IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

ON APPEAL FROM THE QUEENSLAND COURT OF APPEAL

No.s B26, B27, B24 and B28 of 2011

BETWEEN

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DALE CHRISTOPHER HANDLEN
Appellant (No.B26)

DENNIS PAUL PADDISON
Appellant (No.B27)

DANIEL ARAN STOTEN
20 Appellant (No.B24)

ADAM JOHN HARGRAVES
Appellant (No.B28)

AND

THE QUEEN
30 Respondent

SUBMISSIONS OF THE ATTORNEY GENERAL FOR NEW SOUTH WALES, INTERVENING

Filed for the Attorney General of NSW, 25 July 2011
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Part I: Publication of Submissions

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

Parts II and III: Intervention

2. The Attorney General of NSW ("NSW") intervenes in all four of these matters pursuant to s.78A of the Judiciary Act 1903, doing so in support of the Respondent in each matter in relation to the constitutional issue raised. NSW does not seek to be heard on the other issues in the appeals.

Part IV: Applicable provisions

3. The relevant provisions at issue in these cases are accurately set out in the written submissions of the parties.

Part V: Argument

4. The issue raised by the Appellants is whether the nature of the legal error identified by the Queensland Court of Appeal in each case is such that there has been no "trial by jury" as required by s.80 of the Commonwealth Constitution, such that the proviso in s.668E(1A) of the Criminal Code (Qld) is not picked up by s.68 of the Judiciary Act. The relevant errors were:

   (a) in Handlen/Paddison, a failure properly to direct the jury as to the nature of the offence, reflecting an error made by the Crown;

   (b) in Stoten/Hargraves, a misdirection, inconsistent with the principle in Robinson v The Queen (No.2) (1991) 180 CLR 531, going in effect to the scrutiny to be applied to the evidence of the accused.

5. NSW submits that there is no inconsistency with the requirements of s.80:

(a) The requirement of trial by jury is not unqualified, and the proviso is in a sense merely a qualification on an accused's right to appeal, which is itself a qualification on the requirement of jury trial;

(b) The proviso is sufficiently broad and flexible as to accommodate any constitutional imperatives;

(c) The existence and application of the proviso is not inconsistent with the historical notion of trial by jury as at Federation; and

(d) The Appellants' arguments emphasise form over substance.

6. It is convenient to begin by identifying the nature of the Appellants' arguments.

10 **Arguments of the Appellants**

7. The arguments of the Appellants in effect reject the possible application of the proviso at all in federal prosecutions on indictment.

8. In the Handlen appeal the Appellant's argument appears to involve the following elements (and the arguments made in the Paddison matter are relevantly identical):

(a) A jury in a federal indictable matter "must deliver a proper verdict on the charge" (subs [20(i)]).

(b) The word "offence" in s.80 refers to the alleged breach of federal criminal law (at [22]).

(c) The jury in the matter in this case "was never squarely asked" to decide the
20 elements of the offence in correct terms relating to accessorial liability (subs [36]).

(d) The "situation is no different from that in Andrews v The Queen [(1968) 126 CLR 198 at 207], where this Court described the failure of the trial judge properly to instruct the jury as to the matters in which the indictment gave rise as denying 'the very fundamentals of a criminal trial'" (subs [37]).

9. Given that this Court held the proviso not to be satisfied in Andrews, it is difficult to see what the constitutional arguments of the Appellant add to arguments as to whether or not the proviso was satisfied. As Holmes JA stated at [76] (AB 1544), it is not evident "that the appellants' reformulation of their argument in constitutional terms advances matters". The Appellant in Handlen proposes no alternative criterion or criteria as to what might be required by the elements of s.80, other than to assert that the jury must be correctly directed as to the elements of the relevant offence. It appears implicit in the submissions that any error in directing on this issue by the trial judge would lead to the appeal being upheld, regardless of the materiality of the error. This argument thus involves a return to a variant of the Exchequer Rule, at least insofar as any error is made in relation to directions on the elements of an offence.

10. In the Stoten appeal, the Appellant asserts a right to "a trial free from legal error" (subs at [80], see also at [69] and [3(a)]). The Appellant in that case thus appears to support reversion to a very broad form of the Exchequer Rule, being one in which, it seems, any legal error made in the conduct of the trial – whether relating to admissibility of evidence, directions, or any other aspect of the trial – must lead to the appeal being upheld, regardless of the significance of the error.

11. In the Hargraves matter the net effect of the argument is the same. The Appellant suggests at [18]-[19] that insofar as Weiss v The Queen (2005) 224 CLR 300 requires an appellate court to satisfy itself of guilt beyond reasonable doubt then that is inconsistent with the requirements of s.80. In particular, it appears to be argued that insofar as any issue of credit arises (particularly of the accused, but not seemingly limited to this) then an appellate court has no role to play in making an assessment on that issue (see at [25]). Further, an appellate court cannot exercise any power that was "not properly available to the trial judge within the trial by jury itself" (at [26]). An accused was entitled to "the voice of the collective body of a properly instructed jury" (at [22]).

12. The Appellant seeks to distinguish its position from the Exchequer Rule by stating that "the issue of basic factual deliberation (especially on notions of credibility) was a matter that was required to be submitted for the consideration and verdict of the jury, and it is

that which was entrenched in section 80" (at [32]). Yet the Appellant's reference at [22] to "the voice of the collective body of a properly instructed jury" indicates that, in truth, the Appellant in this case is arguing for much the same position as in Stoten, namely a right to a jury trial free from legal error. Further, it will commonly be the case that wrongly admitted evidence, say, might have affected the jury's view of the accused: Weiss at [36]. Underlying the submission of the Appellant in Hargraves is, at least, the second of the considerations referred to in Weiss at [26] as seen to be supporting the Exchequer Rule, namely that "the judicial consideration of the weight of all the evidence, as a motive for refusing a new trial, would be the usurpation of the jury's function".

13. The intended effect of introduction of the proviso was, at the least, to overcome the Exchequer Rule. The effect of the arguments of the Appellants is to revert to something like – and seemingly broader than – that Rule.

Analysis

14. Section 80 provides that "The trial on indictment of any offence against any law of the Commonwealth shall be by jury...". For relevant offences it thus requires, on its face, trial by jury. Yet that requirement does not mean that all aspects of a federal trial on indictment are to be determined by the jury. It is the presiding judge who determines issues of law. It is the judge who determines admissibility of evidence, even though that issue may depend upon matters of fact. The judge may give directions to the jury. The jury acts "under the guidance of a Judge": Huddart, Parker & Co Pty Ltd v Moorehead (1909) 8 CLR 330 at 375. The judge may even direct a verdict.

15. The question whether any such qualification on "trial by jury" is valid is answered by asking if the provision in question offends the essential requirements of the constitutional notion of trial by jury, which question itself is to be answered taking account of the objectives that the institution advances or achieves, and allowing for its constant evolution: Brownlee v The Queen (2001) 207 CLR 278 at [54]; Ng v The Queen (2003) 217 CLR 521 at [9]. The proviso does not fail this test.

16. First, it is necessary properly to identify the character of the proviso. One of the further qualifications of the notion of "trial by jury" is the provision for appeal: note Weiss at [30]. The requirement of a jury manifests "the ordinary entitlement of an accused person to have serious criminal charges decided in the first instance by a jury" (Weiss at [38]). The right to appeal is a statutory creation: noted eg Lacey v Attorney-General (Qld) (2011) 85 ALJR 508 at [8]. It is a right which exists generally to the benefit of defendants, enabling them to challenge convictions (and sentences), including on grounds such as that "the verdict of the jury should be set aside on the ground that it is unreasonable, or can not be supported having regard to the evidence" (to quote s.668E(1) of the Criminal Code (Qld)).

17. The proviso is a qualification to this qualification – it is a qualification on the accused's right of appeal, which is itself a qualification on the requirement of a jury trial. It is an incident of the appeal process. The submission by the Appellant in Hargraves at [26] that it is inconsistent with s.80 "for the appellate court to exercise any power not properly available to the trial judge within the trial by jury itself" is thus misplaced. The logic of that argument undermines appeals altogether.

18. That there may be qualifications on such a right of appeal is neither inherently unreasonable nor offensive to the Constitution. The proviso is limited in scope and flexible in operation.

19. The proviso in s.668E(1A) of the Criminal Code (Qld) is in the standard form. The Court of Appeal, thus, is empowered in its discretion to dismiss an appeal where one or more of the grounds of appeal set out in subsection (1) has been made out only "if it considers that no substantial miscarriage of justice has actually occurred". This Court emphasised in Weiss at [9] (see also [42]) that it is the statutory words, not prior judicial phrases applied in particular cases, which govern application of the proviso. Further, the Court indicated at [44], in effect, that it was necessary but not sufficient that the appeal court itself be satisfied beyond reasonable doubt of the appellant's guilt. The circumstances in which the proviso would not be taken to be satisfied are thus not closed (see at [45]) – even if the appeal court is so satisfied, that does not of itself establish that "no substantial miscarriage of justice has actually occurred".

20. All four Appellants in these cases argue that this criterion in the proviso could not be satisfied in their cases, such that the appeals should not have been dismissed. But each goes further in also arguing that even if the criterion was met, the proviso could not be applied in their cases consistently with s.80 of the Commonwealth Constitution. Necessarily implicit in each appellants' argument, therefore, is the submission that the "no substantial miscarriage of justice has actually occurred" criterion is insufficiently flexible to accommodate the requirements of being consistent with the essential elements of a trial by jury as required by s.80 of the Constitution.

21. This argument suffers from an analogous flaw to the argument considered and rejected by this Court in Hogan v Hinch (2011) 275 ALR 408. Just as there the flexible criterion of "public interest" in making the relevant type of suppression order could accommodate relevant constitutional imperatives and did not "impair impermissibly the character of the State courts as independent and impartial tribunals" (see at [80], also [69]), so the phrase employed in the proviso is sufficiently broad and encompassing as to accommodate such requirements of s.80 as apply.

22. The proviso, as construed in Weiss, does not conflict with the constitutional requirement. The appeal court is required to satisfy itself that the accused is guilty beyond reasonable doubt. But in so doing it is merely satisfying itself of a verdict already reached, doing so in a way consistent with its role in assessing – at the request of, and to the benefit of, an accused – whether the verdict of the jury should be set aside (see Weiss at [41]). In so doing the court is required to take account both of the high standard of proof required and its own natural limitations in assessing the evidence (*ibid*). There "will be cases, perhaps many cases, where those natural limitations require the appellate court to conclude that it cannot reach the necessary degree of satisfaction" (*ibid*).

23. This role of reviewing the facts is thus a confined one. It does not have the effect of undermining the requirement for a jury trial by allowing some kind of fresh trial removed from the jury process.

24. Moreover, as noted, being satisfied on the facts is a necessary but not sufficient condition for application of the proviso. The decision in AK v Western Australia (2008) 232 CLR 438 illustrates that the proviso might be held inapplicable in other circumstances, as do many earlier decisions of this Court (see also Weiss at [46]). In Handlen/Paddison, Holmes JA took account at AB 1544 [76]-[77] of the decisions of this Court in Wilde v The Queen (1988) 164 CLR 365 and Krakouer v The Queen (1998) 194 CLR 202. No complaint has been made by the relevant appellants about the fact that her Honour did so.

25. This limited qualification on the right of appeal is consistent with the evolving historical notion of trial by jury as it existed at Federation:

(a) In the United Kingdom an equivalent of the proviso had been introduced with respect to civil matters in 1848: Weiss at [14].

(b) In the same country, the proposed "Criminal Code" of 1880 (which was not enacted) had included a proviso in cl.490(f). This was a predecessor of what was enacted in s.4(1) of the Criminal Appeal Act 1907 (UK).

(c) A proviso in similar terms to the modern form was introduced in NSW in 1883 in s.423 of the Criminal Law (Amendment) Act 1883. This was then re-legislated in s.471 of the Crimes Act 1900 (NSW).

(d) In Queensland, s.671 of the Criminal Code 1899 contained an earlier variant of the proviso.

26. At the turn of the century, therefore, the notion of qualifying the right of appeal and overturning the Exchequer Rule was emergent. It cannot then be said to be inconsistent with the historical notion.

27. The arguments of the appellants in these appeals prioritise matters of form over substance. Section 80 may be seen as a constitutional guarantee. As such, it may be taken to be concerned with issues of substance and practical effect, not mere form: cf Ha v NSW (1997) 189 CLR 465 at 498-9. A similar point was made by Professor Scott,

referred to approvingly by Brandeis J in Ex parte Peterson (1920) 253 US 300 at 310, and quoted in turn in Brownlee (2001) 207 CLR 278 at [55].

28. The appellants would seemingly require that any legal error lead to a retrial, regardless of whether or not the error was significant or material. That is a formalistic approach. If it is apparent that there was no substantial miscarriage of justice then no harm is done to the requirement of trial by jury by declining to uphold an accused's appeal. Conversely, harm would be done if a retrial was automatically ordered in such circumstances. The "administration of criminal justice would be frustrated and made hostage to 'outworn technicality'": Conway v The Queen (2002) 209 CLR 203 at [29].

10 29. Section 80 exists not only to benefit criminal defendants, but serves a broader set of purposes in the constitutional structure: Brown v The Queen (1986) 160 CLR 171 at 195-7, 201-2 and 214-216. The proviso, properly applied, avoids "the needless retrial of criminal proceedings": Weiss at [47]. To prevent it being so applied not only does not advance the interests of the administration of justice, it harms it. Such a step would tend to undermine public confidence by increasing the number of successful appeals and retrials on points which may make little difference to the justice of the result. It would impose further burdens on curial resources, judges, members of the community who serve on juries (perhaps being exposed to disturbing evidence), witnesses, and defendants themselves, in circumstances where there would be little practical prospect
20 of any different outcome. Section 80 does not require this result.

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