IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

B24 of 2011
No ~~B72~~ of ~~2010~~

BETWEEN **DANIEL ARAN STOTEN**

Appellant

and **THE QUEEN**

Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

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

Part II: Issues

2 Did the giving of a direction to the jury that breached the prohibition in *Robinson v The Queen (No 2)* (1991) 180 CLR 531 constitute a significant denial of procedural fairness as described in *Weiss v The Queen* (2005) 224 CLR 300 at [45]?

3 Given that this was an offence against Commonwealth law, is the proviso in subsec 668E(1A) of the *Criminal Code* (Qld) inconsistent with sec 80 of the *Constitution*? In particular:

(a) does "trial...by jury" mean "a trial free from legal error"? and

(b) does "trial...by jury" necessarily exclude "retrial before the Court of Appeal".

Part III: Section 78B of the *Judiciary Act 1903*

4 Notice pursuant to sec 78B of the *Judiciary Act 1903* (Cth) has been given.

Part IV: Citations

5 *R v Hargraves and Stoten* [2010] QCA 328

Part V: Facts

Introduction

6 The appellant was charged conjointly with Adam Hargraves and Glenn Hargraves with two counts – one of conspiracy to defraud the Commonwealth (subsec 86(2) of the *Crimes Act 1914* (Cth)) between 18th June 1999 and 23rd May 2001, and one of conspiracy to dishonestly cause a loss to the Commonwealth (sec 11.5 and subsec 135.4(3) of the *Criminal*

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Code (Cth)) between 24th May 2001 and 9th June 2005. The separate counts are explained by the commencement of the relevant provisions of the *Criminal Code* (Cth).

7 The appellant and Adam Hargraves made a positive defence that challenged and met the prosecution case with respect to the issue of dishonesty. Both gave evidence. Adam Hargraves also called evidence. Glenn Hargraves did not give or call evidence.

8 When summing the case up to the jury, the learned trial judge told the jury about a "number of techniques" that they could use in assessing credibility. After inviting the jury to "make notes", his Honour {Day 31, pages 75.50-76.01} said:

> Next, interest. Does the witness have an interest in the subject matter of the evidence? For example, friendship, self-protection, protection of the witness's own ego. There are any number of personal interests which people have and which they sometimes try to protect in giving evidence.

9 The appellant's counsel complained about the direction {Day 32 pages 2.10-4.55, 7.20-8.55}. The judge refused to discharge the jury {Day 32 pages 9.05-11.30}

10 On 8 March 2010, a jury acquitted the appellant and Adam Hargraves of count 1, and convicted them on count 2. Glenn Hargraves was acquitted on both charges.

11 On 23 November 2010, the Queensland Court of Appeal dismissed the appellant's appeal against conviction. Muir JA (with whom Fraser JA and Atkinson J agreed) concluded that

> ...the direction breached the prohibition against the giving of a direction, directly or indirectly, to evaluate the reliability of the evidence of an accused on the basis of the accuseds' interest in the outcome of the trial {judgement of the Court of Appeal at [129]}

But that

> it may be doubted that the misdirection gave rise to a miscarriage of justice but, even if it were capable of doing so, this, as is explained below, is an appropriate case for the application of s 668E(1A) of the *Criminal Code 1899* (Qld). {judgement of the Court of Appeal at [130]}

12 In deciding to apply the proviso, the Court of Appeal {Muir JA at [158]-[159]} said that:

> Although the appellants gave evidence of their respective states of mind, there was a wealth of evidence from which their states of mind could be objectively assessed. That evidence demonstrated clearly that the appellants' evidence about their respective states of mind could not be accepted. For the reasons given in relation to the unsafe or

> unsatisfactory grounds, 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 to dishonestly cause a loss to the Commonwealth. The evidence strongly suggested that the appellants had such a state of mind throughout, but the prosecution case after 14 February 2004 was overwhelming.
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> ...
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> ...I have concluded that the accused were proven beyond reasonable doubt to be guilty of the offence the subject of count 2. I am of the opinion that no miscarriage of justice, substantial or otherwise, has actually occurred.

10 **13** It is submitted that the acquittals of each of the appellant and Adam Hargraves on count 1, and those of Glenn Hargraves on both counts reflect the inherent weaknesses in the prosecution case and put the issue of credibility into sharp relief. In this context, the offending direction represented a significant denial of procedural fairness that negated the application of the proviso

The evidence

14 The prosecution case was that in 1999 the appellant ("**DS**") and the Hargraves brothers (Adam "**AH**" and Glenn "**GH**") had embarked upon a scheme to dishonestly avoid the payment of company tax. Together they operated Phone Directories Company Pty Ltd ("**PDC**"), which produced local phone directories for particular localities in Queensland and
20 elsewhere. PDC utilised the services of a Chinese company called QH Data for compilation of data that was then incorporated into its products. The prosecution case was that PDC entered into an arrangement with a Swiss accounting firm known as Strachans whereby QH Data rendered its invoices, not to PDC, but to a British Virgin Islands-incorporated company called Amber Rock Ltd ("**AR**"). AR inflated the amount of the invoice by an amount specified by one of the appellants and forwarded it to PDC. PDC paid the inflated amount to AR, which paid QH Data the amount to which it was entitled, and the balance into trusts, which then made distributions into bank accounts that were operable by debit cards in the names of DS, AH and GH, who were then able to withdraw the funds from automatic teller machines in Australia. PDC claimed a deduction for the inflated amounts in its 2000-2004 tax returns.

30 **15** John Feddema was an experienced accountant who was also AH's uncle by marriage. He had prior experience working for Coopers and Lybrand and had been a partner in an established firm in the Brisbane CBD since 1990. He was PDC's accountant from 1995-1999.

16 In early 1999, Feddema spoke with AH about a way in which company tax could legitimately be minimised utilising an "off-shore" structure. AH had introduced Feddema to a

man who was promoting a scheme that involved Panamanian-registered company and Lithuanian bank accounts. Feddema discouraged AH from pursuing that scheme. He did, however, arrange to put AH in contact with Philip Egglishaw, of Strachans, whom he had met in Brisbane in the early 1990's.

17 By 22 October 1999, AR had been brought into existence, as had the Gabriel and Galaxy Trusts, that were intended for AH and GH respectively. A feature of the trusts was the appointment of a "protector", who had the power to direct the conduct of the trustees. The protector was Philip de Figueiredo, but AH and GH were each given a signed but undated letter of resignation by him that had a blank space for the insertion of the name of a successor protector.

18 DS, who was at that stage only an employee of PDC, drafted an "exclusive procurement agreement" between AR and PDC.

19 On 1 November 1999, AH sent an email to Strachans advising that QH data was about to fax an invoice to AR. He gave an instruction that the amount of USD$100,000 was to be added to that invoice by AR, which was to then forward its invoice to PDC. PDC would then transfer the amount of that invoice to AR, who would pay QH Data by means of a transfer to its bank account and the balance then applied to a security deposit for a gold Visa card for GH.

20 What actually happened was that QH Data sent AR an invoice for USD$6,019.81. AR then sent PDC an invoice for USD$106,019.81. PDC transferred that sum to AR, who paid USD$6109 to QH Data. Investigators later located a bank statement for "Jillette Co Ltd" endorsed "Galaxy TST", which showed a balance at the relevant time of USD$99,783.36.

21 Ultimately, when DS acquired an interest in PDC, the "Dunedin" trust was created specifically for him, and operated in the same way.

22 The scheme resulted in PDC claiming the amount paid to AR as a tax deduction in its returns for the years 2000-2004. The total amount claimed as a deduction over that period was AUD$5,039,267, however the amount paid to QH Data by AR was AUD$108,981. The alleged tax shortfall was AUD$1,339,524.

23 Over the period of the 2000-2005 financial years, AR made the following distributions (AUD$):

- $2.87m to the Gabriel Trust with respect to AH;
- $2.25m to the Galaxy Trust with respect to GH; and
- $1.29m to the Dunedin Trust with respect to DS.

24 Over the same period, cards associated with each of the trusts were used to withdraw the following amounts in cash (AUD$):

- Gabriel/AH: $1.82m;
- Galaxy/GH: $2.25m; and
- Dunedin/DS: $0.87m

25 Investigators located minutes kept by Egglishaw of meetings that he had with some or all of beneficiaries of the scheme. The details of those meetings were:

(a) 4 October 1999 – attended by AH and DS;

(b) 7 April 2000 – attended by GH and DS;

(c) 11 September 2000 – attended by AH, GH and DS;

(d) 15 May 2001 – attended by GH and DS;

(e) 23 November 2001 – attended by AH, GH and DS; and

(f) 3 April 2003 – attended by GS and DS;

14 February 2004

26 On 14 February 2004, Egglishaw was detained by the authorities in Melbourne. According to Feddema, he received a telephone call from AH and DS that morning who asked him what they should do. According to Feddema, he told them that he "didn't have a lot to offer them".

27 A QH Data invoice dated 1 April 2004 located at Strachans' offices in Geneva bears the handwritten notation, "All communication needs to be done by phone only to DS mobile phone. Each of GH and DS then applied for and were issued with a credit card in the name of a foreign national. DS did not commence to use it until mid-2004, and continued to use a card in his own name until November 2004. The prosecution alleged that AH also sought and received a new card, however he did not apply for a new card until February 2005, and when he did, it was in the name of his girlfriend.

28 Having regard to the evidence of apparent concern about Egglishaw's contact with the authorities and the subsequent change in procedure, the trial judge gave the jury this instruction about the available verdicts:

> We would expect that for any one accused the verdict would be the same on each count, whether guilty or not guilty, although there is an exception to that. If you were satisfied beyond reasonable doubt that an accused acted dishonestly after about the 14th of February 2004 when the accused heard of Egglishaw being searched, but were not so satisfied for the period before then, then differential verdicts on the two charges would theoretically be possible.

9 June 2005 and evidence of consciousness of guilt

29 On 9 June 2005, search warrants were executed at the homes of DS, AH, and GH, and also at the premises of PDC. By that stage, the Australian Crime Commission were intercepting telephone calls from a number of handsets. During the course of the search at his home, DS telephoned Feddema to advise him that federal police had raided his home and office. Feddema was already aware of that, and said, "You wouldn't have anything at home though, would you?" When DS told Feddema that, "They got the card", Feddema asked, "How'd they know about that?" and went on to say "But the person's offshore isn't (sic)?"

30 During the course of the execution of the search, DS spoke to one of the police officers. When asked about AR, he described it as "a brokerage company...the ones that source it all for us" and said that it was owned by "a crowd from London". According to the prosecution, he falsely denied any knowledge of the Galaxy, Gabriel or Dunedin Trusts by shaking his head when asked if he had ever heard of them. The prosecution relied upon this as evidence from which a consciousness of guilt could be inferred.

31 During the course of the search DS telephoned GH and asked, "Did they get your card?" GH said that they had not, to which DS said, "Good."

32 A little later, DS rang AH. When AH said that the investigators had not found his credit card, DS replied, "They haven't really got nothin' there then..."

33 Later that morning, DS received a call from Egglishaw who said, "They're fishing now in Australia 'cause they can't get anything from my end." DS replied, "They'll get bits and pieces from us, there's no doubt but they won't get much..." Egglishaw encouraged him to speak to "Galbally" (David Galbally QC).

34 DS also made a series of telephone calls to his brother attempting to arrange to empty a safe deposit box at a nearby bank that was later found to contain $40,000 in cash. That attempt was thwarted when DS saw police waiting outside the bank.

35 On the following day, 10 June 2005, DS spoke to his office manager, who reported that she had found a book that she had thrown out the window the previous day. He told her to "destroy it." In a similar vein, he told another member of staff to "wipe" some data, saying "Anything even remotely connected to any of those names, get rid of it."

Significant aspects of Feddema's evidence

36 The overall effect of Feddema's account was that he had very little to do with the inception and operation of the scheme beyond putting AH in touch with Egglishaw. Cross-examination established the following matters:

(a) As accountant for PDC he had a role as "business advisor". He was intimately involved in the company's "coming and goings" and attended board meetings;

(b) At the time of the inception of the scheme, AH was commercially inexperienced and a relationship based on trust existed between the two of them;

(c) The referral to Strachans was not "high-risk". It was "a referral from one established firm of chartered accountants to another firm of reputable chartered accountants." Unlike that involving Sovereign Capital, any such referral had to be legitimate and legal;

(d) He was never asked to conceal anything, and at no time did he say or even hint that what AH was doing was improper, let alone dishonest.

(e) He believed that he was passing PDC into the "safe hands" of Strachans and Egglishaw, who were – as far as he knew – experts and specialists in the field of offshore tax accounting.

(f) He recommended that AH consider Jersey, a known tax haven, as an appropriate base for an offshore structure, and that Strachans was a firm in which he could have confidence.

(g) He understood, in February 2004, that AH and DS came to him for advice because he was the one who had referred them to him in the first place.

(h) He claimed that when he undertook a valuation of PDC in 2003 he did not know what it was claiming as a deduction in respect of directory listings. That was completely at odds with his statement, in which he said that he knew that the amount of $1,392,582 was claimed in the 2002 tax return when the real cost was only $136,000.97.

(i) When he valued PDC in 2005 for the purposes of advising his niece about a property settlement with AH, he did so in the knowledge that Egglishaw had been intercepted by the authorities and that the company was still using the structure, yet he not only used the same valuation methodology as he had in 2003, but said nothing by way of warning to his niece, to AH or to anybody else.

(j) Feddema became a witness in the proceedings after he was informed by an investigator from the ACC that others had come forward suggesting that he, Feddema, was a promoter "for Egglishaw". Feddema later signed a statement that had been drafted by that investigator without making any changes other than correcting minor grammatical errors. In

that statement, he said that he knew that PDC was claiming a tax deduction for amounts paid to AR, rather than the actual cost charged by QH Data. In his evidence, he claimed that he did not *ever* have knowledge that that was happening. Other than to say he must have been sloppy, he could not explain how such an "error" came to be in his statement;

(k) Although he claimed to have had no dealings with Strachans since 1999, when police searched Feddema's office in June 2005, a Strachan's flyer entitled "The UK for International Trading" was on a table. It referred to such things as "trading from a cosmetically acceptable jurisdiction" and avoiding "trading via black listed tax haven jurisdictions";

(l). He variously could not recall or denied giving detailed advice to AH and then DS about an offshore tax minimisation structure in 1999 at a restaurant called "Zenbar", and denied saying that such an arrangement would not be caught by the then existing domestic tax laws, but that if the ATO discovered the loophole it would be closed;

(m) He denied having sporadic contact with DS in 2000 and 2001 in which the operation of the structure was discussed;

(n) Although he spoke to DS and AH by telephone for what was established to have been 11 minutes 29 seconds on 20th February 2004, after Egglishaw's interception on the 14th, he could not recall what they spoke about.

The defence case

37 GH elected not to give evidence.

38 AH gave evidence, and called evidence from his former wife, who said that when she spoke to Feddema in 2005 about the impending property settlement after her separation from AH, Feddema plainly knew that substantial funds were then held overseas. In 2006, however, when she spoke to Feddema in an attempt to arrange the return of those funds to Australia, he denied knowing Egglishaw and refused to help.

DS's evidence

39 DS first met Feddema in 1997 as Feddema left a board meeting at PDC. AH spoke of Feddema in glowing terms, and DS knew that he had previously worked for Coopers & Lybrand, which impressed him, although the two of them did not have much contact prior to the Zenbar lunch.

40 DS arrived at the Zenbar after AH and Feddema had already eaten. When DS got there, Feddema was drawing diagrams on a napkin and explaining how an overseas structure would work. Feddema emphasised the need to utilise trustworthy accountants, and referred to

Strachans as "bowler-hat boys", who were well established English gentleman-types. Feddema explained how the scheme would be compliant with domestic tax law.

41 Important components of the scheme were that PDC had to effectively surrender control of the money once it left Australia and that the amount claimed as a deduction had to be no more than the domestic equivalent cost.

42 In late 1999, Daniel met with Egglishaw, who was staying in the Brisbane Suite at the Sheraton Hotel. Egglishaw had a butler and a nanny in attendance. "The whole thing was fairly posh...from my point of view." Brochures identical to those later discovered by investigators in the search of Egglishaw's hotel room in Sydney were distributed. DS said he was made to feel fortunate that Strachans were prepared to take on a client that was only the size of PDC.

43 On the issue of "control", DS said that the blank "protector letters" were regarded by him as a means of taking control of the trusts as a last resort or a "nuclear option", as he called it.

44 Secrecy was also important, because if the ATO discovered the loophole they were exploiting, it would be closed. This was expressed to DS by both Feddema and Egglishaw.

45 Given the verdict in relation to count 1, the narrative moves forward and resumes in February 2004.

46 On the morning of 14 February 2004, DS received a call from de Figueiredo advising that Egglishaw had been detained by police in Melbourne. De Figueiredo advised that it related to a Melbourne client, but that he was notifying all Australian clients. DS then rang Adam to tell him. Next, DS rang Feddema and expressed some concerns about the possible effect on PDC. Feddema reassured him and said that he would get further information

47 On 20 February 2004, DS and Adam telephoned Feddema and spoke to him for over 11 minutes. Feddema told them not to worry, that the detention of Egglishaw related to a specific client in Melbourne, and enquired as to the way in which the structure was still being operated. Once told of the details, Feddema said that the structure "stacked up", and that the worst-case scenario was litigation in the Federal Court over deductibility. DS subsequently came up to Brisbane and had lunch with Feddema in a restaurant on the Queen St Mall. He also left that meeting feeling reassured.

48 At about the same time, DS received a further call from de Figueiredo who confirmed that the problem in Melbourne was specific to a particular client.

49 On 23 March 2004, DS left Australia for Geneva. The next day he met with Egglishaw, who explained in some detail what had happened in Melbourne, including the fact

that information had been copied from his laptop that identified PDC and the appellants as clients. Again, however, Egglishaw said that the problem in Melbourne related to a single client involved immigration issues and there would be no consequences for PDC. Egglishaw spent a long time explaining that the structure was sound, but said that he wanted to make some changes which included the issuing of supplementary cards in the names of foreign nationals. This was, he said, to "provide a further level of protection or security". Later, DS chose his brother-in-law, who at that stage lived in America. Egglishaw also said that there would be a change in the method of communication, which thereafter had to be discreet. All instructions were to be communicated by telephone for a period. Given the length of his relationship with Strachans, he believed what he was told.

50 Egglishaw also said that he had taken advice from Mr Galbally QC whom DS understood to be a "tax QC" in Melbourne.

51 Upon his return to Australia, DS had lunch with Feddema at Fix (a restaurant). The lunch involved a detailed discussion of the structure, including the new debit cards. He left that meeting feeling completely at ease.

52 DS went to Geneva again in May 2005. Upon his return on 2 June, he was spoken to by Customs who took his wallet and mobile phone and searched his baggage. When his phone was returned, he noticed that the SIM card had been inserted incorrectly. He did not think that the special attention shown to him had anything to do with his trip to Geneva or the structure.

53 In November of 2004, the ATO conducted an audit of PDC with respect to GST. In particular there was an issue about the absence of a GST component in the AR invoices. As the services were supplied from overseas, there was no taxable supply. During the course of the audit an ATO officer was suspicious about the idea that a Chinese firm could process English language data. However DS explained how it was that Chinese workers could do the work better than people who could speak english.

54 On 9 June 2005, DS arrived home from the gym to find police and ATO officers at his house. Some were in uniform, and a number – both uniformed and plain clothed – were armed. DS had never had any previous dealings with police and found the incident "incredibly overwhelming". He found that and the weeks that followed very difficult.

55 DS embarked upon the exchange with Franklin because he thought the raid may have related to the GST issue that had earlier been discussed with the ATO. He went on to say the things he did because he was in "shock" and "protective-mode". When Franklin mentioned the trusts, "his world caved in". He shook his head, not in denial of any knowledge of the trusts, but in disbelief. The subsequent phone calls were made in a similar frame of mind.

The case against Glenn Hargraves

56 The prosecution relied upon the following matters to establish that GH was guilty

(a) In November 1999, at the scheme's inception, GH had directly telephoned de Figueiredo to enquire about the credit card linked to his trust;

(b) The first card issued was to GH;

(c) In August 2005, in an intercepted telephone call with DS, he spoke of the "cash economy" as a "loophole", and referred specifically to the building industry. In 2002, GH had paid a builder $50,000 in cash in connection with the construction of his home.

(d) In March 2001, in an email to AH, he spoke of a change to the remuneration packages that would involve him getting "extra from Jersey."

(e) In an intercepted telephone conversation with DS on 9 June 2005, they discussed whether the investigators had found his "card".

(f) The discovery of $12,000 cash and a document summarising his profit from the operation of the scheme between 1999 and 17 February 2004.

Part VI: Argument

A significant denial of a trial according to law?

57 The Queensland Court of Appeal's analysis of *Robinson* and subsequent cases {Muir JA at [103]-[129]} resulted in a conclusion that the direction given *had* infringed the principle established in that case.

58 Although the trial judge did not specifically instruct the jury to apply the "technique" to the appellant's evidence, the direction that his Honour gave was of general application and in no way quarantined the appellant's evidence from the impugned approach, which was further emphasised by way of a suggestion that the jury make a note of it and then reinforced visually by means of a PowerPoint slide.

59 Unlike in *Stafford v The Queen* (1993) 67 ALJR 510, where this Court refused special leave to appeal, there was nothing favourable to the appellant about the direction. The direction distracted the jury from their task of assessing the credibility of the appellant's evidence by inviting them to discount it by reason of the fact that he was the accused.

60 The respondent's contention that the direction did not infringe the principle in *Robinson* is unsustainable. The generality of the application of the suggested "technique" is its vice. There was no attempt to limit it to, for example, the evidence of Feddema, whose evidence merited special directions in any event {Day 32 pages 14-16, 18). Further, the seriousness of the erroneous direction is not to be gauged by the strength or otherwise of the prosecution case.

61 In *Robinson*, the direction was described as "seriously impair[ing]" the "fairness of the trial" and having the effect that the "evidence of the appellant had to be scrutinized more carefully than the evidence of any other witness...for no reason other than that he was the accused." The Court then observed that the unfairness of such a direction was "manifest", "particularly when the outcome of the trial inevitably turned upon the jury's preference for the evidence of the complainant against that of the accused" and virtually had the effect of treating the accused as a suspect witness: *Robinson* at 535.

62 The fundamental character of such a misdirection is apparent from the following passages from *Robinson* at 536:

> To hold that, despite the plea of not guilty, any evidence of the accused denying those acts is to be the subject of close scrutiny because of his or her interest in the outcome of the case is to undermine the benefit which that presumption gives to an accused person.
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> ...
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> But to direct a jury that they should evaluate evidence on the basis of the interest of witnesses in the outcome of the case is to strike at the notion of a fair trial for an accused person. Except in the most exceptional case, such a direction inevitably disadvantages the evidence of the accused when it is in conflict with the evidence for the Crown.
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> if...the jury would have understood his Honour's directions as meaning that the evidence of the appellant had to be scrutinized more carefully than that of any other witness, there was a serious misdirection in the summing up which went to the fairness of the trial of the appellant and which undermined the presumption of innocence.

63 Not that the words of this Court in *Robinson* were unclear, but the overwhelming trend of subsequent authority is that intrusion into this area is to be deplored: *R v Asquith* (1994) 72 A Crim R 250 at 255, 259, *The Queen v Haggag* (1998) 101 A Crim R 593 at 598, *Morris v The Queen* (2006) WASCA 142 at [96].

64 This was not the "exceptional case" referred to in *Robinson* {at 536}. The error meets the description of a "fundamental flaw" (*Wilde v The Queen* (1988) 164 CLR 365 at 373), "a serious departure from the essential requirements of the criminal law" (*Quartermaine v the Queen* (1980) 143 CLR 595 at 600-601, *Wilde* at 372), or a "radical error" (*Wilde* at 373), and was a significant denial of procedural fairness that negated the operation of the proviso. The

Court of Appeal's view of the strength of the prosecution case should not have affected its perception of the essential character of this serious error in a case where credibility was the central issue.

65 Even if the strength of the prosecution case is relevant, the acquittal on count 1 makes it difficult to properly assess. In *Dietrich v The Queen* (1992) 177 CLR 292, Mason CJ and McHugh J said at 34-315:

> In our view, the trial judge's failure to adjourn the trial resulted in an unfair trial and deprived the applicant of a real chance of acquittal. Central to this conclusion is the not guilty verdict returned by the jury on count four. The evidence against the applicant appears strong on all counts but, in circumstances where the jury found him not guilty on one count, how can this Court conclude that, even with the benefit of counsel, the applicant did not have any prospect of acquittal on count one, of which he was then deprived by being forced to trial unrepresented.

66 The difficulty with the Court of Appeal's conclusion about the strength of the prosecution is particularly acute given that outcome of the trial depended upon the assessment of credibility. The "appellate judges...had seen no witnesses, heard no evidence and had had no direct contact with the atmosphere, the tensions, the nuances or the reality of the actual trial": *Dietrich* per Deane J at 338.

Section 80 of the Constitution

67 The argument in paras 57-66 above, if accepted, is sufficient to decide the appeal in favour of the appellant without calling for this Court to consider the following constitutional argument. However, the theme of "trial by jury, not trial by judge" found in the 19th century and both English and Australian considerations of the proviso – all before *Weiss*, of course – can be seen in the passages noted below to support the non-Constitutional argument as well. The present case, where the misdirection affected evaluation of the accused's credibility, and that was central to his defence, fits the pattern of cases where the proviso should not be available because the appellate exercise of considering whether the whole record shows proof of guilt beyond reasonable doubt "would substitute trial by judge for trial by jury": per Gibbs J in *Quartermaine* at 601.

68 The question under the *Constitution* is whether, in the prosecution of an offence created by a law of the Commonwealth, the proviso (in this case, Queensland's subsec 668E(1A)) as picked up pursuant to subsec 68(1) of the *Judiciary Act 1903* (Cth), permits the appellate court of a State to decide itself whether, on the record of the trial, "the accused was proved beyond reasonable doubt to be guilty of the offence on which the jury returned its

verdict of guilty" (*Weiss* at [41]), notwithstanding a miscarriage of justice (such as the misdirection in this case). As a matter of text, the question may be recast as an enquiry whether the "trial ... by jury" required by sec 80 for these offences (because they were presented on indictment) has been detracted from, unlawfully, by the subsequent appellate decision that the judges of the Court of Appeal were satisfied beyond reasonable doubt of guilt.

69 In short, sec 80 should be read as a guarantee (among other things) that a verdict of guilty producing a conviction and leading to punishment for an indictable offence against Commonwealth law, may be reached only by a jury. That guarantee will be infringed if a miscarriage (such as the misdirection in this case would produce) is found by an appellate court, which then proceeds purportedly pursuant to the proviso to decide guilt. This is because in such a case the final disposition of the prosecution for the offence, unfavourable to the accused, depends not on the jury verdict but on the decision of the appellate court.

70 This reading accords with the state of affairs in 1900, when the creation and application of statutory criminal appellate jurisdiction was relatively new and had been authoritatively expounded. The statutory position in the Australian colonies before Federation provides some footing to understand whether sec 80 has the effect contended for on the scope of the appellate proviso. (The developments after Federation cannot have the same kind of use in this argument, but does show the continued currency in 1900 of the Exchequer rule in some colonies.)

The Proviso in Queensland at Federation

71 Section 671 of the *Criminal Code 1899* (Qld) (63 Vic No 9, comm 28 November 1899) as originally enacted provided that:

> 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.

72 Sec 668E containing the "common form" proviso was inserted into the *Code* by the *Criminal Law Amendment Act 1913* (Qld) (1913 4 Geo 5 No. 23 ss 3, 9). When the *Code* was reprinted in 1994, the proviso itself was separated from subsec (1) pursuant to the *Reprints Act 1992* (Qld) and became subsec (1A).

73 The proviso as it stood in Queensland at the time of federation would not have saved the appellant's conviction from the consequences of the trial judge's error.

The Other States at Federation

74 In New South Wales, sec 423 the *Criminal Law (Amendment Act) 1883* (NSW) specified that a court hearing a case stated arising out of a criminal trial could not reverse, arrest or avoid a conviction or judgement "unless for some substantial wrong or other miscarriage of justice". The common form proviso was subsequently re-enacted, including in subsection 6(1) of the *Criminal Appeal Act (1912)* (NSW).

75 Section 482 of the *Crimes Act 1890* (Vic) empowered the court to consider questions reserved in criminal trials. It did not contain a proviso in any form. The common form was enacted in subsection 4(1) of the *Criminal Appeal Act 1914* (Vic): *Weiss* at [20]-[21].

76 In South Australia, secs 397 and 398 of the *Criminal Law Consolidation Act 1876* (SA) enabled the reservation and consideration of questions of law in criminal proceedings, but did not contain any proviso. The common form proviso was later enacted in the *Criminal Appeals Act 1912* (SA).

77 In Western Australia *An Act to amend the Criminal Law Procedure 1886* (WA) was to similar effect, with no form of proviso, which was later introduced in the *Criminal Code Amendment Act 1911[No 52 of 1911]* (WA).

78 In Tasmania, the *Criminal Law Procedure Act 1881* (Tas) also concerned the reservation of questions of law, but did not contain any proviso, which was introduced in the *Criminal Code Act 1924* (Tas).

The position in England

79 The Exchequer rule (see *Crease v Barrett* (1835) 1 Cr M&R 919; 149 ER 1353) governed criminal trials in England until the enactment of the *Criminal Appeal Act 1907* (UK): *Weiss* at [13], [16].

A trial free from legal error?

80 The position therefore was that at federation each of the states had a criminal appellate procedure that, like the English model, involved the reservation of questions of law. Only NSW and Queensland had the proviso in any form, and only in NSW was there a need to demonstrate a substantial wrong or miscarriage. This would suggest that what was intended by the use of the words of section 80 is a trial free from legal error.

81 The Queensland 1899 enactment of the more limited proviso was exactly reflected in sec 75 of the *Judiciary Act*. Although sec 75 does not control the appeal in this case, it does provide a plain demonstration of the extent of entrenchment upon the Exchequer rule intended to govern the decision of questions on points of law reserved under Part X Div 3 of the *Judiciary Act*. That would have, perhaps, been anomalous if it was appreciated when the

Constitution came into force that a proviso in the then existing New South Wales form permitted (or even required) so much greater an overturning of the Exchequer rule.

82 In fact, the appreciation of the effect of the New South Wales proviso in 1900 must have been driven by the emphatic statements by the Privy Council in *Makin v Attorney-General for New South Wales* [1894] AC 57. The argument for the Crown in that case contended that the appellate review under the provision containing the proviso was equivalent to that possessed in English civil appeals: at 63. Although obiter, the opinion of the Privy Council on the scope of review permitted under the proviso was expressed because the question was important: at 68. Their Lordships characterized the Crown contention as one that "transfers from the jury to the Court the determination of the question whether the evidence – that is to say, what the law regards as evidence – established the guilt of the accused": at 69. That was rejected as substituting the judges for the jury, was characterized as proposing "a very serious" change of the law and as one that "would gravely affect the much cherished right of trial by jury in criminal cases": at 70. The possibility of credibility affecting the result was at the heart of this reasoning. Deprivation of the verdict of a jury on the facts proved by legal evidence was itself a "substantial wrong": at 70.

83 In 1910, this Court did not regard the matter differently. In *R v Grills* (1910) 11 CLR 400 at 410, this can be seen in the observation by CJ Griffith about the inadvertent admission of irrelevant evidence that "passes without notice and without mischief": at 410. Dissenting on the facts, Isaacs J (at 431) expressly summed up the excessive resort to the proviso (as his Honour saw it) as amounting "to trial by Judges and not by jury", citing *Makin*.

Trial by Court of Appeal

84 In England, similar provisions were from time to time expounded by reference to the impermissible substitution by judges rather than by jury: see Nobles & Schiff Understanding Miscarriages of Justice (2000) at 56-57, esp *Aladesuru* (1955) 39 Cr App R 184 at 185.

85 In *Dietrich* at 338, Deane J elaborated his observation in *Wilde* (at 375) specifically by holding that "a statutory provision which purported to enable the effective substitution of an appellate court's verdict of guilt or obvious guilt would contravene the *Constitution*'s (s80) guarantee of trial by jury". The extent of a permissible Commonwealth proviso should be seen as either in accordance with the formulation following thereafter in Deane J's reasons in *Dietrich*, or in accordance with the limits imposed by sec 75 of the *Judiciary Act*.

Part VII: Legislation

86 The following provisions are relevant to the argument in this case. They appear below in the form they took at the time of the hearings and decisions below. They have not been materially amended since then.

Sec 668E of the *Criminal Code* (Qld):

668E Determination of appeal in ordinary cases

(1) The Court on any such appeal against conviction shall allow the appeal if it is of opinion 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, 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.

(1A) However, 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.

Sec 80 of *The Commonwealth of Australia Constitution Act* (Imp)

Trial by jury

The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.

87 The following provisions relevantly governed criminal appeals at the time of the enactment of the *Constitution*. They form a separate annexure.

Criminal Law Amendment Act 1913 (Qld)

sec 423 of the *Criminal Law Amendment Act 1898* (NSW)

sec 6(1) of the *Criminal Appeal Act (1912)* (NSW).

Section 482 of the *Crimes Act 1890* (Vic)

secs 397 and 398 of the *Criminal Law Consolidation Act 1876* (SA)

Criminal Appeals Act 1912 (SA).

An Act to amend the Criminal Law Procedure 1886 (WA)

Criminal Code Amendment Act 1911[No 52 of 1911] (WA)

Criminal Law Procedure Act 1881 (Tas)

Criminal Code Act 1924 (Tas).

Criminal Appeal Act 1907 (UK)

Part VIII: Orders sought

88 1. Appeal allowed

2. Set aside the order of the Court of Appeal of the Supreme Court of Queensland made on 23rd November 2011 and, in lieu thereof, order that:

(a) the appeal to that court be allowed;

(b) the appellant's conviction be quashed; and

(c) a new trial be held.

10th June 2011

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IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY **No B24 of 2011**

BETWEEN **DANIEL ARAN STOTEN**
Appellant

and **THE QUEEN**
Respondent

Annexure to Appellant's Submissions

Relevant Legislative Provisions

New South Wales

Criminal Law Amendment Act 1898 (NSW)

> 423. The Judge by whom any such question is reserved shall as soon as practicable state a case setting forth the same with the facts and circumstances out of which every such question arose and shall transmit such case to the Judges of the Supreme Court who shall determine the questions and may affirm amend or reverse the judgment given or avoid or arrest the same or may order an entry to be made on the record that the person convicted ought not to have been convicted or may make such other order as justice requires 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.

Criminal Appeal Act 1912 (NSW)

> 6. (1) The court on any such appeal against conviction, shall allow the appeal if it is of 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 other 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 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.

Queensland

Criminal Law Amendment Act (1913) (Qld)

> 9.(1) [668E] 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.

South Australia

Criminal Law Consolidation Act 1876 (SA)

398. The Judge, Court, or Justices by whom such question of law may have been so reserved, shall thereupon state, in a case setting forth the question of law which may have been so reserved, with the special circumstances upon which the same shall have arisen ; and the Judge, Justices, or other person presiding in such Court shall sign and transmit the same within a reasonable time 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 affirm, amend, or reverse my judgment which shall have been given on the information 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 that in the judgment of the said Judges, 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 or sitting of the Court where the question arose, if no judgment shall have been before that time given, or to make such other order as justice may require ; and such judgment and order (if any) of the said Judges, shall be certified under the hand of the presiding Chief Justice or Senior Puisne Judge, to the Clerk of Arraigns, or Associate, or his deputy, who shall enter the same on the original record in proper form; and a certificate of such entry, under the hand of the Clerk of Arraigns, or Associate, or his deputy, in the form, as near as may be, or to the effect mentioned in the next succeeding section of this Act, with the necessary alterations to adapt it to the circumstances of the case, shall be delivered or transmitted by him 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, and also the next Court having jurisdiction shall vacate the recognizance of bail, if any ; and if the Court shall be directed to give judgment, the said Court shall proceed to give judgment accordingly.

Criminal Appeals Act 1912 (SA)

6(1). The Full Court on any such appeal against conviction shall allow the appeal if it thinks 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 judgement of the Court before the which the appellant was convicted should be set aside on the ground of a wrong decision of any question of any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal : Provided that the Full Court may, notwithstanding that it is of opinion that the point raised in 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.

Tasmania

Criminal Law Procedure Act 1881 (Tas)

VIII. The Court by which such question of law may have been so reserved shall thereupon state a Case setting forth the question of questions of law which shall have been so reserved, and with the special circumstances upon which the same shall have arisen ; and the Judge or other person presiding in such Court shall sign and transmit the same within a reasonable time to the Judges of the Supreme Court and the said Judges, whether the person so convicted be present or not, shall have power to hear and finally determine the said question or questions, and thereupon to affirm, amend, or reverse any judgment which shall have been given on the information of the trial whereof such question or questions have arisen, or to avoid such judgment, and to order an entry to be made on the record that in the judgment of the said Judges the party convicted ought not to have been convicted, or to give judgement thereon if the person so convicted be present, or to order judgement to be given thereon at some Session of Gaol Delivery or General Sessions of the Peace, as the case may be, or to direct a *venire de novo* or new trial to be had, or to make such other order as justice may require.

Criminal Code 1924 (Tas)

> 402.(1) On an appeal the Court shall allow the appeal if it is of 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 or order 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 miscarriage of justice, and in any other case shall dismiss the appeal.
>
> (2) The Court may, notwithstanding that it is of the opinion that the point 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.

Victoria

Crimes Act 1890 (Vic)

> 482. The court by which such question of law may have been so reserved shall thereupon state a case setting forth the question or questions of law which shall have been so reserved with the special circumstances upon which the same shall have arisen; and the judge or other person presiding in such court shall sign and transmit the same within a reasonable time to the judges of the said Supreme Court; and the said judges shall have power to hear and finally determine the said question or questions, and thereupon to affirm amend or reverse any judgment which shall have been given on the information on the trial whereof such question or questions have arisen, or to avoid such judgment and to order an entry to be made on the record that in the judgment of the said judges the party convicted ought not to have been convicted, or to order judgment to be given thereon at some other session of gaol delivery or general sessions of the peace if no judgment shall have been before then given, or to direct a *venire de novo* or new trial to be had or to make such other order as justice may require. And such judgment and order (if any) of the said judges shall be certified under the hand of the presiding chief justice or senior of the said judges to the associate or clerk of the peace as the case may be or the deputy of such clerk, who shall enter the same on the original record in proper form; and a certificate of such entry under the hand of such clerk or deputy, in the form as near as may be or to the effect in the Seventh Schedule with the necessary alterations to adapt it to the circumstances of the case, shall be delivered or transmitted by him to the sheriff inspector-general or gaoler in whose custody the person convicted shall be; and the said certificate shall be a sufficient warrant to such sheriff inspector-general or gaoler

and all other persons for the execution of the judgment as the same shall have been so certified to have been affirmed or amended, and execution shall be thereupon executed upon such judgment; and for the discharge of the person convicted from further imprisonment if the judgment shall have been reversed or avoided, and in that case such sheriff inspector-general or gaoler shall forthwith discharge him and also the next court of gaol delivery or general sessions of the peace as the case may be shall vacate the recognisance of bail if any; and if the court of gaol delivery or general sessions of the peace shall be directed to give judgment, the said court shall proceed to give judgment at the next session.

Criminal Appeal Act 1914 (Vic)

4. (1) The Full Court on any such appeal against conviction shall allow the appeal if they think 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 before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice and in any other case shall dismiss the appeal. Provided that the Full Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.

Western Australia

Criminal Procedure Act 1886 (WA)

2. The Judge or Commissioner or Court of General Sessions of the Peace by which such question of law may have been so reserved shall Thereupon state a case setting forth the question or questions of law which shall have been so reserved, with the special circumstances upon which the same shall have arisen, and the Judge or Commissioner or Chairman presiding in such Court shall sign and transmit the same, within a reasonable time, to the Judges of the Supreme Court ; and the said Judges, whether the person so convicted be present or not, shall have full power and authority to hear and finally determine the said question or questions, and thereupon to affirm, amend, or reserve any judgment which shall have been given on the information or inquisition on the trial whereof such question or questions have arisen, or to avoid such judgment and to order an entry to be made on the record that in the judgment of the said Judges, or a majority of them in case there shall be more than two Judges, the party convicted ought not to have been convicted, or to arrest the judgment or to give

judgment thereon if the person so convicted be present, or to order judgment to be given thereon at some other Session of Oyer and Terminer or Gaol Delivery, or General Session of the Peace (as the case may be) if no judgment shall have been before that time given, or to direct a *venire de* novo or new trial to be had, or to make such other order as justice may require.

Criminal Code Amendment Act 1911 [No 52 of 1911] (WA)

669. (1.) The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal, if they think 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 before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:

Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.

England

Criminal Appeal Act 1907 (Imp)

4.-(1) The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think 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 before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal.

Provided that the court may, notwithstanding that they are of opinion that the point raised in the appeal be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.