that existed at 1900, that it has nothing to say about the issue. Secondly, the actual miscarriage here was to treat the witness as if he were suspect, seriously undermining the fairness of the trial and the presumption of innocence, thereby undermining the verdict of the jury and depriving it of any real weight.[18]

34. Thirdly, there is nothing novel about an asymmetry existing within the law such that more obstacles are placed in the path of a verdict of guilt being returned (or sustained) to that of an acquittal. The "public interest" and appeal rights spoken of by the New South Wales Attorney [21]-[26] seem to treat these matters as two sides of the one coin. They are not. The role of the jury to apply community standards in determining guilt under the law is intertwined with the principle expressed in *Cheatle v The Queen*[19] of giving the accused every benefit of a reasonable doubt. It was not just Blackstone that opined that it is "better that ten guilty persons escape, than that one innocent suffer". The same principle begins with Abraham in Genesis 18:23-32, and, in general form, was expressed by many, some of its earliest proponents including Maimonides, Sir John Fortescue in *De laudibus legum Angliae* and then Benjamin Franklin in the United States. It is well known and widely accepted in common law systems. That is the principle underlying the requirement of unanimity, and it is the same principle that requires that the law not leave intact the verdict of a jury (who acquitted the appellant on one count after an earlier jury could not reach a verdict) who it may be assumed treated the appellant as a suspect witness because the judge instructed them to do so.

Conclusions on section 80 in reply

35. In summary, applying the *Cheatle* approach, as to *history*, at 1900, trial by jury connoted that the judge could advise the jury on the facts but could never direct them that they must resolve disputes of fact or credibility in a particular way. Consistent with this recognition of the essential fact finding role of the jury, no actual or contemplated appeal mechanisms as at 1900 allowed the present intrusion to occur. The Commonwealth Attorney's submission at [18] that "the trial judge could always direct that the jury...in some situations...reach a verdict of guilty" obscures a central divide: the "some situations" turn out from footnote 31 in the submissions to be no more than the proposition in *Yager v The Queen* (1977) 139 CLR 28 at 36 that if all the facts are admitted and the law is clear, a verdict can be directed. There is no case supporting the judge being permitted to direct the jury it must decide in a particular way a disputed question of fact, let alone the central issue of credibility against the accused.

36. As to *authority*, no case has squarely considered what substantive role for the jury is entrenched in respect to fact finding on appeal. The Court below strayed into the fact-

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[18] cf *Cesan v The Queen* (2008) 236 CLR 358 at 395 [129] per Hayne, Crennan and Kiefel JJ.
[19] (1993) 177 CLR 541 at 553.

finding role of the jury (the appellant having also explained why this approach went beyond what is allowed by a proper interpretation of the proviso explained in *Weiss* in non-constitutional cases).

37. As to *principle*, whilst the world does not cease to rotate at 1900, section 80 does require that any forms of statutory intervention adopted from time to time be capable of protecting and enhancing the essential features of jury recognised in 1900, as opposed to creating damage to the institutional interests it serves, and to the corresponding protection to the accused. Sections 668D, 669, and all of 668E save for sub-section (1A) pass this requirement. The proviso fails it, because it gives a power so fundamentally different to, and travelling well beyond, what is permitted to the judge within the trial by jury, that no appellate judge can exercise such a power. Any such decision by appellate judges contradicts the requirement that the trial have been by jury.[20]

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[20] Although it is not presented for decision here, this Court has noted that a provision in the form of sub-section 668F(2) – allowing to appellate court to substitute a verdict on a different offence – may also offend section 80: *Spies v The Queen* (2000) 201 CLR 603 at 620-621 [47]. The offence to section 80 is even greater under sub-section 668E(1A) than under sub-section 668F(2). At least under the latter, the appellate court cannot go beyond the findings of fact which a properly instructed jury must have made.