**IN THE HIGH COURT OF AUSTRALIA**
**BRISBANE REGISTRY**

**Nos B24 and B28 of 2011**

**BETWEEN:** **DANIEL ARAN STOTEN**
First Appellant

AND: **ADAM JOHN HARGRAVES**
Second Appellant

AND: **THE QUEEN**
Respondent

**Nos B26 and B27 of 2011**



**BETWEEN:** **DALE CHRISTOPHER HANDLEN**
First Appellant

AND: **DENNIS PAUL PADDISON**
Second Appellant

AND: **THE QUEEN**
Respondent

# SUBMISSIONS ON BEHALF OF THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND (INTERVENING)

## PART I - CERTIFICATION FOR INTERNET PUBLICATION

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

**Submissions filed on behalf of the Attorney-General for the State of Queensland (Intervening)**
Form 27C
R.44.04.4

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PL8/ATT110/2494/JOJ

## PART II – BASIS OF INTERVENTION

2. The Attorney-General for the State of Queensland intervenes in these appeals in support of the Respondents pursuant to s.78A of the *Judiciary Act 1903* (Cth).

## PART III - LEAVE TO INTERVENE

3. Leave to intervene is not required.

## PART IV - LEGISLATION

4. The Attorney-General for the State of Queensland adopts the statements of the applicable legislative provisions by the Appellants. Additionally, annexed to these submissions are copies of:

10 (a) s.68 of the *Judiciary Act 1903* (Cth) as it existed at the relevant time (the appellants' trials), which is still in force in that form at the date of making these submissions.

(b) historical provisions referred to in these submissions, including ones which have not already been extracted by the parties.[1]

## PART V - STATEMENT OF ARGUMENT

5. On its established construction, s.668E(1A) of the Queensland Criminal Code:

(a) does not apply where a defect in a trial has had the effect that there has not been a fair trial by jury;

20 (b) does not justify or require an appeal court to substitute itself for a jury.[2]

6. Consequently, there can never be a conflict between s.668E(1A) of the Queensland Criminal Code and s.80 of the *Constitution*.

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[1] Sections 48-51 of the *Criminal Practice Act 1865* (Qld); s.9(1) of the *Criminal Code Amendment Act 1913* (Qld); s.696 of the 1897 Draft Criminal Code; ss.668-672 of the Queensland Criminal Code as enacted; ss.72, 73 and 75 of the *Judiciary Act 1903* (Cth) as enacted.

[2] Cf. the analysis of Deane J in *Dietrich v The Queen* (1992) 177 CLR 292 at 337-338 with the analysis of the court in *Weiss v The Queen* (2005) 244 CLR 300 at 312 [29] and 317-318 [45]-[46].

7. As this Court demonstrated in *Conway v The Queen*[3] and *Weiss v the Queen*,[4] even before the enactment of the first provision conferring a right to appeal against a conviction,[5] the available procedure to review a conviction on the ground of error, whether at common law or by statute, was already subject to the qualification that a conviction might be affirmed despite the occurrence of error in the conduct of a trial. This was so in the case of common law remedies available before the creation of statutory rights of appeal.[6]

8. It was so in the case of the procedure by means of reservation of points of law.[7] The statutory jurisdiction to review a conviction on the ground of error originated in the *Crown Cases Act 1848* (UK). This operated by the reservation of a point of law by the trial judge for the consideration of the Court for Crown Cases Reserved. In Queensland a jurisdiction in similar terms was enacted in ss.48, 49, 50 and 51 of the *Criminal Practice Act 1865*[8] (Qld) and then re-enacted as part of the Queensland Criminal Code in 1899 ss.668, 669 and 672. The 1865 Queensland statute had not contained any form of proviso but Sir Samuel Griffith inserted one into his draft (s.696) which read as follows:

> A conviction cannot be set aside upon the ground of improper admission of evidence, if it appears to the Court that the evidence was merely of a formal character and not material, or was of such a nature that it could not have affected the jury, nor upon the ground of improper admission of evidence adduced for the defence.
>
> [emphasis added]

9. Sir Samuel Griffith said, in a footnote to this draft provision:

> This is perhaps new. It will be observed that it is limited to cases where the evidence wrongly admitted *could not* have affected the

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[3] (2002) 209 CLR 203.
[4] *supra.*
[5] *Criminal Appeal Act 1907* (UK).
[6] See the history of the common law remedies in *Conway v The Queen* (2002) 209 CLR 203 at 208-217 [7]-[31] per Gaudron A-CJ, McHugh, Hayne and Callinan JJ. especially at 213[16] and [17], 216 [27], 217[29].
[7] *R v Grills* (1910) 11 CLR 400 at 410, cited in *Conway (supra)* at 215-216 [25].
[8] 29 Vic No. 13.

> jury. The second branch is obviously right, whether it is the present law or not.
>
> [italics in the original]

10. When enacted, however, s.671 of the Queensland Criminal Code was in these terms:

> A conviction cannot be set aside upon the ground of improper admission of evidence, if it appears to the Court that the evidence was merely of a formal character and not material, nor upon the ground of improper admission of evidence adduced for the defence.

11. Those provisions continue to exist to the present day in ss.668B and 668C of the modern Code even after the enactment of a right of appeal by the *Criminal Code Amendment Act 1913* (Qld).

12. In 1903 materially identical provisions were enacted as ss.72, 73 and 75 of the *Judiciary Act 1903* (Cth).

13. The idea of a statutory proviso was not the invention of Sir Samuel Griffith. A much stronger proviso already existed in New South Wales where the *Criminal Law (Amendment) Act 1883*,[9] in making similar provision for the reservation of points of law had, by s.423, stated:

> Provided that no conviction or judgment thereon shall be reversed arrested or avoided on any case so stated unless for some substantial wrong or other miscarriage of justice.

14. The *Criminal Appeal Act 1907* (UK) established the Court of Criminal Appeal and, for the first time, a right of appeal against conviction.[10] That Act incorporated a form of proviso.

15. Even in the case of statutes which confer a right of appeal against conviction which is not the subject of such a proviso, it has been held that an implicit part

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[9] 46 Vic. No. 17.

[10] The history of similar provisions in Australia is discussed at length in *Weiss v The Queen (supra)* at 306-311 [12] – [25].

of the discretion conferred by such provisions involves a consideration whether the established error did not result in any substantial miscarriage of justice.[11]

16. As to the question of appellate intervention following a jury trial, in *Weiss v The Queen*, this Court said:[12]

> As Wigmore pointed out the conduct of jury trials has always been subject to the direction, control and correction of both the trial judge and the appellate courts. Once it is acknowledged that an appellate court may set aside a jury's verdict 'on the ground that it is unreasonable or cannot be supported having regard to the evidence', it follows inevitably that the so-called 'right' to the verdict of a jury rather than an appellate court is qualified by the possibility of appellate intervention. The question becomes, when is that intervention justified?

17. This Court's analysis of the historical development of a right of appeal against conviction and its examination of the terms of such a right in *Weiss v The Queen*,[13] which was continued in *AK v Western Australia*,[14] demonstrated that such provisions create a dilemma. An appeal court is required to decide whether or not a "substantial miscarriage of justice" has occurred where, ex hypothesi, there has been an error in the conduct of a trial.[15] How can it determine whether or not there has been such a miscarriage without usurping the function of the jury itself? This is the dilemma which the Judicial Committee of the Privy Council identified in *Makin v Attorney General for New South Wales*.[16]

18. The dicta of this Court in *Weiss* v *The Queen* and in *AK v Western Australia* have settled that question.

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[11] *Stokes v The Queen* (1960) 105 CLR 279 at 284 - 285 per Dixon CJ, Fullagar and Kitto JJ; *Conway (supra)* at 220 [38], [39].
[12] *(supra)* at 312 [30].
[13] *supra.*
[14] (2008) 232 CLR 328.
[15] The tension inherent in this dilemma has been the immutable feature of the various iterations of the proviso and like provisions, whilst the means by which this tension has been resolved in judicial interpretation has evolved over time: *Brownlee v The Queen* (2001) 207 CLR 278 at 284 [6] and 287 [17] per Gleeson CJ and McHugh J and 291 [33] per Gaudron, Gummow and Hayne JJ.
[16] [1894] AC 57 at 69-70.

19. As this Court pointed out in *Weiss v The Queen*,[17] it is neither right nor useful to attempt to lay down absolute rules or singular tests beyond the three fundamental propositions referred to in that decision: that the appellate court must itself decide whether a substantial miscarriage of justice has actually occurred, that the task is an objective task not materially different from other appellate tasks and that the standard of proof is the criminal standard.

20. In *AK v State of Western Australia*, Gummow and Hayne JJ held that deciding whether there has been no substantial miscarriage of justice necessarily invites attention to whether the jury's verdict might have been different if the identified error had not occurred.[18] Therefore, before applying the proviso, an Appeal Court must be satisfied that the jury's verdict would have been the same even if the trial judge had not made a wrong decision on a question of law or there had not been some other miscarriage of justice.

21. Even in the context of the United States Constitution, it has been accepted that it is appropriate for an appellate court to consider whether a demonstrated error at trial was of a kind which did not involve a miscarriage of justice.[19]

22. In *Neder v United States*,[20] Rehnquist CJ, who delivered the opinion of the Court, quoted observations that:[21] "Reversal for error, regardless of its effect on the judgment... bestirs the public to ridicule it..." and "The harmless error doctrine... promotes public respect for the criminal process by focussing on the underlying fairness of the trial." These observations find parallel in Barwick CJ's injunction against "outworn technicality" in *Driscoll v The Queen*.[22] Thus, in *Neder v United States*, Rehnquist CJ observed:[23]

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[17] *(supra)* at 316 [42] and reaffirmed per Gummow and Hayne JJ in *AK v Western Australia* (2008) 232 CLR 438 at 455 [52].
[18] *(supra)* at 457 [59] and see also the authorities cited at footnote 2.
[19] As to the relevance of the United States jurisprudence, see *Cheatle v The Queen* (1993) 177 CLR 541 at 556 and *Cheng v The Queen* (2000) 203 CLR 248 at 329 [241] and 332 [249]. Cf. *Browne v The Queen* (1986) 160 CLR 171 at 180 per Gibbs CJ, 195 per Brennan J, 204 per Deane J and 214 per Dawson J.
[20] (1999) 527 US 1.
[21] *Ibid* at 18. See also R Fairfax, 'Harmless Constitutional Error and the Institutional Significance of the Jury' (2008) 76 *Fordham Law Review* 2027 at 2033.
[22] (1977) 137 CLR 517 at 527.
[23] *(supra)* at 19.

> ...answering the question whether the jury verdict would have been the same absent the error does not fundamentally undermine the purposes of the jury trial guarantee...
>
> ...If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error...it should not find the error harmless...
>
> ...A reviewing court making this harmless-error inquiry does not, as Justice Traynor put it, 'become in effect a second jury to determine whether the defendant is guilty.'...Rather a court, in typical appellate court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element.

23. This approach bears striking similarity to this Court's approach for deciding whether a miscarriage of justice is "substantial" in *Weiss v The Queen.*[24] In *Neder v United States*, Scalia J favoured a stricter approach with respect to misdirections to juries on the elements of offences, but he did not advocate that all such misdirections must result in a successful appeal. His Honour held:[25]

> The failure of the court to instruct the jury properly-whether by omitting an element of the offense or by so misdescribing it that it is effectively removed from the jury's consideration-can be harmless, if the elements of guilt that the jury did find necessarily embraced the one omitted or misdescribed.

24. There is no single universally applicable description of what constitutes a substantial miscarriage of justice.[26] In applying the proviso, it is necessary to have regard to the particular miscarriage of justice that has been identified.[27] In this regard, the range of events, acts or omissions which can constitute a

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[24] *(supra)* at 316-317 [41]-[44].
[25] *(supra)* at 35. Cf. the analysis of Holmes JA in *R v Handlen & Paddison* [2010] QCA 371 at [78]-[82]. Cf. also *Spies v The Queen* (2000) 201 CLR 603 and *R v Courtie* [1984] 1 AC 463 at 467.E-F per Lord Diplock.
[26] *Weiss v The Queen (supra)* at 317 [44].
[27] *Cesan v The Queen* (2008) 236 CLR 358 at 394 [126] per Hayne, Crennan and Kiefel JJ.

miscarriage of justice will depend upon the necessary conditions of "justice" in the criminal justice system.[28]

25. Some errors may constitute such a fundamental departure from the requirements of a fair trial that no consideration is required concerning the possible outcome of a trial absent the error.[29] It is enough that the error be demonstrated because the error takes away the character of a trial from the proceeding.

26. Two features of the criminal justice system for Commonwealth offences are relevant here. First, the constitutional guarantee that the trial for such offences on indictment be by jury is a fundamental law of the Commonwealth.[30] Secondly, the conferral of jurisdiction on State courts by s.68(2) of the *Judiciary Act 1903* (Cth) is expressed in terms to be subject to that guarantee.

27. It follows that a defect in a trial on indictment for a Commonwealth offence that denies the trial the character of a trial by jury within the meaning of s.80 of the *Constitution* would be a miscarriage of justice that is "substantial" for the purposes of the proviso. In this regard, the Attorney-General for the State of Queensland respectfully adopts the formulation of Basten JA in *Cesan v Director of Public Prosecutions (Cth)*:[31]

> In a case in federal jurisdiction, once it is accepted that there has been a contravention of a requirement given constitutional force by s.80, it is appropriate to conclude that the requirement is properly characterised as one which either, in its own terms, gives rise to a substantial miscarriage of justice or is one to which the proviso has no application. That is because to apply the proviso would be to give legal force and effect to a trial which does not qualify as a trial by jury, in accordance with the requirements of s 80 of the Constitution.

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[28] *Ibid* at 379 [66] per French CJ.
[29] *Quartermaine v The Queen* (1980) 143 CLR 595 a 600-601 per Gibbs J; *Wilde v The Queen* (1987-1988) 164 CLR 365 at 372-373 per Brennan, Dawson and Toohey JJ; *AK v Western Australia (supra)* at 447[23] per Gleeson CJ and Kiefel J.
[30] *Cheatle v The Queen* (1993) 177 CLR 541 at 549; *Katsuno v The Queen* (1999) 199 CLR 40 at 69 [67] per Kirby J.
[31] (2007) 174 A Crim R 385 at [121] and His Honour's analysis at paragraphs [96]-[97] and [116]-[119]. This analysis accords with the result in *Cheatle v The Queen (supra)*: see in particular page 562.

28. It is respectfully submitted that s.668E(1A) of the Queensland Criminal Code is not inconsistent with s.80 of the *Constitution*.

**Hargraves and Stoten**

29. The submissions made on behalf of Mr Hargraves and Mr Stoten would compel the conclusion that any direction by a trial judge which is in conflict with the dicta in *Robinson v The Queen*[32] would necessarily exclude the operation of the proviso and result in an overturning of a conviction. But the effect of any misdirection must be considered in the context of the trial in which it has occurred and so no such universal rule could be sustained. In this case, for example, the force of the misdirection must be considered against what was described as a case in which "it is impossible to conclude rationally that after 14 February 2004 at the latest, the appellants did not believe that the scheme was unlawful and that it was being used by them dishonestly."[33] An appeal against conviction in a case where there has been a *Robinson* misdirection involves issues of credibility. This Court has rejected the proposition that the proviso can never be applied when the misdirection goes to credibility.[34] Such an appeal was dismissed by applying the proviso in *R v Goldman*.[35]

**Handlen and Paddison**

30. No constitutional issue arises in these appeals because, if the appellants are correct in their submission that any errors in the conduct of the trial were so fundamental that there has been no proper trial, on its ordinary construction, the proviso could not apply for there will have been a substantial miscarriage of

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[32] (1991) 180 CLR 531.
[33] *R v Hargraves and Stoten* [2010] QCA 328 at [158].
[34] *Glennon v The Queen* (1993-4) 179 CLR 1 at 10-11 per Mason CJ, Brennan and Toohey JJ.
[35] (2007) VSCA 25. See also, *BSD v Western Australia* [2009] WASCA 152; *Stafford v R* (1993) 67 ALJR 510; *R* v *Heness* [2009] SASC 243 at [117]-[119], [123] and [130]; *Cotic v The Queen* [2003] WASCA 14 at [57]; *Sanchez v The Queen* (2009) 196 A Crim R 472 at [83]–[84]; *R v Hayne* (unreported, NSW (CA), Handley JA, James and Levine JJ, CCA60496/97, 18 September 1998); *R v Karki* [2002] NSWCCA 67.

justice. No reference to s.80 of the *Constitution* is required to establish that outcome.

Dated 21 July 2011

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1 **IN THE HIGH COURT OF AUSTRALIA**
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30 **ANNEXURE TO THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND'S SUBMISSIONS**

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|---|---|---|
| (Qld) | | |
| *Draft of a Code of Criminal Law 1897* (Qld) | s.696 | 5 |
| Queensland Criminal Code (as enacted) | ss.668, 669, 670, 671, 672 | 6 |
| *Criminal Code Amendment Act 1913* (Qld) | ss.2(1), 3, 6, 7, 9[668E.] | 7 |
| *Judiciary Act 1903* (Cth) as enacted | ss.72, 73, 75 | 9 |

***Judiciary Act 1903 (Cth)***

**68 Jurisdiction of State and Territory courts in criminal cases**

(1) The laws of a State or Territory respecting the arrest and custody of offenders or persons charged with offences, and the procedure for:

(a) their summary conviction; and

(b) their examination and commitment for trial on indictment; and

(c) their trial and conviction on indictment; and

(d) the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith;

and for holding accused persons to bail, shall, subject to this section, apply and be applied so far as they are applicable to persons who are charged with offences against the laws of the Commonwealth in respect of whom jurisdiction is conferred on the several courts of that State or Territory by this section.

(2) The several Courts of a State or Territory exercising jurisdiction with respect to:

(a) the summary conviction; or

(b) the examination and commitment for trial on indictment; or

(c) the trial and conviction on indictment;

of offenders or persons charged with offences against the laws of the State or Territory, and with respect to the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith, shall, subject to this section and to section 80 of the Constitution, have the like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth.

(4) The several Courts of a State or Territory exercising the jurisdiction conferred upon them by this section shall, upon application being made in that behalf, have power to order, upon such terms as they think fit, that any information laid before them in respect of an offence against the laws of the Commonwealth shall be amended so as to remove any defect either in form or substance contained in that information.

(5) Subject to subsection (5A):

(a) the jurisdiction conferred on a court of a State or Territory by subsection (2) in relation to the summary conviction of persons charged with offences against the laws of the Commonwealth; and

(b) the jurisdiction conferred on a court of a State or Territory by virtue of subsection (7) in relation to the conviction and sentencing of persons charged with offences against the laws of the Commonwealth in accordance with a provision of the law of that State or Territory of the kind referred to in subsection (7);

is conferred notwithstanding any limits as to locality of the jurisdiction of that court under the law of that State or Territory.

(5A) A court of a State on which jurisdiction in relation to the summary conviction of persons charged with offences against the laws of the Commonwealth is conferred by subsection (2) may, where it is satisfied that it is appropriate to do so, having regard to all the circumstances, including the public interest, decline to exercise that jurisdiction in relation to an offence against a law of the Commonwealth committed in another State.

(5B) In subsection (5A), ***State*** includes Territory.

(5C) The jurisdiction conferred on a court of a State or Territory by subsection (2) in relation to:

(a) the examination and commitment for trial on indictment; and

(b) the trial and conviction on indictment;

of persons charged with offences against the laws of the Commonwealth, being offences committed elsewhere than in a State or Territory (including offences in, over or under any area of the seas that is not part of a State or Territory), is conferred notwithstanding any limits as to locality of the jurisdiction of that court under the law of that State or Territory.

(6) Where a person who has committed, or is suspected of having committed, an offence against a law of the Commonwealth, whether in a State or Territory or elsewhere, is found within an area of waters in respect of which sovereignty is vested in the Crown in right of the Commonwealth, he or she may be arrested in respect of the offence in accordance with the provisions of the law of any State or Territory that would be applicable to the arrest of the offender in that State or Territory in respect of such an offence committed in that State or Territory, and may be brought in custody into any State or Territory and there dealt with in like manner as if he or she had been arrested in that State or Territory.

(7) The procedure referred to in subsection (1) and the jurisdiction referred to in subsection (2) shall be deemed to include procedure and jurisdiction in accordance with provisions of a law of a State or Territory under which a person who, in proceedings before a court of summary jurisdiction, pleads guilty to a charge for which he or she could be prosecuted on indictment may be committed to a court having jurisdiction to try offences on indictment to be sentenced or otherwise dealt with without being tried in that court, and the reference in subsections (1) and (2) to ***any such trial or conviction*** shall be read as including any conviction or sentencing in accordance with any such provisions.

(8) Except as otherwise specifically provided by an Act passed after the commencement of this subsection, a person may be dealt with in accordance with

provisions of the kind referred to in subsection (7) notwithstanding that, apart from this section, the offence would be required to be prosecuted on indictment, or would be required to be prosecuted either summarily or on indictment.

(9) Where a law of a State or Territory of the kind referred to in subsection (7) refers to indictable offences, that reference shall, for the purposes of the application of the provisions of the law in accordance with that subsection, be read as including a reference to an offence against a law of the Commonwealth that may be prosecuted on indictment.

(10) Where, in accordance with a procedure of the kind referred to in subsection (7), a person is to be sentenced by a court having jurisdiction to try offences on indictment, that person shall, for the purpose of ascertaining the sentence that may be imposed, be deemed to have been prosecuted and convicted on indictment in that court.

(11) Nothing in this section excludes or limits any power of arrest conferred by, or any jurisdiction vested or conferred by, any other law, including an Act passed before the commencement of this subsection.

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***Criminal Practice Act 1865*** **(Qld)**

*Criminal Appeal.*

*Questions may be reserved.*

**48.** When any person shall have been convicted of any treason felony or misdemeanour before any court of criminal jurisdiction within the colony the judge or chairman or justices of the peace before whom the case shall have been tried shall on the application of counsel made during the trial or without such application in his or their own discretion reserve any question or questions of law which shall have arisen on the trial for the consideration of the judges of the Supreme Court and thereupon shall have authority to respite execution of the judgment on such conviction or postpone the judgment until such question or questions shall have been considered and decided as he or they may think fit and in either case the court in its discretion shall commit the person convicted to prison or shall take a recognizance of bail with one or more sufficient sureties and in such sum as the court shall think fit conditioned to appear at such time or times as the court shall direct and to receive judgment or to render himself in execution as the case may be.

*Questions to be certified to judges.*

**49.** The judge chairman or justices as the case may be shall thereupon state in a case signed in the manner now usual the question or questions of law which shall have been so reserved with the special circumstances upon which the same shall have arisen and such case shall be transmitted to the judges of the Supreme Court and the said judges shall thereupon have full power and authority to hear and finally determine the said question or questions and thereupon to reverse affirm or amend any judgment which shall have been given on the indictment on the trial whereof

such question or questions shall have arisen or to avoid such judgment and to order an entry to be made on the record and on the indictment that in the judgment of the said judges or a majority of them the party convicted ought not to have been convicted or to arrest the judgment or order judgment to be given thereon at some other session of oyer and terminer or gaol delivery or other sessions of the peace or other sitting of the district court if no judgment shall have been before that time given as they shall be advised or to make such other order as justice may require and such judgment and order of the said judges shall be certified under the hand of the prothonotary and the seal of the Supreme Court to the clerk of assize clerk of the court or clerk of the peace as the case may be in the form or to the effect mentioned in form A of the schedule appended to this Act who shall enter the same on the original record in proper form and another certificate of the same tenor under the hand of the prothonotary shall by him as soon as possible be transmitted to the sheriff or gaoler in whose custody the person convicted shall be and the said certificate shall be a sufficient warrant to such sheriff or gaoler and all other persons for the execution of the judgment as the same shall be so certified to have been affirmed or amended and execution shall be thereupon executed on such judgment and for the discharge of the person convicted from further imprisonment if the judgment shall be reversed avoided or arrested and in that case such sheriff or gaoler shall forthwith discharge him or when he shall be at large on bail the next court of gaol delivery district court or sessions of the peace as the case may be shall vacate the recognizance of such bail and if the court of oyer and terminer and gaol delivery or district court or court of quarter sessions shall be directed to give judgment the said court shall proceed to give judgment at the next session.

*Judgments to be delivered in open court.*

**50.** The jurisdiction and authorities by this Act given to the said judges or a majority of them shall be exercised at the Supreme Court House Brisbane or other convenient place and the judgment or judgments of the said judges shall be delivered in open court after hearing counsel or the parties in case the Attorney-General or other prosecutor or the person convicted shall think it fit that the case shall be argued in like manner as the judgments of the Supreme Court are now delivered.

*Amendment of case.*

**51.** The said judges when a case has been reserved for their opinion shall have power if they think fit to cause the case or certificate to be sent back for amendment and thereupon the same shall be amended accordingly and judgment shall be delivered after it shall have been amended.

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***Draft of a Code of Criminal Law 1897* (Qld)**

*Certain Errors not to avoid Conviction.*

**696.** A conviction cannot be set aside upon the ground of the improper admission of evidence, if it appears to the Court that the evidence was merely of a formal character and not material, or was of such a nature that it could not have affected the jury, nor upon the ground of the improper admission of evidence adduced for the defence.[1]

[1] This is perhaps new. It will be observed that it is limited to cases where the evidence wrongly admitted *could not* have affected the jury. The second branch is obviously right, whether it is the present law or not.

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**Queensland Criminal Code**

*Reservation of Points of Law.*

**668.** When any person is indicted for any indictable offence, the Court before which he is tried must, on the application of counsel for the accused person made before verdict, and may in its discretion, either before or after judgment, without such application, reserve any question of law which arises on the trial for the consideration of the Supreme Court.

If the accused person is convicted, and a question of law has been so reserved before judgment, the Court may either pronounce judgment on the conviction and respite execution of the judgment, or postpone the judgment until the question has been considered and decided, and may either commit the person convicted to prison or admit him to bail on recognizance, with or without sureties, and in such sum as the Court thinks fit, conditioned to appear at such time and place as the Court may direct, and to render himself in execution, or to receive judgment as the case may be.

The presiding Judge is thereupon required to state, in a case signed by him, the question of law so reserved, with the special circumstances upon which it arose; and the case is to be transmitted to the Supreme Court at Brisbane.

*Hearing.*

**669.** Any question so reserved is to be heard and determined by the Full Court at Brisbane, after argument by or on behalf of the Crown and the convicted person or persons, if any of them desire that the question shall be argued; and that Court may –

(a) Affirm the judgment given at the trial; or
(b) Set aside the verdict and judgment, and order a verdict of not guilty or other appropriate verdict to be entered on the record; or
(c) Arrest the judgment; or
(d) Amend the judgment; or
(e) Make such other order as justice may require.

Or the Court may send the case back to be amended or restated.

*Effect of Order of Full Court.*

**670.** The Registrar is required to certify the judgment of the Court, under his hand and the seal of the Court, to the proper officer of the Court in which the trial was had, who is required to enter the same on the original record.

If the convicted person is in custody, the Registrar is also required forthwith to transmit another certificate of the same tenor, under his hand and the seal of the Court, to the superintendent of the prison who has the custody of such person. Such certificate is a sufficient warrant to all persons for the execution of the judgment, if it is certified to have been affirmed, or as it is certified to be amended, and execution is thereupon to be executed upon the judgment as affirmed or amended: And, if the judgment is set aside or arrested, the certificate is a sufficient warrant for the discharge of the convicted person from further imprisonment under that judgment; and in that case the superintendent is required forthwith to discharge him from imprisonment under that judgment; and if he is at large on bail; the recognizance of bail is to be vacated at the next Sittings of the Court in which the trial was had: And, if that Court is directed to pronounce judgment, judgment is to be pronounced at the next Sittings of the Court at which the convicted person attends to receive judgment.

*Certain Errors not to avoid Conviction.*

**671.** A conviction cannot be set aside upon the ground of the improper admission of evidence, if it appears to the Court that the evidence was merely of a formal character and not material, nor upon the ground of the improper admission of evidence adduced for the defence.

*Appeal from Arrest of Judgment.*

**672.** When the Court before which an accused person is convicted on indictment arrests judgment, the Court is required, on the application of counsel for the prosecution, to reserve a case for the consideration of the Full Court as hereinbefore provided.

On the hearing of the case the Court may affirm or reverse the order arresting judgment. If the order is reversed the Court is to direct that judgment be pronounced upon the offender, and he is to be ordered to appear at such time and place as the Court may direct to receive judgment, and any justice may issue his warrant for the arrest of the offender.

An offender so arrested may be admitted to bail by order of the Supreme Court or a judge thereof, which may be made at the time when the order directing judgment to be pronounced is made, or afterwards.

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***Criminal Code Amendment Act 1913*** **(Qld)**

*Amendment of Criminal Code.*

**2.**(1.) Sections six hundred and sixty-eight to six hundred and seventy-two, both inclusive, of the Criminal Code are repealed.

*Amendments as to Criminal Appeals*

**3.** The following sections are inserted in lieu of the sections of the said Code hereby repealed, and shall in the said Code bear the numbers respectively set against them in square brackets.

*Reservation of Points of Law.*

**6. [668B.]** When any person is indicted for any indictable offence, the court of trial must, on the application of counsel for the accused person made before verdict, and may in its discretion, either before or after judgment, without such application, reserve any question of law which arises on the trial for the consideration of the Court.

If the accused person is convicted, and a question of law has been so reserved before judgment, the court of trial may either pronounce judgment on the conviction and respite execution of the judgment, or postpone the judgment until the question has been considered and decided, and may either commit the person convicted to prison or admit him to bail on recognizance, with or without sureties, and in such sum as the court of trial thinks fit, conditioned to appear at such time and place as the court of trial may direct, and to render himself in execution, or to receive judgment, as the case may be.

The judge of the court of trial is thereupon required to state, in a case signed by him, the question of law so reserved, with the special circumstances upon which it arose; and the case is to be transmitted to the Court.

Any question so reserved is to be heard and determined as an appeal by the Court. The Court may send the case back to be amended or restated if it thinks it necessary so to do.

*Appeal from Arrest of Judgment.*

**7. [668C.]** When the court of trial before which a person is convicted on indictment arrests judgment, the court is required, on the application of counsel for the prosecution, to reserve a case for the consideration of the Court as hereinbefore provided.

On the hearing of the case the Court may affirm or reverse the order arresting judgment. If the order is reversed, the Court is to direct that judgment be pronounced upon the offender, and he is to be ordered to appear at such time and place as the Court may direct to receive judgment, and any justice may issue his warrant for the arrest of the offender.

An offender so arrested may be admitted to bail by order of the Court or a judge thereof, which may be made at the time when the order directing judgment to be pronounced is made, or afterwards.

*Determination of Appeal in Ordinary Cases.*

**9. [668E.]** (1.) The Court on any such appeal against conviction shall allow the appeal if it is of the opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal:

Provided that the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(2.) Subject to the special provisions of this Chapter, the Court shall, if it allows an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered.

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***Judiciary Act 1903* (Cth) (as enacted)**

*Appeal.*

*Reservation of points of law.*

**72.**(1.) When any person is indicted for any indictable offence against the laws of the Commonwealth, the Court before which he is tried shall on the application by or on behalf of the accused person made before verdict, and may in its discretion either before or after judgment without such application, reserve any question of law which arises on the trial for the consideration of a Full Court of the High Court or of a Full Court of the Supreme Court of the State.

(2.) If the accused person is convicted, and a question of law has been so reserved before judgment, the Court before which he was tried may either pronounce judgment on the conviction and respite execution of the judgment, or postpone the judgment until the question has been considered and decided, and may either commit the person convicted to prison or admit him to bail on recognisance with or without sureties, and in such sum as the Court thinks fit, conditioned to appear at such time and place as the Court directs and to render himself in execution or to receive judgment as the case may be.

(3.) The presiding Judge is thereupon required to state in a case signed by him the question of law so reserved with the special circumstances upon which it arose, and if it be reserved for the High Court the case shall be transmitted to the Principal Registry.

*Hearing.*

**73.** Any question so reserved shall be heard and determined after argument by and on behalf of the Crown and the convicted person or persons if they desire that the question shall be argued, and the Court may –

(a) affirm the judgment given at the trial; or
(b) set aside the verdict and judgment and order a verdict of not guilty or other appropriate verdict to be entered; or
(c) arrest the judgment; or
(d) amend the judgment; or
(e) order a new trial; or
(f) make such other order as justice requires;

or the Court may send the case back to be amended or restated.

*Certain errors not to avoid conviction.*

**75.** A conviction cannot be set aside upon the ground of the improper admission of evidence if it appears to the Court that the evidence was merely of a formal character or not material, nor upon the ground of the improper admission of evidence adduced for the defence.

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GR Cooper, Crown Solicitor
Solicitor for the Intervener