The High Court's Changing Role in the Administration of Criminal Justice

The Toohey Oration

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It is an honour to be invited to deliver this year's Toohey Oration. The Hon John Toohey AC, QC was not only an eminent jurist, but he was a very fine Australian. One can think of numbers of successful barristers who, like me, started their legal careers working in legal aid agencies. What is singular about John Toohey's curriculum vitae is that at the height of a successful career as a silk he left the bar to set up the inaugural Aboriginal Legal Office in Port Hedland. John Toohey's deep understanding of issues affecting Aboriginal Australians, his work as the first Aboriginal Land Commissioner for the Northern Territory (concurrently with his appointment as a judge of the Federal Court of Australia and the Supreme Court of the Northern Territory) and his contribution to the jurisprudence of the High Court, which included his judgments in *Mabo v Queensland (No 2)*[1] and *Wik Peoples v Queensland*[2], have been comprehensively addressed by distinguished commentators in past orations.

I thought that I would focus this year's Toohey Oration on the High Court's changing view of its role in the administration of criminal justice. The change in large measure took place under the 'Mason Court'. On 6 February 1987, Sir Anthony Mason was sworn in as Chief Justice of the High Court and John Toohey and Mary Gaudron were sworn in as puisne Justices. The newly constituted 'Mason Court' was notably more liberal in the grant of special leave to appeal in criminal cases than had been the practice in the past. Toohey J was a party to many important decisions on

[1] (1992) 175 CLR 1.
[2] (1996) 187 CLR 1.

substantive and adjectival criminal law. Some like *Dietrich v The Queen*[3] and *Ridgeway v The Queen*[4] saw radical development of the law.

My focus tonight is on another decision, equally if not more radical, *Morris v The Queen*[5]. Five months after the change in its composition, the High Court heard argument in *Morris*. Judgment was handed down in November of that year, granting special leave and allowing the appeal. Toohey and Gaudron JJ formed part of the majority together with Mason CJ who two years earlier had taken a very different approach to the disposition of a like application[6]. Dawson J dissented. His Honour was later to attribute the substantial increase in the Court's criminal caseload to the decision in *Morris*[7].

Reading the decision today, *Morris* might seem unremarkable. The majority concluded that Morris' conviction for murder was unreasonable and could not be supported by the evidence. It followed that Morris' conviction was a substantial miscarriage of justice and it was quashed. What made the decision singular was that the High Court for the first time undertook to review the reasons of the intermediate appellate court on an issue that was wholly factual. While the interests of the administration of justice in the particular case were engaged, no wider point of general importance was raised by the appeal. To appreciate the significance of *Morris* it is necessary to trace some matters of history.

For the first 70 years of the Court's life, there were few grants of special leave in criminal cases. This was so notwithstanding that our first Chief Justice, Sir Samuel Griffith, the author of the Criminal Code (Qld), was an acknowledged master of the criminal law. Nonetheless, Sir Samuel considered that, save in exceptional cases, it was not the role of the newly established High Court of Australia to concern itself

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[3] (1992) 177 CLR 292.
[4] (1995) 184 CLR 19.
[5] (1987) 163 CLR 454.
[6] *Liberato v The Queen* (1985) 159 CLR 507.
[7] Dawson, D. *Recent Common Law Developments in Criminal Law* (1991) 15 Crim L J 5.

with the administration of criminal justice. Three years after its establishment, he laid down the Court's approach in this respect[8]:

> "[T]he court is very reluctant to grant special leave to appeal in criminal cases, and will not do so unless some point of general importance is involved, which, if wrongly decided, must seriously interfere with the administration of criminal justice."

At the time of this pronouncement there were limited avenues available to a person convicted on indictment who sought to challenge the verdict. The judge might agree to reserve a point at trial for the consideration of the Full Court of the Supreme Court[9]but there was no general right of appeal from the verdict of a jury.

In 1907, the *Criminal Appeal Act* ("the UK Act") was enacted in the United Kingdom establishing the Court of Criminal Appeal and conferring a right of appeal against conviction on indictment on one, or more, of three, broadly stated, grounds. The Australian jurisdictions, still very much in thrall to the United Kingdom, followed suit. The common law and criminal code jurisdictions enacted provisions in terms that mirrored s 4(1) of the English statute providing that a person convicted on indictment might appeal on the ground that (1) the verdict is unreasonable or cannot be supported having regard to the evidence; (2) a wrong decision of any question of law; and (3) on any other ground whatsoever there was a miscarriage of justice. The common form provision was subject to a proviso; 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.

The conferral of jurisdiction on the Supreme Courts of the States to entertain appeals against convictions on indictment did not see a significant increase in the High Court's work in criminal cases. The Court inclined to the view that the orderly administration of the criminal law was best left to the intermediate appellate courts.

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[8] *Millard v The King* (1906) 3 CLR 827 at 828.
[9] See, for example, *Crimes Act* 1900 (NSW) (as enacted), s 470.

Among other considerations, this reflected the view that a prisoner should have one appeal on questions of fact and law and if this was unsuccessful, save in a rare case possessing wider ramifications for the administration of criminal justice, the law should take its course[10].

Eather v The King was decided not long after the enactment of the *Criminal Appeal Act* 1912 (NSW)[11]. Mr Eather applied for special leave to appeal from the Court of Criminal Appeal's dismissal of his appeal from his conviction for sexual offences against a young child. His case raised an important point concerning corroboration, which at the time was a requirement in the case of a conviction based on the unsworn evidence of a child. The Court of Criminal Appeal had been divided on the question[12] and special leave to appeal was granted to resolve the difference of opinion. On the hearing of the appeal, the prosecution submitted that the issue reduced to one of fact namely whether certain inferences capable of amounting to corroboration were properly drawn by the jury. The submission found favour with the majority. Griffith CJ gave the judgment of the majority stating that the High Court would follow the practice of the Privy Council. The Privy Council had most recently stated its practice in *Arnold v King-Emperor*, namely, that it would not intervene regardless of the illegality or injustice unless "justice in its very foundation has been subverted" [13]. The grant of special leave to appeal was rescinded[14].

Isaacs J wrote a stirring dissent in *Eather*, pointing out that litigants who were dissatisfied with the verdict in civil cases had an appeal as of right if £300 or more was at stake. So, too, did litigants whose status was affected by a law relating to aliens, marriage, divorce, bankruptcy, or insolvency, while in other cases whether civil or criminal the Court had the discretion to grant special leave. Isaacs J could not bring himself to believe that the Commonwealth Parliament intended the High Court to give

[10] Gibbs, H. *The High Court Today* (1983) Syd Law Rev Vol 10, No 1, 1 at 2.
[11] (1914) 19 CLR 409.
[12] *R v Eather* 14 SR (NSW) 280.
[13] [1914] AC 644 at 650.
[14] (1914) 19 CLR 409 at 412.

greater protection to money and property than to liberty and life[15]. His Honour saw no reason to adopt the Privy Council's practice, observing that "our history is different, our functions are different, and our raison d'etre is different". He proposed a test for the grant of special leave to appeal in criminal cases in these terms[16]:

> "In criminal cases we draw no line, consider each case as it comes up on its merits, and say whether broad justice or the due interpretation of the criminal law makes revision proper or not. If it does, revise the decision; if not, refuse to do so".

It was to take more than 70 years before the High Court was to approach applications for special leave in criminal cases conformably with this formulation.

A variety of reasons for the Court's reluctance throughout much of the last century to hear appeals in criminal cases have been posited[17]. They include that until amendments to the *Judiciary Act* 1903(Cth) in 1976 and 1984[18], the Court did not have the control it enjoys today over its workload. Litigants in many civil cases had a right of appeal. And the Court lacked the capacity to remit matters.

It is fair to note that the High Court was not alone taking the view that the apex court generally should not interfere with the administration of the criminal law. Until amendments to the UK Act in 1960, appeals in criminal cases could only be brought in the House of Lords with the Attorney-General's fiat, which was rarely given. Only 23 appeals in criminal cases were heard by the House of Lords between 1907 and 1960[19].

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[15] (1914) 19 CLR 409 at 428.
[16] (1914) 19 CLR 409 at 428.
[17] Refshauge, R. *Criminal Law*, in Blackshield, Coper & Williams eds The Oxford Companion to the High Court (2001) at 173; Kirby, M. *Why Has the High Court Become More Involved in Criminal Appeals*? Address to the New South Wales Bar Association, 29 August 2002; Weinberg, M. *The Jurisprudence of the Court: Criminal Law and the Criminal Process, Moral Blameworthiness – The 'Objective Test' Dilemma*, in Cane, P. ed. Centenary Essays for the High Court of Australia, (2004) at 150.
[18] *Judiciary Amendment Act* 1976 (Cth), *Judiciary Amendment Act* (No 2) 1984 (Cth).
[19] Smith, A.T.H. *Criminal Appeals in the House of Lords* (1984) Vol 47 No 2 Mod Law Rev 133.

It should be observed, that on the occasions when the High Court chose to entertain an appeal in a criminal case, its statement of principle has tended to stand the test of time. In this respect the High Court compares favourably with the House of Lords in the period following relaxation of the criterion for the grant of leave to appeal[20]. Three cases in the early 60s, *Director of Public Prosecutions v Smith*[21], *Shaw v Director of Public Prosecutions*[22] and *Sykes v Director of Public Prosecutions*[23], led academic criminal lawyers of the eminence of Professor Sir John Smith and Professor Glanville Williams to publicly question whether the House of Lords should continue as the final appellate court in criminal cases[24]. None of the three decisions was to remain good law for long[25]. Of the three, the one that came in for the greatest criticism was *Smith,* in which the House of Lords embraced an objective test for proof of the mental element of the crime of murder, holding that the trial judge had been right to instruct the jury that the question was whether a reasonable man would have contemplated that grievous bodily harm was likely to result from the accused's conduct.

A decade before *Smith* was decided, in an appeal which at the time lay directly from the Supreme Court of the Northern Territory, the High Court had deprecated use of the maxim, that a man is presumed to intend the reasonable consequences of his acts, in the determination of criminal liability[26]. The decision in *Smith* proved a bridge too far for the High Court. Famously, in *Parker v The Queen*, with the approval of the other members of the Court, Dixon CJ, stated that while in the past he had thought the High Court should follow decisions of the House of Lords, there were propositions in *Smith* that were misconceived and wrong and which he could never accept. *Smith*, his Honour declared, would not serve as authority in Australia[27]. *Parker*

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[20] Smith, A.T.H. *Criminal Appeals in the House of Lords* (1984) Mod Law Rev Vol 47 No 2 133.
[21] [1961] AC 290.
[22] [1962] AC 220.
[23] [1962] AC 528.
[24] Smith, J.C. [1981] Crim L.R. 392; Williams, G. [1981] Crim L.R. 580.
[25] Section 5 of the *Criminal Law Act* 1967 (UK) effectively overcame the decision in *Sykes; Shaw* was discountenanced in *Director of Public Prosecutions v Withers* [1975] AC 842; section 8 of the *Criminal Justice Act* 1967 (UK) effectively overcame the decision in *Smith*.
[26] *Stapleton v The Queen* (1952) 86 CLR 358 at 365.
[27] *Parker v The Queen* (1963) 111 CLR 610 at 632.

was only one of a number of very fine expositions of the criminal law by Dixon CJ. Equally, one can point to fine decisions in criminal appeals decided by the Barwick and Gibbs courts. It remains, that it was not until the change in the composition of the Court in 1987 that criminal appeals came to form a regular part of the diet of the High Court.

This is not to suggest that the High Court had adhered to the highly restrictive Privy Council practice referenced in *Eather v The King.* A case like *Davies and Cody v The King*[28], decided in 1938, laid down important principles with respect to the identification of suspects by civilian witnesses but it is a stretch to characterise the grant of special leave in that case as having been required to prevent justice being 'subverted in its very foundations'. One can instance numbers of decisions in criminal cases on questions of substantive and adjectival law which would not meet the *Arnold v King-Emperor* criterion. Special leave was granted in criminal cases to decide questions of law, the second ground of appeal under the common form provision, and in instances in which there was miscarriage of justice such as the failure to give a judicial warning or some other irregularity, the third ground under the common form provision. However, cases brought under the first ground, that the verdict was unreasonable when considered in light of the evidence, were a different matter. For many years the Court's attitude to such applications remained as stated in *Ross v The King*[29]:

> "If throughout Australia it were to be supposed that the course and execution of justice could suffer serious impediment, which in many cases might amount to practical obstruction, by appeal to this Court, then it becomes plain that a severe blow would have been dealt to the ordered administration of law within the several States".

In 1922, Colin Campbell Ross, a young man of 29, the proprietor of a wine bar located in an arcade between Bourke and Little Collins Streets in Melbourne was

[28] (1937) 57 CLR 170.
[29] (1922) 30 CLR 246 at 251.

convicted of the murder of a 12-year-old girl, Alma Tirtschke. Alma's naked body was found in Gun Alley, a lane running off little Collins Street. It appeared that she had been raped. The prosecution case against Ross consisted of the testimony of witnesses of dubious repute to whom he was alleged to have confessed to the murder. They had received generous sustenance and reward monies for their assistance to the authorities. The Government Analyst, a chemist, gave evidence that hairs found on a blanket in a cubicle at the wine bar were indistinguishable from Alma's hair. Ross gave evidence and maintained his innocence. The jury returned a verdict of guilty, and Ross was sentenced to death. He sought leave to appeal to the Full Court of the Supreme Court of Victoria on grounds which included that the verdict was against evidence and the weight of the evidence. The Full Court rejected this ground for reasons which today would be considered peremptory. Irvine CJ said[30]:

> "[T]here was an abundance of evidence, if the jury believed it, as the jury apparently did believe it, to support their finding, and we need add nothing more upon that point".

T C Brennan, junior counsel at the trial, made an unsuccessful application for special leave to appeal. In the High Court, the majority's reasons echoed Irvine CJ's conclusion that there had been abundant evidence, if the jury chose to believe it, to sustain the verdict of guilt. Their Honours continued[31]:

> "[W]e desire to add that if there be evidence on which reasonable men could find a verdict of guilty, the determination of the guilt or innocence of the prisoner is a matter for the jury and for them alone, and with their decision based on such evidence no Court or Judge has any right or power to interfere. It is of the highest importance that the grave responsibility which rests on jurors in this respect should be thoroughly understood and always maintained".

Isaacs J was again in dissent, although not in rejecting the ground that the verdict was unreasonable. Of this ground he said "however tainted and discrepant and

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[30] *R v Ross* [1922] VLR 329 at 333.
[31] (1922) 30 CLR 246 at 255-6.

improbable any of the facts relied on by the Crown might be, that was a matter for the jury alone"[32].

Colin Campbell Ross was duly executed.

It came to be recognised that a court of criminal appeal might allow an appeal on the first ground under the common form provision, that the verdict is unreasonable or cannot be supported having regard to the evidence, notwithstanding that there was *some* evidence of each element of the offence and that there had not been any legal error in the conduct of the trial[33]. It was common to describe a verdict in such a case as "unsafe and unsatisfactory", even thought this language is not found in the common form provision. Where the High Court drew the line was in reviewing the intermediate appellate court's assessment of the safety of a verdict. Inevitably, the significance of applications brought under the first ground of appeal did not rise higher than their own facts. While the return of an unreasonable verdict of guilty is a substantial miscarriage of justice, the High Court did not consider that special leave to appeal was warranted to review the intermediate appellate court's conclusion of a factual question.

A singular illustration of the firmness with which the High Court held to this view is *Raspor v The Queen*[34]. Special leave was sought to appeal from the judgment of the Victorian Court of Criminal Appeal dismissing an appeal on the ground that the verdict was unreasonable. In joint reasons, Dixon CJ, Fullagar and Taylor JJ, acknowledged that there were features of the application to the intermediate appellate court that were "unusual"[35]. At the close of the prosecution case the trial judge, the chairman of general sessions, advised the jury to acquit telling them that the case depended entirely on evidence of unreliable identification. The jury rejected this advice and returned a verdict of guilty. Nonetheless, the High Court said it was not a

[32] (1922) 30 CLR 246 at 262.
[33] See *Whitehorn v The Queen* (1983) 152 CLR 657.
[34] (1958) 99 CLR 346.
[35] (1958) 99 CLR 346 at 348.

case in which special leave to appeal could properly be granted. The decision of the intermediate appellate court did not disclose legal error, nothing but a question of fact was involved[36], and it followed that the High Court "should not interfere"[37].

So, too, special leave was refused in the rather better-known case of *Plomp v The Queen*[38]. Mr Plomp and Mrs Plomp went swimming in the surf at Southport and only Mr Plomp returned. The prosecution's circumstantial case at Mr Plomp's trial for his wife's murder relied heavily on evidence of motive. Mr Plomp had promised to marry another woman to whom he had represented himself as a widower. In passing, Dixon CJ observed that, had the Queensland Court of Criminal Appeal thought that it was dangerous to convict Mr Plomp, it would have been within its province to interfere[39]. Implicit in this observation was the view that it was not within the High Court's province to concern itself with whether the intermediate court had in fact considered the safety of the verdict. Menzies J observed that the 'unreasonable verdict' ground is not intended to be "a substitute for trial by 12 persons who have seen and heard the evidence for trial by three judges who have not"[40]. His Honour was not alone among appellate judges in expressing this latter concern. It remains that the 'unreasonable verdict' ground necessarily invites consideration of whether, in light of the whole the evidence at trial, the jury did get it wrong.

Barwick CJ was not troubled by suggestions of the court usurping the role of the jury. In *Ratten v The Queen*[41] the Court granted special leave to appeal to settle the test to be applied by the intermediate appellate court on an appeal based on fresh evidence. Barwick CJ said that there will be a miscarriage of justice if the court of criminal appeal is of the opinion that there exists such a doubt as to guilt that the verdict should not be allowed to stand. Importantly, his Honour said that it is the doubt in the mind of the court that is the operative factor and that "[i]t is of no

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[36] (1958) 99 CLR 346 at 350.
[37] (1958) 99 CLR 346 at 352.
[38] (1963) 110 CLR 234.
[39] (1963) 110 CLR 234 at 244.
[40] (1963) 110 CLR 234 at 245.
[41] (1974) 131 CLR 510.

practical consequence whether this is expressed as a doubt entertained by the court itself, or as a doubt which the court decides a reasonable jury ought to entertain"[42]. These statements were controversial. Dawson J (in reasons with which Gibbs CJ and Brennan J agreed) thought it was conceivable that a court of appeal might entertain the possibility of a doubt itself and yet properly conclude that the jury might reasonably have reached a conclusion of guilt[43]. His Honour had in mind cases which turn on questions of credibility, which the appellate court cannot assess. His Honour's views were adopted by Gibbs CJ and Mason J in *Chamberlain v The Queen [No 2]* [44].

The High Court granted special leave in *Chamberlain* in circumstances in which the Full Court of the Federal Court had taken the view that it did not have the power under its statute to entertain a ground that the verdict was unsafe, unsatisfactory, or dangerous. The Full Court was found to have taken to narrow a view of its powers in this respect. The High Court made clear it was the duty of the court of criminal appeal to make an independent assessment of the evidence but, again, the emphasis was on the concern that the appellate court does not usurp the function of the jury and disturb the verdict simply because it disagreed with it.

Deane J, in dissent in *Chamberlain [No 2]*, considered that it is foolish to deny that a jury may be prejudiced, perverse or wrong[45]. His Honour was insistent that there is no principle which requires a jury's verdict of guilt to be treated as beyond examination by an appellate court and no principle which precludes an appellate court from holding that there has been a miscarriage of justice if a person has been convicted on evidence, which in the opinion of the appellate court, fails to establish guilt beyond reasonable doubt[46].

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[42] (1974) 131 CLR 510 at 516.
[43] *Whitehorn v The Queen* (1983) 152 CLR 657 at 687.
[44] (1984) 153 CLR 521 at 532-3.
[45] (1984) 153 CLR 521 at 617.
[46] (1984) 153 CLR 521 at 621.

The restrictive approach to the grant of special leave to review whether the evidence lacked the capacity to establish guilt to the criminal standard remained the prevailing orthodoxy in the mid-1980s when special leave was refused in *Liberato v The Queen*[47]. *Liberato* is much favoured by defence counsel in cases which turn on a conflict between the evidence of a prosecution witness and that of the defence, for Brennan J's formulation of the "*Liberato* direction"[48]. What is often forgotten is that Brennan J's judgment in *Liberato* was a dissent. Liberato appealed against conviction to the South Australian Court of Criminal Appeal, which found that there were legal errors in the trial judge's summing-up but that despite these defects no substantial miscarriage of justice had actually occurred. The appeal was dismissed under the proviso. In refusing special leave to appeal to the High Court, Mason, Wilson, and Dawson JJ, held that Liberato's application reduced to the contention that it had not been open to find that there had not been a substantial miscarriage of justice. Their Honours held that it would not accord with settled practice to grant special leave to appeal in a case in which the High Court was merely being asked to substitute a different view for the view taken by the court of criminal appeal[49]. They referenced s35A of the *Judiciary Act* 1903. This provision had been enacted the previous year together with amendments to the Judiciary Act designed to further relieve the High Court of parts of its workload[50]. Section 35A is a statutory statement of the criteria to be applied in determining applications for special leave to appeal. Subparagraph (b) of s 35A provides that in considering whether to grant special leave the High Court shall have regard to whether *the interests of the administration of justice, either generally or in the particular case*, (emphasis added) require consideration by the High Court of the judgment to which the application relates. There was no suggestion that s 35A(b) served to widen the existing criteria for the grant of special leave.

Just two years after *Liberato,* the newly constituted "Mason Court" took a strikingly different view of 'the interests of the administration of justice in the

[47] (1985) 159 CLR 507.
[48] (1985) 159 CLR 507 at 515.
[49] (1985) 159 CLR 507 at 508.
[50] *Judiciary Amendment Act (No 2)* 1984 (Cth).

particular case' in *Morris v The Queen*[51]. Morris was convicted of the murder of two men with whom he was acquainted. All three were alcoholics living in the St Vincent de Paul Hostel in South Brisbane. The two deceased had been drinking methylated spirits in a laneway near the hostel together with two other men. A witness saw one of the four pouring liquid over one of the others and shortly after she saw that two of the men were alight. The critical prosecution witness was the hostel's welfare officer to whom Morris made admissions on the morning of this tragedy. Expert evidence established that Morris had alcohol induced frontal lobe damage, which might lead him to confabulate. By the time of the trial, Morris had been in custody for some months and had recovered functioning to the extent that he been able to give coherent evidence denying the commission of the offence. He was convicted and he applied for leave to appeal to the Court of Criminal Appeal of Queensland on the ground that the verdict was unreasonable.

The Court of Criminal Appeal reviewed the evidence and found that the evidence of the welfare officer sufficed to support the jury's conclusion of guilt. The Court of Criminal Appeal referenced the expert evidence concerning the possibility of confabulation and the link between this evidence and the reliability of Morris' confessional statement. Nonetheless, the Court of Criminal Appeal considered that the jury might reasonably have convicted on the evidence. The application was dismissed. Morris applied for special leave to appeal on the ground that the Court of Criminal Appeal erred in not finding that the verdicts were unreasonable. An informed High Court watcher, aware of the Court's decisions in *Ross, Raspor* and *Liberato* might have assessed Morris' application as hopeless.

The Hon Michael McHugh AC, KC has suggested that no one reading the Commonwealth Law Reports over the years that Sir Anthony Mason was a member of the Court could miss the change in his approach to judging. McHugh was speaking of the shift from Sir Anthony's early disavowal of any role for judicial law reform[52], to

[51] (1987) 163 CLR 454.
[52] *State Government Insurance Office v Trigwell* (1979) 142 CLR 617 at 633.

his work as Chief Justice when he was a party to many judgments making dramatic changes to the common law[53]. The observation is apt to *Morris*. Mason CJ, who had been in the majority in *Liberato,* held in *Morris* that special leave to appeal should be granted to consider whether the Court of Criminal Appeal had performed its duty of making an independent assessment of the evidence[54]. His Honour closely examined the whole of the evidence and concluded that a reasonable jury could not have been satisfied beyond reasonable doubt that the admission was reliable. It followed that the jury could not have been satisfied to the requisite standard of Morris' guilt[55].

Deane J, who had been in dissent in *Chamberlain* and *Liberato,* now found allies in Toohey and Gaudron JJ. In joint reasons, Deane, Toohey and Gaudron JJ were content to adopt the rationale that the special leave point was the failure of the Court of Criminal Appeal to make an independent assessment of the reliability of the admission. Pointedly, however, their Honours flagged the future reconsideration of *Liberato*[56].

The majority's attempt in *Morris* to say, "nothing to see here", and to identify as a question of general importance whether the intermediate appellate court had done its job should not disguise the 180 degree turn which the Court was taking. The clear burden of a long line of authority was that a person convicted on indictment had one avenue to challenge the conviction on matters of fact and it was not the function of the High Court to review the sufficiency of the intermediate appellate court's assessment of the strength of that challenge. In his dissenting reasons, Dawson J referred to this line of authority and bluntly, but accurately, summed up the application stating that "[t]his case is no different and turns on nothing but a question of fact"[57].

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[53] McHugh, M. *The Constitutional Jurisprudence of the High Court 1989 – 2004* (2008) Vol 30 No 1 Syd Law Rev 5.
[54] (1987) 163 CLR 454 at 462.
[55] (1987) 163 CLR 454 at 465.
[56] (1987) 163 CLR 454 at 474.
[57] (1987) 163 CLR 454 at 476.

Three years later, Sir Daryl Dawson, still troubled by *Morris*, addressed the Third International Criminal Law Congress. He said it was undeniable that *Morris* had encouraged the profession to apply for special leave to appeal in order to dispute the rejection by the court of criminal appeal of any submission that the verdict of the jury was unsafe and unsatisfactory. Predictably, he said, it had become a standard ground in applications for special leave to allege that the court of criminal appeal failed to make an independent assessment of the evidence[58]. Sir Daryl noted that before the 1970s the annual number of special leave applications in criminal cases was usually in single figures. In 1972, there were only three such application of which two were granted and one was refused. In 1990, the figure had grown to about 90 applications and was rising. He warned that there was a danger of a disproportionate amount of the Court's time being spent on criminal cases[59]. Given the limited number of cases the Court can hear each year, Sir Daryl reiterated his statement in *Morris* that the High Court should place greater emphasis on its public role in the evolution of the law than upon the private rights of the litigants before it[60]. He pronounced himself "unrepentant" about the views he had expressed in *Morris*[61].

Three years later again, at the Fourth International Criminal Law Congress, Sir Anthony Mason, while not referring to *Morris* by name, acknowledged that there had been an increase in the number of appeals brought on the ground that the verdict was unsafe[62]. Sir Anthony went on to speak of the inherent tension between two compelling considerations in these cases. First, the need to determine whether there is a significant possibility that an innocent person has been convicted and, secondly, the long-standing view that an appellate court should not substitute its opinion for the verdict of the jury. Perhaps signalling the reason for the shift in his thinking from *Liberato* to *Morris*, Sir Anthony observed that the then recent disclosure of the grave

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[58] Dawson, D. *Recent Common Law Developments in Criminal Law*, (1991) 15 Crim LJ 5 at 6-7.
[59] Dawson, D. *Recent Common Law Developments in Criminal Law*, (1991) 15 Crim LJ 5.
[60] Dawson, D. *Recent Common Law Developments in Criminal Law*, (1991) 15 Crim LJ 5 at 6 and see *Morris* at 475.
[61] Dawson, D. *Recent Common Law Developments in Criminal Law*, (1991) 15 Crim LJ 5 at 6.
[62] Mason, A. *Opening Remarks, Fourth International Criminal Law Congress* (1993) 17 Crim L J 5.

miscarriages of justice in England, known as the "Guildford Four" and the "Birmingham Six", serve to demonstrate that mistakes can be made in reconciling the two[63].

While *Morris* heralded a changed approach to the grant of special leave in the interests of the administration of criminal justice in the particular case[64], there remained some controversy about the test to be applied to the determination of whether a verdict is unreasonable. In *Chidiac v The Queen* Dawson and Toohey JJ were at odds about the width of the statement of the test in *Morris*[65]. The issue was resolved in *M v The Queen* [66]with an authoritative statement of the test in the joint reasons of Mason CJ, Deane, Dawson and Toohey JJ:

> "Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty. But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations."

A lingering suggestion that there might be some distinction between asking whether a reasonable jury would or should or must have had a reasonable doubt and whether having regard to the probative evidence it was open to the jury to be satisfied of guilt[67] was given its quietus in *Pell v The Queen*[68]. In a unanimous judgment, the Court acknowledged that to say that a jury "must have had a doubt" is another way of

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[63] Mason, A. *Opening Remarks, Fourth International Criminal Law Congress* (1993) 17 Crim L J 5.

[64] And see, discussion of the 'interests of the administration of justice… in the particular case' in the joint reasons of Toohey and Gaudron JJ in *Radenkovic v The Queen* (1990) 170 CLR 623.

[65] (1991) 171 CLR 432 at 452 per Dawson J; 457-8 per Toohey J.

[66] (1994) 181 CLR 487 at 493.

[67] See the dissenting reasons of McHugh J in *M v The Queen* (1994) 181 CLR 487 at 525.

[68] (2020) 268 CLR 123.

saying that it was "not reasonably open" to the jury to be satisfied of guilt beyond reasonable doubt[69].

In *Pell,* and less well-known cases[70], the Court has granted special leave to consider whether a verdict of guilty is unreasonable, because the interests of the administration of justice in the particular case require it. Unless one subscribes to the notion that the jury is infallible, the concern lest the appellate court usurp the jury's role is misconceived, as the Court sought to explain in *Pell*.

It has become common to record the evidence of witnesses given at a criminal trial. In such cases it would be possible for the appellate court, reviewing the evidence, to enjoy the same advantage as the jury in seeing and hearing the witnesses. In *Pell,* that is what the Victorian Court of Appeal did. The Court of Appeal viewed the recording of the complainant's evidence, and the majority assessed him as a compellingly credible witness. The dissentient formed a different impression. The High Court did not view the recording and cautioned appellate courts against doing so because assessment of the credibility of witnesses is quintessentially a jury function. Jurors are expected to share their subjective views in this respect in the course of their deliberations. It is not the role of the appellate court to make its own assessment of the credibility of witnesses in deciding whether the verdict is reasonable. In a case in which the evidence of the complainant is central to the prosecution case, the court proceeds upon the assumption that the evidence was accepted by the jury as credible. The court is concerned to determine whether notwithstanding that assessment, given inconsistencies or other inadequacies in that evidence, or in light of other evidence, a jury acting rationally ought nonetheless to have entertained a reasonable doubt as to guilt[71].

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[69] (2020) 268 CLR 123 at 147 [45].
[70] *Coughlan v The Queen* (2020) 267 CLR 654; *Fennell v The Queen* (2019) 93 ALJR 1219.
[71] (2020) 268 CLR 123 at 145 [39].

In *Pell* there was unchallenged evidence from a number of witnesses as to Archbishop Pell's movements following Sunday solemn Mass and as to the traffic to and from the sacristy in the period following Mass. This body of undisputed evidence was not susceptible being satisfactorily reconciled with the complainant's account of the commission of the offences. The Court was unanimous in concluding that there was a significant possibility that an innocent person had been convicted[72].

In my experience, lawyers who have worked with juries on either of the record, and judges who have presided over jury trials, have a uniformly high regard for the jury system. Nonetheless, I agree with Deane J that it is foolish to suggest that juries can never get it wrong or that juries may not be prejudiced in cases involving strong public sentiment. In 1922, the murder of Alma Tirtschke attracted enormous public sympathy and the arrest of Colin Campbell Ross was accompanied by unprecedented publicity much of which depicted him in a very bad light. In 2007, 85 years after his execution, a petition was presented to the Attorney-General of Victoria by members of the families of Colin Campbell Ross and Alma Tirtschke asking for the exercise of the Royal prerogative of mercy. The petition was referred for the advice of three judges of the Supreme Court of Victoria[73]. The petition was supported by new evidence, comprising expert evidence that the hairs found on the blanket could not have come from Alma and further evidence of the bad character of one of the witnesses who had testified that Ross had confessed to the murder. The judges concluded that there had been a miscarriage of justice and so advised the Attorney-General. In May 2008, Colin Campbell Ross received a posthumous pardon.

Of course, as the Victorian judges made clear, they were not purporting to review the decision of the High Court[74]. Their advice was based on the new evidence. Nonetheless, it appears that T C Brennan's submission, that the jury's verdict was unreasonable in light of the evidence at the trial, had merit had the High Court been

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[72] (2020) 268 CLR 123 at 137 [9] and 165 [119].
[73] Joint Opinion *In the matter of Colin Campbell Ross* [2007] VSC 572.
[74] Joint Opinion *In the matter of Colin Campbell Ross* [2007] VSC 572 at [11].

prepared to entertain it. Shortly after Ross' execution, Brennan wrote a book about the case[75]. In the introduction, he explained consistently with the law at the time, that the courts did not interfere with a jury's verdict if there was *any* evidence to support it. He said that the purpose of his book was not to show that the appellate courts were wrong but rather to show that the jury was wrong. Thanks to Project Gutenberg, the book can be freely downloaded, and it suffices to say Brennan made a powerful case that the evidence at the trial lacked the capacity to prove Ross' guilt beyond reasonable doubt.

The grant of the posthumous pardon adds poignancy to the account of Ross' execution. After the noose was placed around his neck, he was asked whether he had anything to say before the sentence of death was carried out. He is recorded to have stated[76]:

> "I am now face to face with my Maker, and I swear by Almighty God that I am an innocent man. I never saw the child. I never committed the crime, and I don't know who did. I never confessed to anyone. I ask God to forgive those who have sworn my life away, and I pray God to have mercy on my poor darling mother, and my family".

By the time *Morris* was decided, happily substantial miscarriages of justice were no longer attended by such final consequences. Nonetheless, it goes without saying that it is a grave affront to the administration of criminal justice for a person to be wrongly convicted of a serious offence. The recognition by Mason CJ and Deane, Toohey and Gaudron JJ in *Morris* that it is within the High Court's remit to review the work of the courts of criminal appeal deciding purely factual challenges to verdicts of guilt was an important milestone. Knowledge that the High Court may grant special leave to appeal in a case in which the intermediate appellate court's examination of the sufficiency of the evidence to support conviction is cursory is apt to serve as a useful corrective [77]. John Toohey was a party to more memorable decisions in

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[75] Brennan, T.C. *The Gun Alley Tragedy*, (1922, Gordon & Gotch, Melbourne), Project Gutenberg eBook.
[76] Morgan, K. *Gun Alley: Murder, Lies and Failure of Justice*, Ch 31.
[77] See *SKA v The Queen* (2011) 243 CLR 400.

criminal cases but none to my mind rival *Morris* for its salutary impact on the health of the administration of criminal justice throughout the Australian jurisdictions.

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