

'MISCARRIAGE OF JUSTICE' UNDER THE CRIMINAL APPEAL ACT 1912

INTRODUCTION

1. In *Lee v R; Lee v R* (2014) 308 ALR 252 the High Court, by a unanimous decision, held that a miscarriage of justice had been occasioned due to an irregularity in the system of criminal justice. Specifically, the Court found that a miscarriage of justice had occurred in circumstances where the prosecution, illegally, had possession of the appellants' compulsory interviews, conducted before the NSW Crime Commission.
2. At [43]-[51] French CJ, Crennan, Kiefel, Bell and Keane JJ said:

"[43].....This is a case concerning the very nature of a criminal trial and its requirements in our system of criminal justice. The appellant's trial was altered in a fundamental respect by the prosecution having the appellants' evidence before the commission in its possession.

[44] The prosecution has a specific role in our system of criminal justice, one which entails particular responsibilities. ...It is the prosecution which has the responsibility of ensuring its case is presented properly and with fairness to the accused. It is therefore more to the point that the prosecution's possession of the appellants' evidence before the commission put at risk the prospect of a fair trial, which s13(9) sought to protect.

.....

[46]It is a breach of the principle of the common law, and a departure in a fundamental respect from a criminal trial which the system of criminal justice requires an accused person to have, for the prosecution to be armed with the evidence of an accused person obtained under compulsion concerning matters the subject of the charges. It cannot be said that the appellants had a trial for which our system of criminal justice provides and which s 13(9) of the NSWCC Act sought to protect. Rather, their trial was one where the balance of power shifted to the prosecution.

.....

[51] It is not necessary to resort to questions of policy to determine whether a miscarriage of justice has occurred. What occurred in this case affected this criminal trial in a fundamental respect, because it altered the position of the prosecution vis-à-vis the accused."

3. This article briefly looks at how this notion of 'miscarriage of justice' has been considered by the High Court. The starting point is the language of section 6(1) of the *Criminal Appeal Act 1912*, followed by an examination of that particular species of miscarriage of justice which concerns a failure of process and extends beyond acts and omissions in the course of a criminal trial.

MISCARRIAGE OF JUSTICE LIMB OF APPEAL

4. In order for an applicant to successfully appeal against conviction in the Court of Criminal Appeal, it is essential to meet one of the criteria set out under section 6(1) of the *Criminal Appeal Act*. That sub-section provides:

"6 Determination of appeals in ordinary cases

(1) The court on any appeal under section 5 (1) 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."

5. It can be seen that there are essentially 3 limbs of appeal; an unreasonable verdict, an error of law and where a miscarriage of justice has occurred. The caveat in sub-

section 6(1), known as the proviso, provides that even if the points raised in the appeal are successful, the Court retains discretion to dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred. The onus is cast on the respondent to establish that no substantial miscarriage of justice has occurred: see *Baini v The Queen* (2012) 246 CLR 469 per the plurality at [22], *TKWJ v The Queen* (2002) 193 ALR 7 per McHugh J at [63], *Mraz v The Queen* (1955) 93 CLR 493 per Fullagher J at 514, *KBT v R* (1997) 191 CLR 417 per the plurality at [7].

6. What constitutes a miscarriage of justice is not neatly defined. Nor are the categories of miscarriage of justice closed. One species of miscarriage of justice concerns a failure of process or a fundamental defect in the system of criminal justice. In *Lee* the Court accepted that a miscarriage of justice had been occasioned by the inversion of the accusatorial process, which departed from the essential requirements of a fair trial. This species of miscarriage of justice is well recognised in the authorities: see *Nudd v The Queen* (2006) 225 ALR 161 per Gleeson CJ at [3]-[7], per Gummow and Hayne JJ at [24], per Kirby J at [85],[86], *Cesan v The Queen* (2008) 236 CLR 358 per French CJ at [64]-[67], *Patel v The Queen* (2012) 290 ALR 189 per the plurality at [114], *TKWJ* per McHugh J at [72],[73].
7. Relatedly, the High Court has repeatedly held that it is inapposite to apply the proviso where the miscarriage of justice involves a failure of process: see *Nudd* per Gleeson CJ at [6], Kirby J at [100], *Cesan* per French CJ at [78]-[89], *Patel* per the plurality at [125]-[128], Heydon J at [260], *Wilde v R* (1988) 164 CLR 365 per the plurality at [10], Deane J at [2], *AK v The State of Western Australia* (2008) 232 CLR

438 per Gleeson CJ and Kiefel J at [23], Gummow J and Hayne J at [54], *Baiada Poultry Pty Ltd v The Queen* (2012) 286 ALR 421 per the plurality at [21]-[29], *Grey v R* (2001) 184 CLR 593 per Kirby J at [53].

8. The effect of the above is that where an applicant can point to an irregularity such as to constitute a fundamental defect in the system of criminal justice, it may be said that a miscarriage of justice has taken place and for which it is inapposite to apply the proviso.

A FEW EXAMPLES OF THIS SPECIES OF MISCARRIAGE OF JUSTICE

9. A consideration of the authorities reveals that cases invoking this species of miscarriage of justice involve defects in the course of a trial as well as acts or omissions not limited to the record of trial.
10. In *Grey v R* the issue for the High Court was whether a criminal trial miscarried because the accused was not provided with a copy of a letter of comfort which had been given by an investigating police officer to a person who had had an involvement in the events giving rise to the charges against the appellant and was a key prosecution witness against him at trial (at [1]). The plurality found that there had been a miscarriage of justice as there was no reason why the defence in a criminal trial should be obliged to fossick for information of this kind and to which it was entitled (at [23]). The plurality declined to apply the proviso holding that the respondent was bound to facilitate a fair process by providing to the appellant all materials to which he was entitled to have access (at [26]).

11. In *Penney v R* (1998) 155 ALR 605 one of the issues to be decided was whether unfairness and incompetence in the process of investigation by the police into a charge of attempted murder was productive of a miscarriage of justice under s 353 of the *Criminal Law Consolidation Act 1953* (SA), entitling the appellant to an acquittal or retrial (at [14]). Dismissing the appeal, Callinan J, with whom McHugh, Gummow, Kirby and Hayne JJ agreed, found that the appellant's contentions failed on the facts however importantly stated that there may be cases in which deficiencies in the investigation might be of such significance to a particular case as a whole that the accused will be entitled to an acquittal or a retrial (at [18]). In considering whether deficiencies in an investigation may amount to a miscarriage of justice, Callinan J in *Penney* explicitly referred to the observations of Mason CJ in *Jago v District Court of New South Wales* (1989) 168 CLR 23 as contemplating that very possibility (at [18]-[20]).
12. In *Patel v The Queen* the Court considered whether a miscarriage of justice had occurred in circumstances where the Crown reformulated its case against the appellant on day 43 of a 58 day trial, rendering much of the evidence already lead against the appellant irrelevant and prejudicial. Referring to the fairness of the process (at [114]) French CJ, Hayne, Kiefel, Bell JJ found that a miscarriage of justice had occurred and relying on *Wilde v The Queen*, accepted that errors of this kind may be so fundamental that by their very nature exclude the application of the proviso (at [125]). Heydon J appeared to agree with this proposition (at [260]).

13. In *AK v State of Western Australia* an issue for determination by the High Court was whether the proviso should be applied in circumstances where a trial judge failed to provide adequate reasons in a finding of guilt in a trial by judge alone (at [2]). The majority held that the proviso was inapplicable. Addressing, inter alia, the Court of Appeal's finding that the irregularities which occurred in the trial were not in the conduct of the trial itself (at [87]), Heydon J held that non-compliance with section 120(2) of the *Criminal Appeal Act*, which required strict compliance with the duty to state the principles of law and the findings of fact, was a departure from an essential legal requirement going to the root of the proceedings (at [108]). Similarly, Gummow and Hayne JJ, held that where the *Criminal Procedure Act* required that the trial judge yield a reasoned decision, but no reasons were given for the determination of the central issue tried, it cannot be said that there was no substantial miscarriage of justice (at [59]).
14. Similar to the finding in *AK v Western Australia*, the High Court held in *Subramaniam v The Queen* (2004) 211 ALR 1 that a miscarriage of justice, in the sense of a root irregularity, had occurred where the judge did not comply with a legislative requirement to explain the nature of a special hearing at the outset to the jury (at [47]) and that the proviso was inapplicable when dealing with an error of this nature (at [48]).
15. In *Gately v The Queen* (2007) 232 CLR 208, High Court considered whether there was a miscarriage of justice in circumstances where the jury were permitted unrestricted and unsupervised access to the recorded evidence, otherwise than in open court and

after the close of the evidence (at [37]). Relying on this “*serious procedural irregularity*” Kirby J in a dissenting judgment found that there was a miscarriage of justice and declined to apply the proviso (at [52], [53]). Hayne J, with whom Gleeson CJ, Heydon and Crennan JJ agreed, did not dispute the fact of the serious procedural irregularity but disposed of the appeal on the basis that trial counsel for the appellant consented to the jury having the unsupervised and unrestricted access and in those circumstances there was no miscarriage of justice (at [77]-[81]).

16. In *Webb & Hay v R* (1994) 181 CLR 41 an issue for determination was whether a trial judge in a murder trial ought to have discharged a jury in circumstances where a juror handed flowers to the deceased’s mother. Brennan J in a dissenting judgment observed that an apprehension that a juror or the jury might not deal with the case impartially may be derived from the occurrence of an irregularity where the irregularity infringes a practice designed to ensure both the appearance and the reality of a fair trial (at [4]). Relying on the miscarriage of justice limb and the decision in *Wilde v The Queen*, his Honour found that the flower incident was an irregularity of a fundamental kind which vitiated the conviction (at [12]). Deane J in a dissenting judgment appears to have concurred with Brennan J’s approach and observed that the position remains that any extraneous contact between a juror and a person with a special interest in, or concern about, the outcome of the trial is a serious irregularity in the administration of justice (at [20]). The majority did not appear to reject the proposition that bias may constitute an irregularity that vitiates a conviction but found on the facts there could be no reasonable apprehension of

bias on behalf of the juror: Mason CJ and McHugh at [18]-[20], Toohey J at [17], [21]-[23].

CONCLUSION

17. Whilst opaque in its very term, a consideration of the authorities reveals that one species of ‘miscarriage of justice’, under sub-section 6(1) of the *Criminal Appeal Act*, has been invoked in circumstances where there has been some irregularity in the system of criminal justice, which can be characterised as going to the root of the proceedings or demonstrating a failure of process. Furthermore, the circumstances in which this may apply are diffuse and not limited to acts or omissions on the record of trial.

Samuel Pararajasingham

Forbes Chambers

March 2015