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An analysis of the Common Form legislation and the use for new and fresh evidence

Crowley, Joseph

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An analysis of the Common Form legislation and the use for new and fresh evidence

Joseph Crowley

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Supervisor Dr Terry Goldsworthy and

Associate Supervisor Dr David Field

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Abstract

This thesis is an exploration of the development, interpretation and implementation of the new and fresh evidence rules in criminal appeals in Australia. The core legislative provision allowing for such appeals in Australia is called the common form. The common form was enacted uniformly in every State in Australia in the early twentieth century and has remained almost unchanged for over a century.

This thesis examines the introduction of that legislation and its effect on the reception of new and fresh evidence in criminal appeals. The jurisprudence on the reception of such evidence was developed in conjunction with jurisprudence on the common form legislation.

In England and Wales, it has been identified that the jurisprudence regarding new and fresh evidence is a symptom of wider problems with the interpretation of the common form. Specifically, England and Wales have had two inquiry's to address appellate courts' reluctance in overturning convictions: the Donovan Committee in 1968 and Runciman Commission in 1995. These inquiries made recommendations for legislative change to encourage courts to be more relaxed in their reception of new and fresh evidence. Despite this, British appellate courts still have problems determining appeals on factual error.

This thesis considers the findings of the two British inquiries, and compares those findings with the Australian jurisprudence. In so doing, this thesis seeks to demonstrate that Australian courts (like the British courts) take a restrictive approach to new and fresh evidence. In Australia, unlike England and Wales, however, there has been no overarching inquiry into these issues. Moreover, no State has sought to introduce legislation to address these or wider issues that exist with the statutory regime for criminal appeals. This thesis opines that change to the rules for the reception of new and fresh evidence is necessary because of the difficulties Australian appellate courts experience in determining appeals on factual error.

The thesis compares the Australian experience with that of British and concludes with some recommendations for legislative change in Australia.

Statement of Originality

This thesis is submitted to Bond University in final fulfilment of the requirements of the degree of Doctor of Juridical Science.

This thesis represents my own original work towards this research degree and contains no material that has been submitted for a degree or diploma at this University or any other institution, except where due acknowledgement is made.

Signed: _____ Date: 1 February 2022

Joseph Crowley

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I want to acknowledge Capstone Editing provided excellent copyediting and proofreading services, (according to the guidelines laid out in the university-endorsed national 'Guidelines for Editing Research Theses').

Second, let me acknowledge my wonderful supervisor Dr Terry Goldsworthy who provided much needed feedback and guidance in the pressure filled final few months prior to my submission. His calmness under (what I felt) was enormous pressure gave me much reassurance. Also thanks to my Associate Supervisor Dr. David Field who turned around draft chapters with remarkable speed and never seemed to be perturbed by my frantic emails.

Third, let me acknowledge my children. I began this thesis when my eldest was still at school and my youngest two children weren't born. My eldest has now finished university and my second youngest is well into primary school. They have born the brunt of my weekends and late nights in the office to produce my doctorate. I hope I have been a reasonable role model for a working parent and balanced their needs with my own. Only time will tell.

Finally let me thank my wife. I have heard it said that doctorates sometimes end marriages. I can understand how. We have argued about my thesis often. But we found our level with it and it has (I think) bought us closer together. The process of writing has taught me much about myself and that (I hope) has made me a better husband. Certainly the thesis would not have been completed without my wife's unfailing support. There was more than once that I would have quit but for her urging and belief that I could complete it. For that I owe her much.

Contents

Chapter 1: Introduction: Defining the Problem

It is trite to acknowledge that adversarial criminal trials are subject to errors; appeals from a jury verdict were created for this reason. Equally self-evident is that criminal appeals are also subject to error. In the English and Welsh, the problems with the jurisprudence of criminal appeals has long been recognised. However, in Australia, little has been done to identify or correct the problem. Michael Kirby J, once President of the New South Wales Court of Appeal, stated 'it should be acknowledged wholeheartedly that, in too many cases, it has been the media rather than the institutions of justice or the Judges, which have been vindicated'.[1]

In England and Wales, it was identified more than 50 years ago that the jurisprudence regarding new and fresh evidence is a symptom of the wider problems with the interpretation of the statutory regime of criminal appeals. England and Wales have twice enacted measures to address appellate courts' reluctance in overturning convictions through the *Criminal Appeals Act 1968* and *Criminal Appeals Act 1995*. This included measures to address new and fresh evidence. Despite this, British appellate courts still have problems determining appeals on factual error because, first, they give too much deference to the jury and, second, they give undue reverence to the principle of finality.[2] This thesis identifies these two principles as central to the jurisprudence that created the new and fresh evidence rules.

In Australia, the common form is the core provision allowing for criminal appeals. It was enacted uniformly in every state in the early twentieth century and has remained almost unchanged for over a century. This thesis focuses on appeals from indictable offences to intermediate appeal courts and the High Court where common form legislation is applicable. Some cases raised in later chapters include appeals that occurred because of successful pardon petitions. This thesis does not address issues of access to justice for post-appeal review of convictions, although an understanding of those processes is necessary for a proper understanding of some of the case studies in this thesis.

Although the statutory regime that created criminal appeals is the same in Australia as in England and Wales, no legislature in Australia has addressed the interpretation problems created by new and fresh evidence rules or the wider issue of the statutory regime of criminal appeals. This thesis looks

[1] Michael Kirby, 'Miscarriages of Justice: Our Lamentable Failure' (1991) 17(3) *Commonwealth Law Bulletin* 1037, 1047.
[2] Stephanie Roberts, 'Fresh Evidence and Factual Innocence in the Criminal Division of the Court of Appeal' (2017) 81(4) *Journal of Criminal Law* 303, 304–5.

at the development, interpretation and implementation of the new and fresh evidence rules in criminal appeals in England and Wales and Australia. This jurisprudence developed in conjunction with jurisprudence on common form legislation. Therefore, this thesis charts the introduction of that legislation and its effect on the reception of common law rules regarding new and fresh evidence in criminal appeals. The thesis compares the Australian experience with that of England and Wales and concludes with some recommendations for legislative change in Australia.

An example of how little understanding there is in relation to problems in the jurisprudence of criminal appeals is the notorious miscarriage of justice in Australia concerning Lindy and Michael Chamberlain. The Chamberlains were convicted on 29 October 1982 of murdering their nine-week-old daughter Azaria at Ayers Rock. By 1986, after commissions of inquiry, both were pardoned, and in 1988 the Court of Criminal Appeal of the Northern Territory quashed their convictions and entered verdicts of acquittal.[3]

What is not often considered in relation to the Chamberlains' case is that their appeal, to the Full Federal Court and then to the High Court, failed. On both occasions they had sought to introduce new or fresh evidence. It was not until a Commission of Inquiry that the miscarriage of justice that the pair had suffered was exposed. The author for their entry in the *Oxford Companion to the High Court*[4] admits that the Court did nothing to uncover the most infamous miscarriage of justice in Australia: 'Few cases have generated as much public controversy. The role of the High Court in the drama was, however, a minor one'.[5]

The Chamberlains' story is not unique in the annals of criminal law in Australia. High-profile cases, such as those of the Mickleberg brothers[6] and Andrew Mallard ('*Mallard*')[7] in Western Australia, Graham Stafford ('*Stafford*')[8] in Queensland, and Edward Splatt ('*Splatt*')[9] and Henry Keogh ('*Keogh*')[10] in South Australia, have all, to a greater or lesser degree, suffered the same fate. The issues of new and fresh evidence arose in all of these cases.

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[3] *Re Conviction of Chamberlain* (1988) 93 FLR 239.
[4] Russell Hogg, 'Chamberlain Case' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 85.
[5] Ibid.
[6] *Mickelberg v The Queen* (2004) 29 WAR 13. See also Avon Lovell, *The Mickelberg Stitch* (Creative Research, 1985).
[7] *Mallard v R* (2005) 224 CLR 125.
[8] *R v Stafford* [2009] QCA 407. See also Graeme Crowley and Paul Wilson, *Who Killed Leanne Holland: One Girl's Murder and One Man's Injustice* (New Holland, updated ed, 2010).
[9] *Royal Commission into the Conviction of Edwards Charles Splatt* (Report, 1984).
[10] *R v Keogh* (No 2) (2014) 121 SASR 307. See also Robert Moles, *Losing Their Grip: The Case of Henry Keogh* (Elvis Press, 2006).

1.1 What is the Problem?

The difficulties the wrongly convicted face is an issue across the common law world. Australia is no exception. This thesis explores a particular aspect of those difficulties; new and fresh evidence. As will be explained, the jurisprudence that has been created around new and fresh evidence has added a layer of complexity to such appeals. this thesis argues that such complexity was not part of the legislation and has caused meritorious appeals to be rejected.

The common law does not provide for an appeal from the decision of a jury. This is a statutory creation. In the early twentieth century, all Australian states enacted similar legislation creating appeals from the verdicts of juries.[11] That legislation was borrowed verbatim from the English and is known as 'the common form' legislation. This statutory uniformity allowed appellate reasoning from the courts of England and Wales and one state to be applicable in another Australian state. Further, it has provided fertile ground for the High Court to impose its jurisprudence. Thus, a comparison of cases from England and Wales and different state jurisdictions is possible.

In England and Wales, there has been considerable research on courts' problematic interpretation of common form legislation.[12] These problems have been attributed to the convoluted wording of the provision. The reasons for the unclear wording of the statutory provision lie in the history of its development. In England and Wales, it has been demonstrated that this lack of clarity has meant uncertainty in its application and, thus, provided justification for judicial reluctance to overturn convictions.

One symptom of the problematic interpretation was the courts' creation of rules in relation to new and fresh evidence. This thesis proposes that these rules were created by judges because of two

[11] See Appendices A and B.

[12] Buxton, Richard, 'Miscarriages of Justice and the Court of Appeal' *Law Quarterly Review* 1993 109(Jan) 66-81; Goddard of Aldbourne, Rt Hon Lord, 'The Court of Criminal Appeal in England' (1950) 67(2) *South African Law Journal* 115; Greer, Steven, 'Miscarriage of Criminal Justice Reconsidered' (1994) 57 *Modern Law Review* 58; Howard, Pendleton, 'The English court of Criminal Appeal' (1931) American bar Association Journal 149; Kock, Gerald L, 'Criminal Appeals in England: The court that isn't' (1964) *Journal of Public Law* 95; Leverick, Fiona, et al. 'Post-Conviction Review: Questions of Innocence, Independence and Necessity' (2017) *Stetson Law Review* Vol 47(1), 45-84; O'Connor, Patrick, 'The Court of Appeal: retrials and tribulations' *Criminal Law Review* 1990 Sep, 615-628; Orfield, Lester B, 'History of Criminal Appeal in England' (1936) 1(4) *Missouri Law Review* 326; Roberts, Stephanie, 'Fresh Evidence and Factual Innocence in the Criminal Division of the Court of Appeal' (2017) 81(4) *Journal of Criminal Law* 303; Taylor, Nick and David Ormerod, 'Mind the Gaps: Safety Fairness and Moral Legitimacy' [2004](April) *Criminal Law Review* 266; Whiteway, Ken, 'The Origins of the English Court of Criminal Appeal' (2008) 33(2) *Canadian Law Library Review* 309.

underlying attitudes: jury deference and the principle of finality.[13] This thesis will not focus on courts' interpretation of the common form itself, but on how the creation of rules regarding new and fresh evidence and how these two principles play into them.[14]

This thesis argues that Australian courts' approach to new and fresh evidence is too restrictive. This is based on a comparison of the findings of two inquiries in England and Wales, the Donovan Committee in 1968 and Runciman Commission in 1995, with Australian jurisprudence that evinces the same approach identified by these inquiries. The British inquiries recommend legislative change to encourage courts to be more relaxed in their reception of new and fresh evidence. From this, this thesis draws recommendations for similar legislative change for Australia.

1.2 Sources of Information

To build a picture of the development of the common law regarding the reception of new and fresh evidence, this thesis examines case law in the England and Wales and Australia. The earliest cases referred to are from the 1860s in England and the then Colony of Victoria.

As the focus of this thesis principles of new and fresh in criminal appeals, the majority of cases analyzed dated from after the creation of such appeals (1907 in England and Wales and 1913 onwards when the first Australian jurisdictions to enact the common form legislation). However, since the contention of the thesis is that this jurisprudence was influenced by decisions in civil cases earlier judgments are considered. The earliest decision explored is the English case of *Shedden v Patrick*[15] (1869). The earlier Australian cases identified is *Attorney General for N.S.W. v Bertrand*[16] from 1867 and *Ward v Hearne*,[17] from 1884 in the Full Court of the Victorian Supreme Court.

Though the thesis explores the jurisprudence of England and Wales up to the findings of the Runciman Commission in the early 1990's the changes in the criminal appeal legislation in those jurisdictions and the fact that there have been no further inquiries into the use of new and fresh

[13] There is a third judicial attitude, the 'floodgates argument', which is the concern that if appeals are too easily granted it will open the floodgates for appeals or overburden trial courts with new trials. Although this attitude is obvious on occasion, identifying its expression in individual judgements is difficult.
[14] Although there has been academic interest in the procedural deficiencies of the post-appeal review of convictions, this is not a focus of this thesis. See, eg, Bibi Sangha and Robert N Moles, *Miscarriages of Justice: Criminal Appeals and the Rule of Law in Australia* (LexisNexis, 2015).
[15] (1869) LR 1 HL Sc 470 ('*Shedden*').
[16] [1867] EngR 20; (1867) L.R. 1 P.C. 520; 10 Cox C.C. 618.
[17] (1884) 10 VLR 163.

evidence meant that a further exploration of decision from England and Wales was deemed unnecessary.

In Australia the latest case considered was that of *Mallard*'[18] in 2005 which was the last occasion the High Court grappled with the justification for the distinction of new and fresh evidence.

The research methodology of the thesis was conducted in antichronological fashion following the precedent relied on back to their source. As such judgments considered, whether from Australia or England and Wales, were chosen because they had been cited in cases where the theoretical basis for the distinction of new and fresh evidence was considered.

In relation to the history and effectiveness of criminal appeal legislation, there is much to draw on. Besides the reports of the two inquiries mentioned above, legal academics in England and Wales have always taken an active interest in analysing the effectiveness of the Court of Criminal Appeal (and later the Court of Appeal – Criminal Division).[19] This thesis draws on their articles.

Though there is some literature on wrongful convictions in Australia[20] none focuses on the issues of new and fresh evidence. Perhaps the best example to demonstrate that fresh evidence as a potential source of miscarriages of justice is not something that Australian academics write about is the lack of attention given to the topic in two of the most significant works for criminal law practitioners; *Cross on Evidence* and *Ross on Crime*. *Cross on Evidence* which has been published in Australia

[18] *Mallard v R* (2005) 224 CLR 125.

[19] Buxton, Richard, 'Miscarriages of Justice and the Court of Appeal' *Law Quarterly Review* 1993 109(Jan) 66-81; Goddard of Aldbourne, Rt Hon Lord, 'The Court of Criminal Appeal in England' (1950) 67(2) *South African Law Journal* 115; Greer, Steven, 'Miscarriage of Criminal Justice Reconsidered' (1994) 57 *Modern Law Review* 58; Howard, Pendleton, 'The English court of Criminal Appeal' (1931) American bar Association Journal 149; Kock, Gerald L, 'Criminal Appeals in England: The court that isn't' (1964) *Journal of Public Law* 95; Leverick, Fiona, et al. 'Post-Conviction Review: Questions of Innocence, Independence and Necessity' (2017) *Stetson Law Review* Vol 47(1), 45-84; O'Connor, Patrick, 'The Court of Appeal: retrials and tribulations' *Criminal Law Review* 1990 Sep, 615-628; Orfield, Lester B, 'History of Criminal Appeal in England' (1936) 1(4) *Missouri Law Review* 326; Roberts, Stephanie, 'Fresh Evidence and Factual Innocence in the Criminal Division of the Court of Appeal' (2017) 81(4) *Journal of Criminal Law* 303; Taylor, Nick and David Ormerod, 'Mind the Gaps: Safety Fairness and Moral Legitimacy' [2004](April) *Criminal Law Review* 266; Whiteway, Ken, 'The Origins of the English Court of Criminal Appeal' (2008) 33(2) *Canadian Law Library Review* 309.

[20] For example, Hamer, D. 'Wrongful Convictions, Appeals, and the Finality Principle: The Need for a Criminal Cases Review Commission', (2014) *UNSW Law Journal*, 37(1), 270-311; Weathered, L 'The Growing Acknowledgement of Wrongful Conviction – The Australian Response Within an International Context' (2013) *Victoria University Law and Justice Journal* 3(1):79-92; Dioso-Villa R, Julian R, Kebbell M, Weathered L, Westera N, 'Investigation to Exoneration: A Systemic Review of Wrongful Conviction in Australia' (2016) *Current Issues in Criminal Justice* 28(2):157-172; Lynne Weathered, 'Wrongful Convictions in Australia', (2012) 80 *U. Cin.L. Rev*. 1391.

since 1970 devotes a few sentences to the explanation of fresh evidence and none of that is to do with the development or justification of the rules (or how/why they are relevant in criminal law).[21]
Ross on Crime, which is an encyclopedia of criminal law, has an entry for "Fresh Evidence".[22] That entry outlines the law in relation to fresh evidence but does not explore how or why these rules developed nor whether their strict application in criminal appeals is problematic.

Since Australian academics do not have a similar tradition, of writing on new and fresh evidence there is little Australian academic work to draw from. Authors Robert Moles and Bibi Sangha are Australia's pre-eminent writers on miscarriages of justice yet they provide little analysis of new or fresh evidence. Their 2010 monograph *Forensic Investigations and Miscarriage of Justice* (co-authored with Kent Roach) sought to compare the legal systems of Australia, Canada and the United Kingdom in terms of investigation, prosecution and responses to miscarriages of justice.[23] That work identified the relevant law in all three jurisdictions response to fresh evidence on appeal.[24] But rather then trace the history of the rules regarding fresh evidence the monograph merely identified the current jurisprudence in each jurisdiction and identified fresh evidence as a potential cause of wrongful convictions.

In 2015 Sangha and Moles published their book *Miscarriages of Justice: Criminal Appeals and the Rule of Law in Australia*.[25] It does not specifically address fresh evidence except in passing.[26] It is discussed in some detail in relation to the right to a second or subsequent appeal and the use of the test of "fresh and compelling evidence" at a statutory criterion to be granted leave for such applications but does not explore the development of that provision of the evolution of the fresh evidence rule either.[27]

The lack of academic scholarship means that this thesis draws heavily from Australian case law. Also, in 2010, the Standing Committee of Attorneys-General published a discussion paper on common form legislation. Although that paper did not deal directly with new and fresh evidence, the criticisms

[21] See for example Heydon, J.D. *Cross on Evidence* 7th ed (LexisNexis Butterworths, 2004) [11150].
[22] Bagaric, Mirko. *Ross on Crime* 6th ed (Lawbook Co., 2013) [6.2300].
[23] Sangha, Bibi, Kent Roach, Robert Moles *Forensic Investigations and Miscarriages of Justice: The Rhetoric Meets the Reality* (Irwin Law Inc, 2010).
[24] *ibid* 69, 112, 156.
[25] Sangha, Bibi, Robert Moles. *Miscarriages of Justice: Criminal Appeals and the Rule of Law in Australia* (LexisNexis Butterworths, 2015).
[26] *ibid* [6.5].
[27] *ibid* [6.1].

of the interpretation of common form legislation are instructive when considering Australian jurisprudence on new and fresh evidence.

1.3 Methodology

The methodology employed in this thesis is doctrinal in that it is primarily focused on legal principles and concepts as elucidated in cases and statues. The thesis charts the development of the approach to new and fresh evidence from some fundamental legal maxims related to retrials in civil cases through the reception of such normative rules in criminal appeals. This process is similar in Australian and British jurisprudence, with Australian cases relying heavily (though not exclusively) on English decisions. As will be demonstrated, the development of the common law in this area did not flow neatly from one decision to the next, but was created by a patchwork of decisions. However, after several decades, this led to seminal judgments becoming the touchstone for most future decisions. This process was similar in England and Wales and Australia.

1.4 Thesis Structure

This thesis is structured as follows.

Chapter 2 provides an overview of the criminal appeal process. Before examining the statutory regime governing criminal appeals, it is necessary to set out the system of criminal justice in Australia so that the appellate procedure is understood in context. This chapter also defines the principles of new and fresh evidence, jury deference and finality.

Chapter 3 reviews the history of criminal appeal legislation in England from which Australian law is copied. It explores the controversy surrounding the creation of the Court of Criminal Appeal. It is necessary to understand the reasons this was opposed, because it allows for a better understanding of the subsequent strict interpretation by appeal courts of their powers. This chapter also examines the jurisprudence of new and fresh evidence prior to the introduction of the criminal appeals but later received into its interpretation.

Chapter 4 demonstrates that the English statutory provision has been subject to two inquiries which identified problems with the way appellate courts approached appeals against conviction. As a result of these inquiries, the relevant statutory provision was rewritten and amended several times to encourage appeal judges to overturn convictions more often. Chapter 4 also examines the cases of

Stafford & Luvaglio v DPP[28] and the Birmingham Six[29] to demonstrate the problematic approach English courts took to new and fresh evidence.

Chapter 5 showcases how Australia has adopted the same statutory provision used in England known as the common form. The Australian experience with this statute evidences confusion for a century among lower appellate courts as to the requirements imposed by the statutory test. The chapter examines the jurisprudence in relation to new and fresh evidence from early state courts and as received from English common law. It demonstrates the (often strict) implementation of rules regarding new and fresh evidence. As will be demonstrated, the Australian experience in interpreting the common form appeal provision mirrors that of England (particularly in relation to new and fresh evidence). Australian judges are prone to the same myopic focus regarding new and fresh evidence as their English brethren. Yet, unlike England and Wales, no Australian jurisdiction has identified and grappled with the problem of new and fresh evidence. The chapter concludes with the Chamberlain and Mallard cases which both reveal courts' problematic approach to new and fresh evidence.

Chapter 6 provides recommendations for resolving the issues around the common form test and the jurisprudence it has created. This thesis posits that the Australian states should re-enact the statutory test creating criminal appeals in the same way that the British have to simplify the wording of the statutory test to encourage courts to be more open overturn jury verdicts—the motivation for enacting the provision in the first place.

[28] [1974] AC 878.
[29] *McIlkenny v R* [1992] 2 All ER 417; *McIlkenny v Chief Constable of the West Midlands* [1980] QB 283; *Re Callaghan* (1988) 88 Cr App Rep 40.

Chapter 2: An Overview of the Criminal Justice System and Appellate Process in Australia

In Australia, both state and federal[1] courts have jurisdiction over criminal law (although in practice the Federal Court does not exercise jurisdiction and leaves it to state courts to deal with federal criminal matters). Criminal offences are divided into two broad categories, simple offences and indictable offences. Simple offences are dealt with summarily by a magistrate in a local or magistrates court. This thesis is not concerned with appeals from summary trials.[2] Indictable offences are dealt with in higher courts, district or county courts, or supreme courts, depending on how each state or territory divides the jurisdiction of their courts. Indictable offences are tried by judge and jury and appeals from the verdict of a jury are to an intermediate appellate court (either a full court of a supreme court as in South Australia or Tasmania, or a court of appeal as in Queensland, New South Wales (NSW) and Victoria). This thesis is only concerned with appeals by accused persons after conviction on indictment. In most cases, that is a trial by jury.[3]

In Australia, persons charged with indictable offences have a right to a trial by jury.[4] In a jury trial, questions of law are decided by the trial judge and questions of fact are decided by the jury. The division of questions of law and fact is a crucial one that is echoed in both the rights of appeal and the grounds of appeal (see below). An appeal is available to an accused person as of right on a question of law alone,[5] and by leave of the court on questions of fact or mixed questions of fact and law.[6]

The High Court of Australia is at the apex of the Australian court system and has jurisdiction to hear appeals from all intermediate appeal courts.[7] Appeals to the High Court are not as of right, but by leave of the Court.[8] The criteria the Court must have in regard to determining whether to grant special

[1] Because federal criminal matters are dealt with in state courts, there is no material difference in the division of offences, their trials and appeals. Federal criminal matters are not considered by this thesis.
[2] Appeals from a magistrate are often *de novo* giving the convicted person the right to a rehearing (see, eg, *Justices Act 1886* (Qld) s 222). As such, the legal forces are different from those appellate courts engage with when conceding the rightness of a jury verdict.
[3] Most state jurisdictions have now enacted legislation for judge alone trials. See, eg, *Juries Act 1927* (SA) ss 7(1)(b), 7(2), 7(3); *Supreme Court Act 1933* (ACT) s 68B; *Criminal Procedure Act 1986* (NSW) s 132(4); *Criminal Procedure Act 2004* (WA) s 118(4); *Criminal Code 1899* (Qld) s 615(1). The impact of this on the way appellate courts reason is discussed later in this chapter.
[4] *Australian Constitution* s 80; *Spratt v Hermes* (1965) 114 CLR 226, 244; *Zarb v Kennedy* (1968) 121 CLR 283, 294; *Kingswell v R* (1985) 159 CLR 264, 298–303; *Brown v R* (1986) 160 CLR 171.
[5] See, eg, *Criminal Code 1899* (Qld) s 668D(1)(a).
[6] See, eg, Ibid ss 668(1)(b)–(c).
[7] *Judiciary Act 1903* (Cth) s 35.
[8] *R v Lee* (1950) 82 CLR 133, 138; *R v Morris* (1987) 163 CLR 475; *R v Benz* (1989) 168 CLR 110; *R v Glennon* (1992) 173 CLR 592.

leave is if the decision sought to be appealed is of public importance (generally or otherwise) or the appeal seeks to resolve differences of opinion in lower courts on the state of the law.[9] Further, the judgment under appeal must involve the interests of the administration of justice before it would be considered by the High Court.[10] Although the most likely source of error in criminal proceedings is one of fact,[11] appeals to the High Court are on questions of law only.[12] Special leave will not be granted where the appeal relates only to questions of fact.[13]

2.1 The Nature of Appellate Courts' Function

Criminal appellate courts are designed to review the decisions made in the court below. That requires an analysis of the facts and law considered by the court at first incidence. However, the appeal court rules provide for the possibility that there is cogent evidence that was not considered by the court at first instance that is relevant to the facts in issue. The common law has developed rules for the way appeal courts are to approach such evidence. These common law principles were developed for sound public policy reasons for civil appeals. However, criminal appeal courts have used these rules to avoid having to make a proper assessment of the whole case on appeal. As such, the rules relating to new and fresh evidence have become a barrier to accused seeking access to justice.

By their nature, appeal courts do not take evidence orally but rely on the record from the trial court. Therefore, appellate courts, whether criminal or civil, have the difficulty of assessing the cogency or reliability of witnesses testimony when they only read such testimony, rather than seeing and hearing the witnesses, although they are empowered to receive both written and oral evidence. This is often used as a justification for accepting the decision of the trial court. This thesis posits that appellate courts exaggerate and overapply such weaknesses.

The criminal justice system could not cope with accused persons running trials piecemeal, with one lot of evidence at one trial and, if unsuccessful, a second trial containing (at least some) new evidence. The distinction was based on policy considerations that a person had a right to a fair trial; that is, one trial. For example, the legal maxim, *intest reipublicae ut sit finis litium* ('it is in the interest of society as a whole that litigation must come to an end').

[9] *Judiciary Act* (Cth) s 35A(a)(i)(ii).
[10] Ibid s 35A(b).
[11] Rosemary Pattenden, *English Criminal Appeals 1844-1994* (Clarendon Press, 1996) 6.
[12] *Judiciary Act* (Cth) s 35A.
[13] *R v Raspor* (1958) 99 CLR 346; *R v Liberato* (1985) 159 CLR 507, 509; *R v Morris* (1987) 163 CLR 454, 476.

2.2 Petitions of Mercy, Royal Pardons and Exercise of the Royal Prerogative

If a convicted person exhausts all the aforementioned avenues of appeal, there is the exercise of the prerogative of mercy. This is the power of the Crown to grant a pardon to a person who has been convicted and sentenced for an offence by a court.[14] Originally, this was an appeal to the sovereign (or their representative) for a pardon or clemency at common law. Each jurisdiction maintains this ancient prerogative (sometimes known as the royal prerogative of mercy).[15] However, the availability of this remedy has been codified, and in all jurisdictions, either expressly by statute or by convention, the decision is to be made by the attorney general rather than the governor.[16] Thus, an application for the exercise of the royal prerogative of mercy is no longer a common law remedy, but the exercise of statutory power by the executive.[17]

South Australia is one such jurisdiction. The *Criminal Law Consolidation Act 1935* (SA) s 369 reads:

> Nothing in this Part affects the prerogative of mercy but the Attorney-General, on the consideration of any petition for the exercise of Her Majesty's mercy having reference to the conviction of a person on information …, may, if he thinks fit, … refer the whole case to the Full Court, and the case shall then be heard and determined by that Court as in the case of an appeal by a person convicted.

One of the benefits of the pardon is that the various statutory provisions do not prohibit the number or the scope of the petitions a convicted person can bring. However, pardon petitions are not without problems. First, a pardon is not equivalent to an acquittal; it is merely the relieving of the burden of the punishment for a crime.[18] Second, there is no particular form in which a petition is required which does not provide applicants with direction on how to proceed.[19] Third, how the governor or attorney general exercises that power has been a matter of debate (at least in NSW) for some time.[20]

Much has been written in recent years on post-appeal mechanisms. Both South Australia and Tasmanian have passed legislation allowing for second or subsequent appeals. This innovation will

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[14] Peter Butt (ed), *Butterworths' Concise Australian Legal Dictionary* (LexisNexis, 2004).
[15] See, eg, *Sentencing Act 1995* (WA) s 140; *Criminal Code 1899* (Qld) s 672A; *Crimes (Appeal and Review) Act 2001* (NSW) s 76. In Queensland, the pardoning power of the Governor has also been codified in the *Constitution of Queensland 2001* (Qld) s 36.
[16] For example, the *Crimes (Appeal and Review) Act 2001* (NSW) s 76 allows any person to petition the governor for a pardon. Section 77 of that Act provides that after consideration of the petitions, the attorney general may refer the whole case to the Court of Criminal Appeal, to be dealt with as an appeal under the *Criminal Appeals Act 1912* (NSW).
[17] Bibi Sangha, Kent Roach and Bibi Sangha, *Forensic Investigations and Miscarriages of Justice: The Rhetoric Meets the Reality* (Irwin Law, 2010) 142.
[18] *R v Cosgrove* [1948] Tas SR 99, 105–106 (per Morris CJ). However, for federal offences, the *Crimes Act 1914* (Cth) s 85ZR(1) means that persons pardoned are taken to have never committed the offence.
[19] *White v R* (1906) 4 CLR 152, 159 (per Griffith CJ).
[20] GD Woods, *A History of Criminal Law in New South Wales: The Colonial Period* (Federation Press, 2002), 322–3.

be outlined in Chapter 4. It is important to recognise that legislation regarding the problem in post-appeal scrutiny of a case is often a question of access to justice, rather than an analysis of the jurisprudence in relation to allowing appeals. An exploration of questions regarding access to the appellant court system have been well covered by other writers and are beyond the scope of this thesis.

2.3 New and Fresh Evidence

There is, and has always been, a difficult dichotomy faced by a court on an appeal from a jury's decision. Any appeals court faces two considerations: the principle of finality and jury deference. This chapter defines what is meant by new and fresh evidence (see Section 2.4) and examines how the principle of finality and the deference to the jury verdict play into courts' approach to such evidence (see Sections 2.5 and 2.6 respectively).

The issue of new and fresh evidence only arises on an appeal because such evidence was not before the finder of fact at trial. The issue does not arise on an appeal on a question of law, only on appeals where questions of fact or mixed questions of fact and law are raised.

It should be noted that, as appeals against acquittal effectively do not exist,[21] these considerations always take place in the context of a defendant appealing against their conviction and seeking to place evidence not used at trial before the appeal court.

New evidence is defined by reference to fresh evidence. New evidence is any evidence not presented at trial that does not fit the category of fresh evidence. It is evidence that was known about or could have been found with reasonable diligence but was not placed before the finder of fact.

Fresh evidence is evidence that was not known of and could not have been discovered with reasonable diligence presented at trial. What should be noted is the focus these two tests have on the 'reasonable diligence' of defence lawyers and the reason the evidence was not placed before the court at trial. This is very much a consideration of the principle of finality (see Section 2.6). However, how the court treats the evidence is also informed by deference to the jury's verdict (see Section 2.5).

[21] In NSW, it is accepted that appeals against an acquittal do exist where there has been a judge only trial. The *Crimes (Appeal and Review) Act 2001* (NSW) s 107(1)(b) provides for an appeal against an acquittal from a judge sitting without a jury (see, eg, *R v Lazarus* [2017] NSWCCA 279). This thesis does not consider such appeals because they are extremely rare and the considerations on appeal for the prosecution to adduced new or fresh evidence would be considerably different for policy reasons.

In a forensic sense, when facing an appellate court, evidence must generally be fresh, not just new.[22] Although the High Court's description of the requirement for 'fresh' evidence, rather than 'new' evidence, is a principle (rather than a hard and fast rule),[23] the Court identified that evidence will not usually be considered if it could, with reasonable diligence, have been produced at trial.[24] Although the Queensland Court of Appeal, in a moment of benevolence, opined that there was a residual discretion in exceptional cases to receive other evidence to prevent miscarriage of justice.[25]

There are different tests in criminal law appeals as to what the appellate court can make of new (as opposed to fresh) evidence. When the appellate court is presented with fresh evidence, it must first determine whether 'the fresh evidence has cogency and a plausibility as well as relevancy'.[26] Then, such fresh evidence must create a significant possibility that a reasonable jury would have reached a different verdict.[27] When an appellate court is presented with new evidence, it must raise 'such a doubt about his [the appellant's] guilt in the mind of the court that the verdict should not be allowed to stand'.[28]

2.4 New and Fresh Evidence in a Circumstantial Case

The jurisprudence on the reception of new and fresh evidence often reveals judicial consternation as to what assessment the appellate court should make. As the principle of deference to juries' verdicts reveals, judges are conscious of not usurping the role of the jury by determining the effect of the evidence on the original Crown case. However, as this thesis reveals, Australian courts often do not separately consider the question of ordering a retrial as opposed to acquitting the defendant. The cogency of evidence required for an appellate court to order a retrial would necessarily be lower than that required for ordering an acquittal. The fact that most prosecutions are based on circumstantial evidence, rather than direct evidence, requires an understanding of what circumstantial evidence is and how it might affect the reasoning of appellate courts.

[22] *Lawless v The Queen* (1979) 142 CLR 659.
[23] *Green v R* (1938) 61 CLR 167.
[24] Although the Court acknowledged that this was 'not a universal and inflexible requirement' (see *Gallagher v R* (1986) 160 CLR 392, 395).
[25] *R v Katsidis* [2005] QCA 229; *R v Mackay* [2011] QCA 28.
[26] *Craig v The King* (1933) 49 CLR 429, 439.
[27] *Gallagher v R* (1986) 160 CLR 392.
[28] *Ratten v The Queen* (1974) 131 CLR 510.

There are two types of evidence: direct and circumstantial. Direct evidence is eyewitness testimony or confessional evidence. Most trials are based on circumstantial evidence in that they do not contain eyewitness or confessional evidence.

A jury is entitled to convict a person based purely on circumstantial evidence. Circumstantial evidence is 'evidence of a basic fact or facts from which the jury is asked to infer further fact or facts'.[29] Facts that directly prove events that are sought to be proved are called direct evidence and consist of confessional or eyewitness evidence.[30] The prosecution's case is to ask the jury to accept a series of facts and accept that the only rational inference that can be drawn from that series of facts is that the accused is guilty.

Therefore, what needs to be born in mind is that most new or fresh evidence is circumstantial—it does not directly prove the innocence of the appellant. The appeal court is asked to do the opposite of what the jury have done; to draw an inference from the new or fresh evidence (often combined with the evidence adduced at trial) and reject that the only rational inference that can be drawn from these facts is that the accused is guilty.

It is important to set out the test that juries (and by extension appellate courts) apply to a prosecution case consisting of circumstantial evidence. Juries must be satisfied of their verdict of guilt beyond a reasonable doubt. More specifically, juries must be satisfied that each element of the offence has been proved beyond a reasonable doubt. In a circumstantial case, all or at least some central elements of the offence will not have evidence that directly proves them, but the jury will be asked to draw inferences from several pieces of evidence.

The question then arises, does a jury have to be satisfied with each of these pieces of evidence beyond reasonable doubt? The High Court has laid down that where a piece of evidence is indispensable, even if it does not directly prove an element of the offence, the jury must be satisfied with it beyond a reasonable doubt.[31] This is known as the links in a chain, which is in contrast to the strands in a cable. If the jury are asked to infer guilt from a series of facts, but none of those facts of themselves is essential, the jury does not have to be satisfied of each fact beyond a reasonable doubt, provided they are satisfied that, in combination, the ultimate issue is proved beyond a reasonable doubt.[32] Thus, an element of an offence may be established by inference.[33] What poses a problem both for juries and

[29] *Shepherd v The Queen* (1990) 170 CLR 573, 579.
[30] Ibid.
[31] Ibid.
[32] Ibid. See also *The Queen v Kotzmann* (1999) 105 A Crim R 243, 248.
[33] *Shepherd v The Queen* (1990) 170 CLR 573, 579–80. See also *Horrell v The Queen* (1997) 6 NTLR 125.

appellate courts when considering the inferences to be draw from circumstantial evidence is the narrow distinction between conjecture and inference. The old saying 'one man's meat is another man's poison' aptly elucidates the problem. As does Lord MacMillian's dissenting judgment in *Jones v Great Western Railway Co*:[34]

> The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may be the validity of legal proof.[35]

Such questions as the inferences to be draw from a given piece of evidence play out in appeal in two ways. First, in reference to whether it should be accepted for consideration (ie, whether it has cogency and a plausibility as well as relevancy)[36] and, secondly, whether the inferences drawn from it 'create a significant possibility that a reasonable jury would have reached a different verdict'[37] or 'raises such a doubt about his [the appellant's] guilt in the mind of the court that the verdict should not be allowed to stand'.[38]

Therefore, it is unsurprising that the jurisprudence of both intermediate courts and the High Court has been to take a very prescriptive approach to the reception of new or fresh evidence, particularly in relation to unravelling convictions based solely on circumstantial evidence. An exception to this is the High Court's decision in *Mallard v The Queen*,[39] where the Court explicitly mandated that all evidence before the Court was to be considered together and no artificial distinction between evidence should be drawn: 'it is elementary that evidence adduced at trial may assume an entirely different complexion in the light of the new or fresh evidence and facts either ignored or previously unknown may become crucial'.[40]

2.5 Deference to the Jury's Verdict

As identified above, considerations of the reception of new or fresh evidence are underpinned by two principles: jury deference and the principle of finality (or res judicata). Appeals from the decision of a jury raise questions as to the division of responsibility between the appellate court and the jury.[41]

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[34] (1931) 144 LT 194.
[35] *Jones v Great Western Railway Co* (1931) 144 LT 194, 202.
[36] *Craig v The King* (1933) 49 CLR 429, 439.
[37] *Gallagher v R* (1986) 160 CLR 392.
[38] *Ratten v The Queen* (1974) 131 CLR 510.
[39] (2005) 224 CLR 125.
[40] *Mallard v The Queen* (2005) 224 CLR 125, 132 [13].
[41] See David Harmer, 'The Unstable Province of Jury Fact Finding: Evidence Exclusion, Probative Value and Judicial Restraint after IMM v The Queen' (2017) 41(2) *Melbourne University Law Review* 689.

The High Court in *M v The Queen* opined that this raises the question as to whether it was open to the jury to be satisfied of the accused's guilt beyond a reasonable doubt.[42] However, the High Court has also touched on the dichotomy facing appellant courts when grappling with appeals on the facts.

In *Carr v The Queen*, the Court noted that while an appellate court should make its own independent assessment of the evidence, the court should simultaneously be restrained. The reason it should feel such restraint is the notion of jury deference. It should not 'substitute its assessment of the significance and weight of the evidence for the assessment which the jury … was entitled to make'.[43] This focus on how the jury reasoned has been a source of conflict in English jurisprudence, as will be seen in Chapters 3 and 4. The High Court has said that an appellate court is concerned with how a reasonable jury might view the evidence,[44] but has more recently added to this by saying 'the boundaries of reasonableness within which the jury's function is to be performed should not be narrowed in a hard and fast way'.[45]

It has been said that juries are the guardians of liberty in the Australian criminal justice system.[46] Certainly, their use in determining guilty or innocence is constitutionally mandated.[47] The decision of a jury has 'special respect and legitimacy' on questions of guilt or innocence in serious criminal cases.[48] This has caused reluctance in appellate courts to interfere with juries' verdicts.[49] The test, as provided in the common form legislation, on an appeal from a question of fact is, was the verdict unreasonable or cannot be supported having regard to the evidence.[50] There is a further 'rational'[51] reason that appellant courts have for deferring to the jury's decision: the jury's advantage in having been at the trial and having seen the witnesses give their evidence.[52] This is an observation relevant to all appeals justifying deferring to the decider's finding of facts at first incidence. In *Fox v Percy*,[53] the High Court said an appellate courts must have "...respect for the advantages of trial judges ... especially where their decisions might be affected by their impression about the credibility of

[42] *M v The Queen* (1994) 181 CLR 487, 494–5. See also *R v Baden Clay* (2016) 258 CLR 308, 330 [66].
[43] *Carr v The Queen* (1988) 165 CLR 314, 331. See also *Chamberlain v R* (No 2) (1984) 153 CLR 521, 534.
[44] *Knight v The Queen* (1992) 175 CLR 495, 511.
[45] *R v Baden Clay* (2016) 258 CLR 308, 329 [65].
[46] *Brown v R* (1986) 160 CLR 171, 197 (per Brennan J).
[47] *Hocking v Bell* (1945) 71 CLR 430, 440. See also *Australian Constitution* s 80.
[48] *MFA v The Queen* (2002) 213 CLR 606, 624 [59].
[49] Sangha, Roach and Moles (n 72) 73, 152.
[50] See, eg, *Criminal Code 1899* (Qld) s 668E.
[51] Sangha, Roach and Moles (n 72) 73.
[52] Ibid 73, 152.
[53] (2003) 214 CLR 118.

witnesses whom the trial judge sees but the appellate court does not"[54]. The same can be said of the advantages of the jury.

However, in *M v The Queen*,[55] the High Court identified the limits to the advantages of juries being present at the trial:

> In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence.[56]

Despite the Court identifying that there are limits to the advantages juries have to assess evidence, this thesis contends that jury deference—either because of a constitutional mandate or because of the jury having been at the trial—is used by appellate courts to decline to exercise the statutory power given to them. As some eminent authors put it: '[Appellate courts] have expressed reluctance to second guess determinations of fact made at trial and especially by juries'.[57]

There are some inherent problems with a review by courts. Some are systematic and others are legal. There is both academic and legal justification for asserting that appellate courts are reluctant to overturn wrongful convictions.[58]

The use of juries to determine the guilt or innocence of an accused is a fundamental part of the adversarial criminal trial. In the common law world, up until the early twentieth century, the decisions of juries in criminal cases was said to be final. No appeal from their decision was allowed. In common law countries, the sanctity of a jury's verdict is still something that criminal appeal courts are reluctant to overturn. This reluctance to usurp the functions of the jury is one reason that cases involving a miscarriage of justice are not adequately dealt with by the traditional system of criminal appeal.

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[54] Ibid [26]
[55] (1994) 181 CLR 487.
[56] (1994) 181 CLR 487, 494.
[57] Sangha, Roach and Moles (n 72) 167.
[58] See Steven Greer, 'Miscarriage of Criminal Justice Reconsidered' (1994) 57 *Modern Law Review* 58.

Juries have been described as 'the constitutional tribunal for deciding contested facts'.[59] Further: 'a jury is taken to be a microcosm of the community. A verdict of [a] jury, particularly in serious criminal cases, is accepted, symbolically, as attracting to decisions concerning the liberty and reputation of accused persons a special authority and legitimacy and finality'.[60]

This deference to the jury's verdict is still evident in the statues creating criminal appeals, as the inclusion of the proviso[61] demonstrates. Further, the legislation directs appellate courts to consider whether the jury's verdict is unreasonable or unsupportable.[62] This specifically directs the court to consider what the jury concluded and whether it was reasonable on the evidence. As noted in a commentary on Queensland criminal law: '[t]he key issue in relation to unreasonable or unsupportable verdicts is how much deference should be given to the conclusion reached in the trial process'.[63] The fear of the appellate court to readily overturning a conviction was expounded in *Chidiac v The Queen*,[64] when the Court identified its fear of 'substituting trial by a court of appeal for trial by jury'.

Deference to the jury's verdict is justified for two reasons, as expressed by Brennan J in *Knight v The Queen*:

> The deference which is due to a jury's verdict, both by reason of the jury's presence at the trial and by reason of its function as the constitutional arbiter of the facts, precludes an appellant court from simply substituting its view of the evidence for the view formed by the jury under proper direction.[65]

It has been suggested that '[w]hat is at issue [in a criminal appeal] is the verdict at trial and not the prosecution's case as to how the crime was committed'.[66] There are several weaknesses in focusing on the jury's verdict rather than the prosecution case.

Most obvious is that juries do not give reasons; therefore, an appellate court cannot know how they came to their ultimate conclusion. All that is known is that the jury (in the event of a guilty verdict) accepted enough of the Crown's case to be satisfied beyond a reasonable doubt of the guilt of the

[59] *MFA v R* (2002) 213 CLR 606, 621 [48].
[60] Ibid.
[61] See Chapter 4.1.3
[62] *Criminal Code 1899* (Qld) s 668E.
[63] E Colvin and J McKechnie, *Criminal Law in Queensland and Western Australia* (LexisNexis, 5th ed, 2008), [30.18].
[64] (1991) 171 CLR 432, 461–462.
[65] (1992) 175 CLR 495, 511.
[66] Colvin and McKechnie (n 61) [30.17].

accused. In the absence of this information, what can the court do, other than focus on the Crown's case and make reasonable assumptions as to why the jury accepted it?

2.6 The Principle of Finality

The principle of finality is so self-evident that it is not often given ample expression. The most detailed expression of this principle comes from the English courts:

> Any determination of disputable facts may, the law recognises, be imperfect: the law aims at providing the best and safest solution compatible with human fallibility and having reached that solution, it closes the book. The law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but, in the interest of peace, certainty and security it prevents further inquiry.[67]

The principle of finality is born out of the well-known legal maxim *'res judicata pro vertate accipitur*' ('res judicata'). Res judicata in criminal law was the original basis for the principle of double jeopardy.[68] The notion of the importance of the finality of litigation was one reason given against the creation of the criminal appeal.[69] Finality, found expression in the jurisprudence of the common form when courts took the view that because the common form did not expressly identify the right to a second or subsequent appeal, an appellant only had one.[70] An aspect of the justification of this was the reliance on the pardon petition process[71].

Later cases have considered the principle of finality in relation to time limits in which an appeal must be lodged. In *Kentwell v R*[72] the High Court said:

> The principle of finality finds expression in the prescription of the time limit within which an appeal or an application for leave to appeal may be brought. The discretionary power to extend the time limit is a legislative recognition that the interests of justice in a particular case may favour permitting an appeal or an application for leave to appeal to be heard, notwithstanding that it was not brought within time. The interests of justice will often pull in different directions. As earlier noted, they may include consideration of the adverse effect on the

[67] *The Ampthill Peerage* [1977] AC 547, 569 (per Lord Wilberforce).
[68] *Sambasivam v Public Prosecutor, Federation of Malaya* [1950] AC 458 at 479.
[69] R Pattenden, English Criminal Appeals 1844-1994: Appeals Against Conviction and Sentence in England and Wales, Clarendon Press, Oxford, 1996 pp22-7.
[70] Sangha, B. and Moles, R., Miscarriages of Justice- Criminal Appeals and the Rule of Law in Australia, Lexis Nexis, Australia, 2015 Part 6.2 pp 170.
[71] *R v Grierson* (1937) 54 WN (NSW) 144a
[72] *Kentwell v The Queen* [2014] HCA 37; 252 CLR 601.

victim, or on the community generally, occasioned by re-opening a concluded criminal proceeding.[73]

However, some have argued that the principle of finality should never prevent the re-examination of a claimed wrongful conviction.[74]

The criminal justice system is a publicly funded mechanism for determining guilty or innocence. As a publicly funded system, it is a matter of practical reality that there is a limit to the amount of resources can be expended on any given case. Ideally, a trial is played out once, a decision is reached and the matter is concluded. With the introduction of appeals there was a further level added. There is clear authority that a litigant is allowed only one appeal.[75] The problem in criminal appeals is that it is pervaded by the general principle that once the trial is concluded, the decision should only be interfered with in exceptional circumstances'.[76] As David Harmer put it: '[t]he line must be drawn somewhere, and the least arbitrary place to draw it is under the original trial verdict'.[77]

In criminal appeals particularly, the deference paid to the jury's verdict is also reflected in the notion of finality, because that verdict is the justification for drawing the line there, rather than after the appeal. The special legitimacy that jury verdicts are imbued with gives the appellate court the rationale for (effectively) ruling that the proceedings should conclude with them.

2.7 How the Principles Feed into New and Fresh Evidence

As the primary fact finder, the jury are assumed to be in a better position to assess evidence, both because they see and hear the witnesses give their evidence and are privy to the entire trial. Further, there is a special reverence accorded to the verdict of a jury by virtue of its place as a little parliament in a democratic society. This immediately inspires a reluctance of the court to begin a process of questioning how new or fresh evidence produced at an appeal might have affected the jury's decision-making. This creates the opposite effect of the *in dubio pro reo* ('[when] in doubt, for the accused') principle; on appeal, the court's approach seems to be 'when in doubt, for the jury'. Such attitudes

[73] *ibid* [32].
[74] G Zellick, "The Causes of Miscarriages of Justice" (2010) 78(1) Medico-Legal Journal 11 at 12; see also Sangha, B. and Moles, R., Miscarriages of Justice- Criminal Appeals and the Rule of Law in Australia, Lexis Nexis, Australia, 2015 Part 6.2 pp 170.
[75] *Grierson v The King* (1938) 60 CLR 431.
[76] *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, 17 [34]–[35].
[77] Harmer (n 41) 718.

are reflected in the reluctance of appellate courts to accept new or fresh evidence and their reluctance to accept that such evidence may have affected the jury's reasoning.

The principle of finality is evident in the tests for the reception of new and fresh evidence. The immediate focus of the court's attention is not on what the evidence is, but primarily on why it was not produced at the trial. The court focuses on why there has been a challenge to the notion that the trial is played out once. An appellant has to have good reasons to explain why they did not run their case properly at first instance before an appellant court will consider what that evidence is and how it effects the verdict. Add to this the difficulty of drawing inferences from evidence in a circumstantial case and the difficulties of overturning a verdict on appeal become clear. It has been noted that appeals are disruptive for accused and victims because it delays or denies closure.[78]

2.8 Conclusion

This chapter has oriented the reader by providing an overview of the system of criminal justice in Australia. Such an analysis was necessary to understand the statutory regime governing criminal appeals and the case law explored in later chapters. The chapter has also defined key terms such as jury deference and the principle of finality and has explained circumstantial evidence and the process of reasoning appellate courts engage in.

[78] Legislative Review Committee, Parliament of South Australia, *Inquiry into Criminal Cases Review Commission Bill 2010* (Parliamentary Paper No 211, 18 July 2012) 82.

Chapter 3: History of the Criminal Appeals Process and Development of Fresh Evidence

This thesis is based on the argument that the judiciary in Australia are reluctant to overturn jury verdicts.[1] This reluctance has manifested in courts in their interpretation of the common form provision and its operation, particularly the jurisprudence developed in relation to new and fresh evidence. This interpretation has included creating jurisprudential tests, which do not exist in the common form or the provisions that accompany it, regarding the reception of evidence on appeal.

This chapter charts the history of the criminal appeal and the objections raised against it. It then charts the development of the rules in relation to new and fresh evidence and demonstrates that the reactions against criminal appeals can be seen in the reaction to reviewing new or fresh evidence. The principles that later underpinned the rule of fresh evidence—jury deference and finality—were also raised as reasons to deny legislation creating criminal appeals.

This thesis demonstrates that, rather than developing through a clear line of authority, new or fresh evidence was developed by the appeal courts through several cases over many decades in England and Wales and was a reformulation or rewording of old legal precepts in relation to new trials. The rules regarding reception of new evidence were not fully formed in the first criminal appeals in England in 1908, and only developed in the early twentieth century through civil and criminal appeals before being settled by the late 1920s.

3.1 The Beginnings of the Struggle for Criminal Appeals

As self-evidently necessary as appeals from jury verdicts now seem, the creation of such appeals was a process that took more than 70 years in England and Wales.[2] The English Parliament considered 31 bills containing provision for appeals from criminal trials between 1844 and 1906.[3] The lack of progress on this legislation was not because of a lack of understanding for the need for such a measure, but a lack of political will. The creation of a mechanism for appeals from a criminal jury's verdict

[1] Standing Committee of Attorneys-General, *Harmonisation of Criminal Appeals Legislation* (Discussion Paper, July 2010) [1.6], [1.8], [1.21]. See also Bibi Sangha and Robert N Moles, *Miscarriages of Justice: Criminal Appeals and the Rule of Law in Australia* (LexisNexis, 2015) [1.1.1]
[2] Lester B Orfield, 'History of Criminal Appeal in England' (1936) 1(4) *Missouri Law Review* 326, 336.
[3] Rosemary Pattenden, *English Criminal Appeals 1844-1994* (Clarendon Press, 1996) 6.

became a political necessity because of the public outcry after widely publicised cases of wrongful conviction.[4]

Throughout the eighteenth and nineteenth centuries, there was no appeal from the verdict of a jury on the facts; however, there had long been appeals made on the ground of legal error.[5] The enactment of legislation enshrining appeal from a criminal trial was not forthcoming until the twentieth century. Incongruously, there had been appeals from civil jury decisions in England and Wales since the mid-seventeenth century.[6]

Three of the main reasons for the lack of political will to enact legislation creating a criminal appeal were:[7]

1) the resistance of the judiciary to the creation of such appeals;
2) the belief in the safeguards already provided in the adversarial criminal trial making an appeal from a jury trial unnecessary;
3) the flood of appeals that would be created and the inherent undermining of the jury system that such a process necessarily entailed.

The reasons given by judges against appeals from jury verdicts have resonated throughout the history of criminal appeals.[8] Specifically, judges reasoned that they did not believe innocent people were convicted, that juries would feel less responsible in their duty to assess the evidence, that the right of appeal would lessen the deterrent effect of criminal law and that there were insufficient judges to handle the anticipated volume of appeals.[9] Despite the fact that all these fears proved to be unfounded within the first few years after the enactment of the relevant legislation, it is argued that such attitudes (particularly that innocent people do not get convicted and that courts cannot or could not handle the appellate workload) have persisted in the jurisprudence of appellate courts in England and Wales and Australia. However, as will be identified in Chapter 4, the two countries differ in their approaches, with England and Wales legislation having been amended to encourage courts to overturn convictions.

[4] Ibid 31.
[5] GD Woods, *A History of Criminal Law in New South Wales* (Federation Press, 2002) 253.
[6] Pattenden (n 3) 6.
[7] Ibid 6–8.
[8] Stephanie Roberts, 'Fresh Evidence and Factual Innocence in the Criminal Division of the Court of Appeal' (2017) 81(4) *Journal of Criminal Law* 303, 306.
[9] Ibid.

3.1.1 'The Implausible Fiction': Judicial Reluctance to Establish Criminal Appeal

Because the English parliamentary system had a partial fusing of the legislative and judicial arms of government through the House of Lords, some members of the judiciary participated in the parliamentary debates on the creation of criminal appeal and all members of the House of Lords could participate in the debates of the various bills and vote on them. Further, between 1844 and 1907, several reports into criminal law revealed the reluctance of judges to establish criminal appeals.[10]

The reluctance of English judges to endorse or accept the creation of a right of appeal from a criminal conviction by a jury has been well documented;[11] 'few, if any judges were prepared to admit that there was any practical need for a court to review jury verdicts'.[12] The attitude of the judiciary was in part motivated by the many protections for the accused that already existed in the criminal law[13]. Further, '[s]hould a jury convict a person and the judge have doubts about his guilt he could recommend a pardon'.[14] Finally, judges felt that their strong influence over juries would allow them to affect the verdict should the judge believe that an innocent person was in jeopardy.[15]

This notion of judicial oversight ensuring the accused's right to a fair trial was strongly relied on as a reason for criminal appeals being unnecessary. However, critics described the notion of the judge as the prisoner's friend 'as an implausible fiction'.[16]

Another reason given for judicial reluctance to the introduction of criminal appeal was inherent conservatism. As one legal historian has noted, 'Hansard is full of references to the reluctance of the judges to agree to any change in the law. Most judges did not want to allow the prisoner to address the jury through counsel in 1836, to be provided with counsel at public expense in 1893, and to give evidence in 1898'.[17]

Even in 1906, a year before the passing of the bill creating criminal appeals, the Lord Chief Justice spoke against it several times, saying that his views were shared not only by his brother judges, but by the recorders and magistrates as well.[18]

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[10] Ibid.
[11] Pattenden (n 3) 22–7.
[12] Ibid 16.
[13] See Discussion in Chapter 3.1.2
[14] Ibid.
[15] Ibid.
[16] VAC Gatrell, *The Hanging Tree: Execution and the English People 1770-1868* (Oxford University Press, 1994) 532 as quoted in ibid.
[17] Pattenden (n 3) 24.
[18] Ibid 25.

3.1.2 'The Criminal Trial was in a Sense an Appeal': The Safeguards Inherent in the Adversarial Criminal Trial Negated the Need for an Appeals Process.

Part of the reason for the lack of political will was the belief that the jury trial itself contained sufficient safeguards to protect the rights of the accused. The development of the adversarial criminal trial was a by-product of a political power struggle between the Crown and Parliament, but by the early eighteenth century all the essential features of today's criminal trials existed.[19] These features are directed to the protection of the rights of the accused, including the privilege against self-incrimination, right to legal representation and prosecution bearing the burden of proof. The emergence of these legal rights and privileges was to provide the innocent with safeguards from wrongful conviction:

> The law of evidence set a standard of proof beyond reasonable doubt. In order for there to be a conviction, twelve persons had all to be convinced of the accused's guilt. No case reached trial unless it had been vetted by a grand jury … [as such] the criminal trial itself was in a sense an appeal.[20]

3.1.3 The Fallacy of the Flood Gates: Criminal Appeals and the (Supposed) Undermining of the Criminal Trial System

Even in 1907, in the debates on the appeal bill that passed the legislature, strong objections were raised for fear of the volume of appeals that would be created.[21] Parliamentarians prophesied that allowing an appeal on the facts, even one only after a grant of leave by the court, would result in a breakdown in the system due to the pressure of innumerable applications.[22] Others argued that it would create a system where cases were continuously re-tried or that jurors would not be as careful in performing their duties, because an appeal would exist to correct their mistakes.[23]

A year after the enabling legislation was passed and the Court of Criminal Appeal had come into operation, a long-time supporter of the notion of criminal appeals, Lord James of Hereford, said in Parliament:

> ...it was prophesied that it [the Court of Criminal Appeal] would be impossible to create and maintain such a Court in this country, that there would be a glut of appeals, that many judges would have to be appointed to administer it, that it would frustrate rather than support the

[19] JH Langbein, *The Origins of Adversary Criminal Trial* (Oxford University Press, 2003) 5.
[20] Pattenden (n 3) 16.
[21] *Report of the Interdepartmental Committee on the Court of Criminal Appeal* (Final Report, 24 June 1965) 3 [10]–[11].
[22] Ibid 3 [10].
[23] Ibid 3 [11].

> acquittal of innocent people, that nothing but evil would result. Such prophecies were uttered in both Houses of Parliament; they were even uttered by Judges on the Bench. I now claim, as one who has always had the establishment of a Court of Criminal Appeal at heart, that the experience we have had of its working has proved all these prophecies to be unsound.[24]

The only reason that anti-appeal attitudes did not prevail in 1907 was the tide of public support for the measure after miscarriages of justice were made public, particularly in the cases of Adolf Beck and George Edalji. These cases are elaborated on in the next section.

3.2 Appeal by Media and Public Pressure for Criminal Appeals

The real impetus for change was brought about by the publication of wrongful conviction cases, such as those of George Edalji and Adolf Beck:

> Retrial by newspaper had become so prevalent that public confidence in the courts was being undermined. *The Times* commented in an editorial in 1907 that 'were there no other reason for creating a Court of Appeal, a strong case would be found for it in the demoralising irregular discussions in Parliament and the Press of the verdicts of juries and sentences of Judges'. Ad hoc committees of inquiry, such as those set up to investigate the convictions of Beck and Edalji, were no answer because they were an extraordinary remedy created in response to intense pressure and could not build up a settled practice.[25]

The case of Adolf Beck in 1904 was described as 'a spectacular miscarriage of justice in which a completely innocent man was twice wrongly accused and convicted'.[26] The first trial was in 1896, where Beck was charged with defrauding people. At the first trial, 10 women swore that Beck was the man they had dealt with. Beck produced an alibi that at the relevant time he was in prison. The jury rejected his alibi and convicted him. He served seven years in jail. The Home Office rejected 16 attempts by Beck to have his conviction reviewed.[27] In 1904, Beck was again tried for defrauding people, and on this occasion five women gave evidence identifying Beck as the offender. He was again convicted. However, his case gained the notice of the media and was subsequently investigated by a Commission of Inquiry.[28]

[24] Ibid 4 [14].
[25] Pattenden (n 3) 31.
[26] Pattenden (n 3) 15.
[27] Roberts (n 8) 306.
[28] *Report of the Interdepartmental Committee on the Court of Criminal Appeal* (Final Report, 24 June 1965) 32 [142]–[144].

George Edalji was a Birmingham solicitor of 'impeccable character'[29] who, in 1905, was convicted of horse maiming on a weak circumstantial case based primarily on his proximity to the crimes and opportunity to commit them.

It has been noted that each of these cases provided an example of the problems with criminal trials and the necessity of an appellate court:[30]

> From Beck came the necessity of providing a judicial forum to consider new evidence of actual innocence … From the Maybrick case came the necessity to provide a forum to review judicial errors and excesses … from the Edalji case came the necessity to provide a forum to review the sufficiency of the evidence.[31]

The deficiencies in judicial attitudes to criminal appeals were evidenced by the Lord Chief Justice's public statement in 1949 that, had the case of Beck been an appeal before the Court of Criminal Appeal, he doubted that the Court would have overturned the verdict unless fresh evidence had been produced.[32]

3.3 The Creation of the 'Common Form': The *Criminal Appeal Act 1907* (UK)

Under the first draft of the *Criminal Appeal Bill 1907*, the Court was empowered to overturn a conviction on the same grounds as the Court of Appeal was empowered to overturn the decision of a civil jury; that being 'that the verdict was such as no jury on the evidence and properly instructed could reasonably have returned'.[33] The famous English barrister and politician FE Smith (later Lord Birkenhead) suggested that this be amended to allow the court to overturn a conviction if 'under all the circumstances of the case [the verdict was] unsafe or unsatisfactory'.[34] Unfortunately, when the Bill was before the House of Lords, such an amendment to the section was removed and so allowed for the wording as eventually appeared in the Act, 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'.

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[29] Pattenden (n 3) 30.
[30] See Ken Whiteway, 'The Origins of the English Court of Criminal Appeal' (2008) 33(2) *Canadian Law Library Review* 309.
[31] D Michael Risinger, 'Boxes in Boxes: Julian Barnes, Conan Doyle, Sherlock Holmes and the Edaliji Case' (2006) 4(2) *International Commentary on Evidence* [article 3] 88–89.
[32] Rt Hon Lord Goddard of Aldbourne, 'The Court of Criminal Appeal in England' (1950) 67(2) *South African Law Journal* 115, 117.
[33] *Report of the Interdepartmental Committee on the Court of Criminal Appeal* (Final Report, 24 June 1965) 33 [146].
[34] Ibid.

In 1907, the English Parliament passed the *Criminal Appeal Act 1907* (UK), thus creating, for the first time in the common law world, an appeal on both fact and law from a jury verdict. Section 4 of that Act provided:

> 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.[35] The Court may, notwithstanding that they are of the 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.[36]

Section 4(1) of the Act contained an exception to the miscarriage of justice cases that the Court of Criminal Appeal was empowered to overturn. Following the 'common form' provision already outlined, it continued: 'Provided that the court may, notwithstanding, that they are of the 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 occurred'.[37]

3.4 The Power to Received Evidence on Appeal

Section 9 of the *Criminal Appeal Act 1907* provided for the Court to receive evidence that was not before the jury at trial. Section 9(1)(b) reads: 'For purposes of this Part of this Act the Court of Criminal Appeal may, if they think it necessary or expedient in the interests of justice ... order any witness who would have been a compellable witness in the proceedings from which the appeal lies to attend for examination'. [38] Thus, this section provided the test on an application to adduce new evidence on appeal—'necessary or expedient in the interests of justice'. The section also proscribed a broad list of what could be produced on appeal including for example to '...order the production of any document, exhibit or other thing connected with the proceedings'[39].

Interestingly, the Act did not use the phrase 'fresh evidence'. As will be shown below, the phrase was probably well known and had appeared in at least one Act of Parliament, the *Summary Jurisdiction (Married Women) Act 1895* (see below). The analysis of cases in this chapter will demonstrate the

[35] *Report of the Interdepartmental Committee on the Court of Criminal Appeal* (Final Report, 24 June 1965) 31 [137].
[36] *R v Dyson* [1908] 2 KB 454.
[37] *Criminal Appeal Act 1907* (UK) s 4(1).
[38] *Criminal Appeal Act 1907* (UK) s 9(1)(b).
[39] *Criminal Appeal Act 1907* (UK) s 9(1)(a). This subsection contained the further criteria that 'the production of the [document] appears to them necessary for the determination of the case'.

use in the *Criminal Appeal Act 1907* of a broad test of 'necessary or expedient in the interests of justice'[40] did not lead judges to break new jurisprudential ground. Judges' conservative approach to the interpretation of this phrase is best summed up by Farwell LJ in *Dean & Anor v Brown*[41] when Acts give judges powers to use "if they think just" the justice meant is not that elusive and indefinable concept called "abstract justice" but is justice in accordance with established principles and rules known to and applied by the Courts'.[42] This thesis proposes that this statement aptly describes how judges in both England and Wales and Australia approached the reception of new evidence and the statutory test of 'necessary or expedient in the interests of justice'.[43]

Notable in the *Criminal Appeal Act 1907* was the lack of any power of the Court of Criminal Appeal to order a retrial. This was not included in England and Wales until the 1960s. The Act was tinkered with in 1908 when the *Criminal Appeal (Amendment) Act 1908* was passed, increasing the number of judges eligible to sit on the Court of Criminal Appeal.[44]

3.5 The Birth of New and Fresh Evidence in Criminal Appeals

The fact that there had been appeals from civil jury decisions in England and Wales since the mid-seventeenth century[45] means that the question of how appellate courts deal with the reception of evidence not presented at trial was in existence prior to the emergence of criminal appeals. What is striking when one reads nineteenth-century civil decisions is that the same considerations (deference to the original decision and the importance of finality) are apparent, as are the beginnings of the test for new and fresh evidence. Interestingly, in the nineteenth century, it seems courts were primarily interested with the cogency of the evidence and what effect it would have on the original judgment. This is suggestive of why the reasons evidence was not produced at trial did not begin to gain prominence until the early twentieth century.

Most interesting, however, is the uncritical reception of the test of new evidence from the civil jurisdiction to the criminal. No consideration seems to have been given to the different burden of proof from the civil to the criminal or the difference in consequences for an accused. A civil case tends to revolve around questions of retrial, rather than a challenge to the original decision. The plea

[40] Ibid s 9(1).
[41] [1909] 2 KB 573.
[42] *Dean & Anor v Brown* [1909] 2 KB 573, 586.
[43] *Criminal Appeal Act 1907* (UK) s 9(1)(a).
[44] Some further minor amendments were made by the *Criminal Justice Act 1948* (UK), but these are not relevant to this thesis.
[45] Pattenden (n 3) 6.

of *res noviter veniens ad notitiam* ('things newly come to light, which may warrant the admission of further evidence or even a new trial')[46] was recognised in Scottish law and the concept existed in English law. As such, courts were not unfamiliar in dealing with such applications or pleas. Yet, as these were questions of retrial, considerations of the advantages of the trial court in assessing the evidence did not arise. Decisions in civil cases tend to be appeals from a decision of a trial judge to grant (or not grant) a new trial based on evidence that was not before them in the original trial. Criminal appeals tend to be an attack on the ultimate decision more than an application for a new trial. The following sections explore cases and legislation that paved the way for new and fresh evidence in criminal appeals.

3.5.1 *Shedden v Patrick*

Shedden v Patrick[47] was a civil appeal in the House of Lords in 1869 relating to a question of inheritance. The son and daughter of a wealthy American were trying to inherit a legacy in Scotland to which they claimed a right. The litigation, regarding the question of the inheritance, had been running for almost 70 years in various forms by other family members. The question central to this aspect of the case turned on the existence of new evidence of a marriage between a man who was a legitimate descendent of the Scottish family and an American woman. The appellants produced affidavit evidence and oral evidence before the House of Lords, seeking a new trial on the basis of the new evidence. The Lords, in quite strident terms, rejected their appeal.

As to the use of the new evidence to justify a new trial, the Lord Chancellor resorted to 'the clearest principles of reason and justice' when he asserted:

> It is an invariable rule in all the Courts and one founded upon the clearest principles of reason and justice, that if evidence which either was in the possession of parties at the time of a trial, or by proper diligence might have been obtained, is either not produced, or has been procured and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given by granting a new trial.[48]

The justification the Lord Chancellor gave for this principle was founded on reasoning that would reappear in similar forms in the jurisprudence. His Lordship was concerned that to allow in new evidence would be to encourage lawyers or litigants to misuse the trial system. Perhaps, because he

[46] Law Society of Scotland, *Glossary: Scottish Legal Terms, Latin Maxims and European Community Legal Terms* (Butterworths, 1992) 79.
[47] (1869) LR 1 HL Sc 470 ('*Shedden*').
[48] *Shedden* (n 46) 545.

deemed the reasoning so obvious, his Lordship relied on it without any evidentiary support. If allowing a new trial were permitted on the basis of new evidence, the Lord Chancellor said: 'it is obvious that parties might endeavour to obtain the determination of their case upon the least amount of evidence, reserving the right, if they failed to have the case re-tried upon additional evidence which was all the time within their power'.[49]

Interestingly, this sentiment was echoed 110 years later by Mason J in *Lawless v The Queen*,[50] again with no evidentiary support for the propositions on which his judicial reasoning was based (and without referencing *Shedden*). Mason J (as His Honour then was) said:

> ...in a criminal trial the accused is entitled to decide how his case will be conducted, in particular, what evidence he will call. He makes this decision in the light of the knowledge that he is tried but once, unless error or miscarriage of justice results in a successful appeal. He cannot therefore conduct his defence by keeping certain evidence back in the expectation that, if he is convicted, the existence of the uncalled evidence will provide a ground for a second trial at which a different or refurbished defence may be presented.[51]

Lord Colonsay, who delivered the only other judgment in *Shedden* (concurrent with the Lord Chancellor), identified the relevant plea of *res noviter veniens ad notitiam.*[52] His Lordship similarly dismissed the appeal and focused squarely on the responsibility of the parties to bring forth relevant evidence at trial:

> The law does not consider the mere discovery of a document, or the mere discovery of a fact, to be a matter *noviter veniens ad notitiam*, as giving a right to a new trial. It must be a matter not only that was not in point of fact, before known to the party but which the party could not by reasonable inquiry, such as he ought to have made, have put himself in possession of.[53]

3.5.2 *Summary Jurisdiction (Married Women) Act 1895* (UK)

In an age before welfare and women's liberation, the Magistrates' Court in England and Wales were empowered to make orders in relation to domestic arrangements for woman. This often involved making orders that husbands continue to support their wives when cohabitation or divorce had occurred.

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[49] Ibid.
[50] (1979) 142 CLR 659.
[51] *Lawless v The Queen* (1979) 142 CLR 659, 675 [4].
[52] 'The plea (*res noviter veniens ad notitiam*) means that new evidence has become available, of which the party was not aware at the time of the former trial and which he could not then, by the exercise of reasonable diligence, have discovered' (Enid A Marshall, *General Principles of Scots Law* (Sweet and Maxwell, 6th ed, 1995) 52).
[53] *Shedden* (n 46) 548.

The appearance of the term 'fresh evidence' is notably absent from legislation in both England and Wales and Australia. One exception to that is a nineteenth-century English Act, the *Summary Jurisdiction (Married Women) Act 1895* ('*Married Women's Act*'). Section 7 of the Act stated:

> A court of summary jurisdiction … in which any order under this Act … has been made, may, on the application of the married woman or her husband, and upon cause being shown upon **fresh evidence** to the satisfaction of the court at any time, alter vary, or discharge any such order, and may upon any such application from time to time increase or diminish the amount of any weekly payment ordered to be made, so that the same do not in any case exceed the weekly sum of two pounds. If any married woman upon whose application an order shall have been made under this Act, or the Acts mentioned in the schedule hereto, or either of them, shall voluntarily resume cohabitation with her husband, or shall commit an act of adultery, such order shall upon proof thereof be discharged. (emphasis added)

The procedural necessity of such a section is self-evident when considering the ongoing nature of such orders. The use of the term 'fresh evidence' as opposed to 'change of circumstance' or other equally applicable phrases is of note because it indicates that the word was known to lawyers. The appearance of 'fresh evidence' in the *Married Women's Act* without being defined indicates that the term was commonly understood at the time. This is made plain by the case of *Johnson v Johnson*[54] which defined the term for the purposes of the *Married Women's Act*.

3.5.3 *Johnson v Johnson*

Johnson v Johnson[55] involved a man seeking an order from the Court relieving him of the weekly sum of money the court had previously ordered him to pay.[56] In 1899, Mrs Johnson had obtained a court order allowing her and her infant daughter to live apart from him.[57] At that hearing, Mr Johnson was too ill to give evidence or instruct his solicitor and it was thought that he would soon die.[58] However, he lived and bought an application under the *Married Women's Act* s 7 to adduce fresh evidence in an effort to have the original order set aside.

The Magistrate at first instance accepted the application and heard the evidence over the objection of Mrs Johnson's legal representative. Her solicitor argued that the evidence was not fresh because it might have been given at the first hearing or could have been obtained if the matter was adjourned for that purpose.[59] The Magistrate proceeded on the basis that fresh evidence under the *Married*

[54] [1900] P 19.
[55] Ibid.
[56] Ibid.
[57] Ibid.
[58] Ibid 21–2.
[59] Ibid 20.

Women's Act referred to any evidence not given or tendered at the first trial.[60] The decision cited is the appeal from the second order of the Magistrate.

The President of the Court neatly summed up the problem their Honours faced: 'we are landed in what is very likely a miscarriage of justice: one bench hears only one side and decides in one way; another bench subsequently hears only the other side and decides the other way'.[61]

The learned President was concerned to provide guidance for magistrates as to the meaning of fresh evidence as used in the Act. The learned President felt that 'there was no real doubt about'[62] what it meant. He linked the term used in the Act back to the old pleading to obtain a new trial *res noviter ad motitiam perventa*:

> [Fresh evidence] means practically the same sort of evidence as that upon which a new trial would, in the ordinary course, be granted: it must relate to something which has happened since the former hearing or trial, or it must be evidence which has come to the knowledge of the party applying since that hearing or trial and which could not by reasonable means have come to his knowledge before that time.[63]

Interestingly, the President made observations that reflect the judicial concern with opening the floodgates of litigation if the rule were less strict:

> It is altogether a mistake to suppose that fresh evidence, within the meaning of the Act of 1895 means or includes evidence which could have been called but which was not in fact adduced, at the first hearing. It would be monstrous to suppose that a party could abstain from calling evidence and could thereafter proceed to make application upon application, based on evidence which might have been tendered in the first instance.[64]

Although the case of *Johnson v Johnson* was only interpreting the meaning of the term 'fresh evidence' for the purpose of the *Married Woman's Act*, it would go on to be cited in other civil and criminal cases as authority for that term generally.

3.5.4 *Brown v Dean*[65]

Although by no means the first case to deal with considerations of new evidence, *Brown v Dean* became one of the touchstones for later decisions in relation to such evidence. *Brown v Dean* was a

[60] Ibid.
[61] Ibid 22.
[62] Ibid 21.
[63] Ibid.
[64] Ibid.
[65] (1910) AC 373.

torts case where a father sued a schoolteacher for damages for 'thumping' his daughter on the back and pushing her out of the school room. This caused her to be ill. The judge at the trial expressed difficulty in deciding the case but eventually found for the father.

Subsequent to the trial, the schoolteacher applied to the trial judge for a new trial based on evidence that subsequent to the incident at school the girl's mother had struck the girl for telling lies and that this assault was the cause of the illness. The trial judge, having laboured over the original decision, granted a new trial to hear this new evidence. The father appealed to the Court of Appeal,[66] and the teacher then appealed to the House of Lords which is the judgment analysed below.

Focusing firmly on the principle of finality, the Lord Chancellor Lord Loreburn said:

> [w]hen a litigant has obtained a judgment in a Court of justice … he is by law entitled not to be deprived of that judgment without very solid grounds; and where (as in this case) the ground is the alleged discovery of new evidence, it must at least be such as is presumably to be believed, and if believed would be conclusive.[67]

Interestingly, the Lords noted that the trial judge's difficulties in deciding the matter originally was the impetus for him granting the reception of the new evidence at a retrial. But that was not part of the test for the reception of evidence. In the 1908 criminal case of *The Queen v Dunton*[68] ('*Dunton*'), the Court of Criminal Appeal reasoned exactly the opposite when it considered that the question asked by the jury indicated its difficulty in reaching a verdict which justified the calling of further evidence.[69]

The Lord Chancellor in *Brown v Dean* prefigured later discussions as to the cogency of the new evidence. It must be 'conclusive' of the issues before the court. This is a very high standard and this jurisprudence on the question of the cogency of new evidence has troubled courts throughout the years.

The Lord Chancellor then affirmed the decision of one of the Court of Appeal judges and quoted from the Court of Appeal's judgment (but without citing where it came from):

> I agree with the judgment of Farwell LJ in which he says, referring to the earlier authorities, 'In the present case the county court judge disregarded those principles and has granted a new trial on affidavits which shew at the outside that there will be oath against oath on a new trial—that is clearly not enough—which shew in the nature of surprise fraud or

[66] *Dean & Anor v Brown* [1909] 2 KB 573.
[67] *Brown v Dean* (1910) AC 373, 374.
[68] (1909) 1 Cr App R 165.
[69] *R v Dunton* (1909) 1 Cr App R 165, 166.

> conspiracy and which also state nothing to shew that the information alleged could not with reasonable diligence have been obtained at the first trial'.[70]

Thus, the phrase 'reasonable diligence', which became a centrepiece of the test for fresh evidence, appears. Further, the nature of fresh evidence is elucidated when the Court rejects information that would result in 'oath or oath' (mere divergent witness testimony) as being insufficiently 'conclusive', thus warranting the granting of a new trial. It should be recalled that most criminal trials are based on circumstantial evidence where the facts in issue are not proved directly but by inferences draw, most often from witness testimony. The civil standard for reopening a trial did not take such evidentiary nuance into account.

3.6 Some Early Criminal Appeals

In *Dunton*[71] and *The Queen v Jones*[72] ('*Jones*'), the Court of Criminal Appeal faced application for the admission of fresh evidence. These decisions have been cited[73] as indicative of the examples of how judges chose to narrowly interpret their powers under the new right to appeal and the Courts broad power to admit new evidence.[74] The test laid down in the *Criminal Appeals Act 1907* s4(1) was 'necessary or expedient in the interests of justice'. In neither case does the judgment refer to the statutory test or even the provision.

In *Jones*, the appellant was convicted at trial of an assault with intent to do grievous bodily harm. After the conviction he became aware of the whereabouts of a witness who could attest to the fact that the appellant took no part in the assault. He had mentioned at trial that such a witness existed. The court rejected his application for leave to appeal and adduce further evidence. The judge focused on the sufficiency of evidence before the jury when he stated '[t]here was ample evidence to justify the conviction'.[75] As to the availability of the witness, His Honour also noted that the appellant 'could have asked to have them called at the trial'.[76]

[70] *Brown v Dean* (1910) AC 373, 375.
[71] (1909) 1 Cr App R 165.
[72] (1909) 1 Cr App R 27.
[73] Roberts (n 8) 307.
[74] *Criminal Appeal Act 1909* (UK) s 9.
[75] (1909) 1 Cr App R 27.
[76] Ibid.

In *Dunton*,[77] the Court was faced with a similar application for leave and to adduce fresh evidence. This time it was in relation to a witness who could provide alibi evidence. The appellant had called alibi evidence at trial, but that witness had been discredited regarding his criminal history.[78]

Obviously, the alibi evidence was material to the conviction and the jury had twice said they could not agree on a verdict before bringing one down. As noted above, the Court, in granting the application, was particularly persuaded by the difficulties the jury had in coming to a decision.[79]

3.6.1 *Nash v Rochford Rural District Council*[80]

The rule in relation to criteria for reception of evidence not produced at trial was being cemented as needing to be obtained with reasonable diligence in the civil courts. As will be seen, this was later to be adopted in the criminal jurisdiction without any analysis. *Nash v Rochford Rural District Council* ('*Nash*'), although a civil case coming within the first decade of criminal appeals, elucidates two principles that would becoming the foundation of the test for the reception of new or fresh evidence, the principle of finality and deference to the jury's verdict.

In *Nash*, the appellant sued the local Council after a ditch in the road cause when a pipe under the road collapsed, injured him.[81] At trial, although he could prove his injury, there was little evidence on the question of whether the Council had installed the pipe.[82] The parties agreed that the trial would proceed on the basis that the Council was the successor to the organisation that had installed the pipe, but when the civil jury decided that matter they were not convinced by the scant evidence produced that the Council was responsible for the installation of the pipe.[83]

The appellant appealed and made application to adduce further evidence on the appeal. Unlike other judgments, this was not an application for a new trial. As such, the issues were more akin to those in a criminal appeal in that the verdict was in question based on the evidence to be produced at the appeal. As such, the principle of jury deference and finality were more apparent.

Lord Cozens-Hardy MR gave the primary judgment of the Court of Appeal. His Lordship noted that: '[i]t is within our power, no doubt to do so on special grounds, but this is a jurisdiction which ought

[77] (1909) 1 Cr App R 165.
[78] Ibid 166.
[79] Ibid.
[80] [1917] 1 KB 384.
[81] *Nash v Rochford Rural District Council* [1917] 1 KB 384, 389.
[82] Ibid.
[83] Ibid 390.

to be exercised with the greatest possible care, particularly in a case where the issue between the parties has been decided by a jury'.[84] His Lordship identified that the appellants were not arguing that the necessity to adduce further evidence because they were taken by surprise at trial or that new facts had come to light since the trial.[85] Lord Cozens-Hardy quoted an earlier decision in which the Court had said:

> ...if the Court thought that the case had been decided on insufficient evidence and that the evidence proposed to be adduced would be sufficient to enable the Court to discover the truth, that would be a special ground within the meaning of that rule, but that was not the case here.[86]

In this, Lord Cozens-Hardy put the process of the trial and the need for finality above the truth of the issue when he said of that case that: '[e]ven in that case I venture to think it would be dangerous, and tend to want of finality in all the proceedings of the Court, to admit further evidence merely on the ground that it would give more satisfactory proof of what took place'.

Scrutton LJ agreed with the Master of the Rolls, but identified two relevant cases that Lord Cozens-Hardy had not. Lord Scrutton quoted the seminal passage from *Shedden* as the applicable principle; namely, whether evidence was in the possession of the party or could have been obtained with 'proper diligence'.[87] Lord Scutton then provided the jurisprudential basis for the rule laid down in *Shedden*:

> I take the reason of it to be that in the interests of the state litigation should come to an end at some time or other; and if you are to allow parties who have been beaten in a case to come to Court and say 'Now let us have another try; we have found some more evidence', you will never finish litigation, and you will give great scope to the concoction of evidence.[88]

Again, like the Lord Chancellor in *Shedden* and Mason J in *Lawless*, the assumption (without evidence) as to how litigants would act if evidence was too easily allowed on appeal preoccupied the judicial mind.

Lord Scutton acknowledged that what evidence an appellate court would accept on appeal must be judged on a case by case basis: '[w]hat evidence a court will admit must depend very much on the

[84] Ibid.
[85] Ibid.
[86] Ibid 391.
[87] Ibid 393.
[88] Ibid.

circumstances of each case and how far the evidence could have been obtained before the trial by the party who seeks to adduce it with proper diligence'.[89]

His Lordship cited an example of a recent case where a woman had succeeded in an action against a man for breach of a promise of marriage. The man subsequently obtained evidence that the woman, at the time the engagement was proposed, was already married.[90] His Lordship concluded by adopting the phrase 'with reasonable diligence',[91] as opposed to 'proper diligence' from the case of *Shedden*.

3.6.2 *Hip Foong Hong v H. Neotia*[92]

Another English case of the early twentieth century that would influence Australian jurisprudence on new and fresh evidence, and that followed the reasoning in *Brown v Dean*, was the Privy Council's decision in *Hip Foong Hong v H. Neotia* ('*Hip Foong Hong*'). This was a case on appeal from the Supreme Court in China sitting in Shanghai. The facts are long, complicated and, although interesting, ultimately not relevant to this thesis.

The appellants and respondents were in the opium trade.[93] The outbreak of the First World War led to difficulties in securing the necessary supplies of opium from some provinces in China.[94] This resulted a situation where those in the trade agreed to slowly supply the opium required by the contract but when that was achieved the contract would be cancelled.[95] The delivery of opium thereafter was intermittent.[96]

In May 1915, the appellants asked for the balance of their opium under the contract from the respondents who refused and claimed that the contract between them had been cancelled in 1912.[97] The appellants sued unsuccessfully, the chief evidence against them being a contract from 1912 that had the words 'cancelled' written across it and signed by the appellants.[98] Although there was other documentary evidence which did not sit squarely with that document, the trial judge found for the respondents.[99]

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[89] Ibid 394.
[90] Ibid 393.
[91] Ibid 394.
[92] (1918) AC 888.
[93] *Hip Foong Hong v H Neotia* (1918) AC 888, 889.
[94] Ibid.
[95] Ibid 890.
[96] Ibid.
[97] Ibid.
[98] Ibid 891.
[99] Ibid.

Subsequently, the appellants produced documentary and affidavit material that demonstrated that not only was the respondent's case flawed, but that the respondents had engaged in fraud, demonstrated that witnesses evidence given at trial was wrong and provided evidence that some witnesses for the Respondent were paid or promised payment for their testimony.[100] An issue mentioned several times by the Privy Council (and it seems the lower court) was that these documents were obtained by means of an unlawful search warrant executed on the house of one of the respondent's witnesses after the trial.[101] Although the Court accepted that the documents were relevant and should have been disclosed prior to trial, they were clearly unhappy with the manner in which the documents were obtained.[102] As to the affidavit's evidence, some of it consisted of witnesses deposing to the fact that they gave false evidence at trial.[103] The Privy Council dismissed the application for a new trial.

An argument in the appeal was that the judge at first instance had misapprehended *Brown v Dean*. But Lord Buckmaster for the Court said that *Brown v Dean* was of little use because that case did not deal with an allegation of fraud or surprise. His Lordship said: 'In all application for a new trial the fundamental ground must be that there has been a miscarriage of justice'.[104]

The Privy Council was not convinced that the new evidence established that fraud had been perpetrated.[105] They discounted the witnesses who swore affidavits that they lied in their testimony at trial because their oath to tell the truth was worthless.[106] Although they accepted relevant evidence had not been disclosed, they reasoned that it did not alter the evidence already presented at trial.[107] They concluded that the evidence would not have altered the trial judge's judgment.[108] In this assessment, they were assisted by the fact that they had the judge's trial notes and that the judge had been one of the two judges that constituted the Full Court that had heard the original application for a new trial.[109]

Their Lordships clear disapproval of the appellant; their dismissal of the new evidence piecemeal; and their conclusion that, in any event, it would not have affected the original decision, is strikingly

[100] Ibid 892–3.
[101] Ibid 892.
[102] Ibid 894.
[103] Ibid 893.
[104] Ibid 894
[105] Ibid 894.
[106] Ibid 893.
[107] Ibid 892–3.
[108] Ibid 893.
[109] Ibid 893.

similar to the failure to apply standards of rational evaluation shown almost a century later by the Western Australian Court of Appeal in *Mallard* (discussed in Chapter 5).

Finally, in what was a most unhelpful observation for the appellants, the Council concluded that the proper way to approach the matter would have been a new cause of action against the respondents, alleging that they had been fraudulent at the trial.[110]

3.6.3 *The King v Copestake Ex Parte Wilkinson*[111]

The first criminal law judgment to provide reasoning for the decision in relation to the reception or rejection of new evidence was the 1927 case of *The King v Copestake, Ex Parte Wilkinson*[112] ('*Copestake*'). This case identified the decision in *Shedden*, *Brown v Dean* and *Nash* as the relevant jurisprudence regarding fresh evidence.

Although *Copestake* is nominally a criminal case, which stems from the fact that it was instituted under the *Criminal Justice Administration Act 1914* (UK), the facts involved what is known as alimony (or as it was called then, a bastardy order). A child was born out of wedlock and the mother applied to a Magistrate for an order that the father pay a weekly sum.[113] The Magistrate had to first determine if the man alleged to be the father (Wilkinson) was indeed so.[114] Wilkinson admitted having intercourse with the mother on the dates she alleged, but denied paternity.[115] The Magistrate made the bastardy order.[116] Wilkinson subsequently spoke to the doctor and nurse who had attended the mother during pregnancy.[117] They attested to the fact that the baby was full term when born which, Wilkinson argued, meant that it was conceived two months earlier than his liaison with the mother.[118] He eventually succeeded in convincing a Magistrate to accept his new evidence and reverse its previous order. The matter was appealed to the Divisional Court and then to the Court of Appeal.[119]

The appeal turned on the proper construction of the relevant section of the *Criminal Justice Administration Act 1914*. However, Lord Hansworth MR made some observations on the definition of fresh evidence. His Lordship quoted the definition of fresh evidence given in *Johnson v Johnson*

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[110] Ibid 894.
[111] [1927] 1 KB 468.
[112] Ibid.
[113] *R v Copestake; Ex parte Wilkinson* [1927] 1 KB 468.
[114] Ibid 469.
[115] Ibid.
[116] Ibid 469.
[117] Ibid.
[118] Ibid.
[119] Ibid 470.

that fresh evidence 'means evidence of something which has happened since the former hearing or has come to the knowledge of the party applying since the hearing and could not by reasonable means have come to his knowledge before that time'.[120] His Lordship then quoted from *Brown v Dean* and concluded that: 'only such fresh evidence could be produced as would satisfy those conditions. That evidence must be of such a character that not merely is it relevant but of such importance that it would have affected the judgment of the tribunal if it half been before them at the original hearing of the case'.[121]

Interestingly, his Lordship concluded that the test is whether the fresh evidence would have an effect on the judgment.[122] Since Lord Hansworth did not specify what effect is necessary, such phrasing (given a broad interpretation) would allow for the admission a wide of range of evidence.

Scutton LJ also provided some commentary on the fresh evidence rule; however, his Lordship relied on *Nash*, *Shedden* and *Timmins*. Scrutton LJ is far more parsimonious in his phraseology: the effect of the new evidence 'must be of such importance as very probably to influence the decision'.[123]

With the principles of new or fresh evidence having successfully migrated across from civil to criminal cases, the next 40 years saw the appeal courts strictly apply the rules. The courts saw their job as a bulwark against the flood of appeals should they be too lenient in admitting new evidence or overturning jury verdicts.

In late 1949, the Lord Chief Justice of England and Wales told an audience at the University of Cape Town that:

> All Questions of fact are the exclusive province of the jury and as I shall show, it is very seldom that the court of Criminal Appeal set the verdict of a jury, provided that there has been no misdirection by the Court or no wrongful admission of evidence, and then only if they think there has been a miscarriage of justice. The jury have seen and heard the witnesses: the Court of Appeal does not have witnesses before them, and accordingly will only interfere with a finding of fact in an extreme case, where it can be seen that the verdict of guilty must be wrong.[124]

The Lord Chief Justice's comments provide insight into the attitudes of judges. Their interpretation of the broad powers provided by the statue was significantly narrowed by their deference to the jury,

[120] Ibid 474.
[121] Ibid.
[122] Ibid 775.
[123] Ibid 477.
[124] Rt Hon Lord Goddard of Aldbourne (n 31) 116.

and appellants must effectively prove factual innocence. As identified earlier, the Lord Chief Justice commented in this oration that Adolph Beck, the case that precipitated the passing of the 1907 Act, would not have succeeded on appeal without fresh evidence.[125] The Lord Chief Justice's attitudes to overturning a conviction also provides insight into the attitudes of the judges to the reception of fresh evidence and the high evidentiary value it must have.

3.6.4 *The Queen v Parks*[126]

However, perhaps with criticisms mounting, the appellate courts sometimes took a more lenient approach to admission of evidence. *The Queen v Parks*[127] ('*Parks*') involved a conviction for indecent assault. The victim was attacked by a stranger in the street early in the morning in a dimly lit alley.[128] The victim said she scratched her attacker's face.[129] The next day, the victim saw Mr Parks riding a bicycle and identified him has her attacker.[130] Mr Parks indeed had scratches on his face, which he said he had received from shaving.[131] The central question at the trial was identity. Mr Parks was convicted and then appealed, seeking to admit new evidence to the Court, that being the victim's previous convictions for dishonesty and a witness who said they saw a man running from the scene who did not fit the description given by the victim or Mr Parks.

The Lord Chief Justice outlined the test applied to new evidence and commented that such evidence was only rarely admitted: 'It is only rarely that this court allows further evidence to be called, and it is quite clear that the principles upon which this court acts must be kept within narrow confines, otherwise in every case this court would in effect asked to affect a new trial'.[132]

In referencing the statutory provision that created the power to admit evidence, the Lord Chief Justice aptly summed up the courts' attitude to that test and their approach: '[a]s the court understands it, the power under section 9 of the *Criminal Appeal Act 1907* is wide. It is left entirely to the discretion of the court but the court in the course of years has decided the principles upon which it will act in the exercise of that'.[133] His Lordship then summarised the principles (without citing authority):

[125] Ibid.
[126] (1961) Cr App R 29.
[127] Ibid.
[128] Ibid 30.
[129] Ibid 31.
[130] Ibid.
[131] Ibid.
[132] Ibid 32.
[133] Ibid.

> First, the evidence that is sought to call must be evidence which was not available at the trial. Secondly, and this goes without saying, it must be evidence relevant to the issues. Thirdly, it must be evidence which is credible evidence in the sense that it is well capable of belief; that is not for this Court to decide it is to be believed or not but evidence which is capable of belief. Fourthly, the Court will, after considering that evidence, go on to consider whether there might have been a reasonable doubt in the mind of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at trial.[134]

The Court then assessed whether the evidence was new or fresh (as we now call it). The previous convictions of the victim were considered to meet the criteria and should have been disclosed prior to trial.[135] No provenance for the new witness's evidence was provided in the judgment, but the Court declared that it was 'clearly not available at trial'.[136] Available to whom, one wonders? The evidence of prosecution witnesses are rarely available to the defendant, because the defendant has not investigated the matter nor gathered the evidence.

The Court then looked at the effect the new evidence might have on the verdict of the jury.[137] It was accepted by the Court that the victim had been assaulted as she described.[138] Further, it was accepted that since Mr Parks was a stranger to her, there was nothing to suggest that her identification of him was motivated by anything other than an honest belief that he was her attacker.[139] Incredibly (considering the deference appellate courts had shown and to jury decisions), the Court accept the submission that her convictions for dishonesty meant she would not be honest about how sure she was of her initial identification of Mr Parks.[140] Although the court expressed that it had 'considerable doubt on the matter', it accepted that the evidence 'might have had an effect on the minds of the jury'.[141] This, coupled with the description given by the new witness of the man leaving the scene, was enough to convince the Court to acquit Mr Parks.[142]

3.7 Developments from 1951–1960

Further alterations were made to the powers of the Court of Criminal Appeal in 1964 through the *Criminal Appeal Act 1964* (UK) which empowered the Court to order a retrial in circumstances where

[134] Ibid.
[135] Ibid.
[136] Ibid 34.
[137] Ibid 33.
[138] Ibid.
[139] Ibid.
[140] Ibid.
[141] Ibid.
[142] Ibid 34–5.

fresh evidence was produced on appeal and it seemed in the interests of justice to order a retrial.[143] But such alterations were not sufficient to stop the rising tide of complaints (see Chapter 4).

3.8 Conclusion

This chapter began by outlining the history of the creation of the Court of Criminal Appeal and the arguments raised against it. Arguments such as the belief in safeguards inherent in the adversarial criminal trial and the flood of appeals that would be created bear striking resemblance to the principle of finality and deference to the original decision that later emerged in the case law on new and fresh evidence.

The chapter identified that dealing with evidence not adduced at trial predates the criminal appeal in the plea of *res noviter veniens ad notitiam*[144] which identifies the original jurisprudential link between admission of new evidence and the power to order a retrial. These notions were eventually imported into criminal cases despite the Court of Criminal Appeal not originally having the power to re-try. The chapter identified that, by 1895, the term 'fresh evidence' was common enough to appear in the *Summary Jurisdiction (Married Women) Act 1985* without being defined. The rules regarding the reception of new evidence developed in the early twentieth century through civil and criminal appeals before being settled in criminal appeals by the late 1920s.

The chapter explored the early cases of *Shedden*[145] and *Johnson v Johnson*[146] and the later civil cases of *Brown v Dean*,[147] *Nash*[148] and *Hip Foong Hong*[149] where the question of whether a retrial should be ordered was paramount. As such, the decisions focused on whether the new evidence is convincing and if there is sufficient reason for it having not been tendered at trial. The same standard is seen in early criminal appeals from 1926 onwards, such as *Dunton*,[150] *Jones*[151] and *Copestake*[152] which relied on several of the earlier civil judgments. Finally, in the authority of later English and Australian cases, *Parks* articulated the rules around fresh evidence, requiring explanation for the failure of it to be tendered at trial and the cogency of the evidence to be such that it would affect the outcome of the

[143] *Report of the Interdepartmental Committee on the Court of Criminal Appeal* (Final Report, 24 June 1965) 8 [32].
[144] This plea means that new evidence has come to light which may warrant the admission of further evidence or even a new trial.
[145] (1869) LR 1 HL Sc 470.
[146] [1900] P 19.
[147] (1910) AC 373.
[148] [1917] 1 KB 384.
[149] (1918) AC 888.
[150] (1909) 1 Cr App R 165.
[151] Ibid 27.
[152] [1927] 1 KB 468.

case. This chapter argued that the reception of civil rules for fresh evidence into criminal law without any acknowledgement of the different standards of proof at trial and the different public interests in the outcome set the bar too high in criminal appeals.

Chapter 4: The Donovan Committee and Runciman Commission and the Attempt to Free Up Fresh Evidence Rules

This chapter identifies two inquiries in England and Wales into the works of criminal appeals in 1965 and 1990. Both inquiries examined and made recommendations as to the rules in relation to the approach of the courts to the common form legislation and to new and fresh evidence. This chapter will elucidate the issues these inquiries identified with the approach of the appellant courts and the remedies they suggested. Such an analysis is useful for comparison with the appellate jurisdiction in Australia, which will be explored in Chapter 5. This thesis seeks to demonstrate that Australian appellate courts have a similar approach to the common form provisions and the reception of new and fresh evidence primarily because they followed English cases. However, no Australian jurisdiction has had the benefit of an inquiry into the workings of their criminal appeals jurisprudence, let alone two.

The Interdepartmental Committee on the Court of Criminal Appeal ('Donovan Committee') was established in 1965 to inquire into the workings of the Court of Criminal Appeal. The number of appeals from jury verdicts had increased significantly since the end of the Second World War.[1] The primary objective was to consider transferring that courts role to the Court of Appeal.[2] In the course of that inquiry, complaints about the strict interpretation the Court of Criminal Appeal had regarding the overturning of convictions and that Court's overly strict approach to the reception of new evidence were examined.[3] Twenty-five years later, the Royal Commission into Criminal Justice ('Runciman Commission') was established in the wake of the Irish bombing cases (see Section 4.3).[4] It was found that successful appeals based on fresh evidence were relatively rare,[5] and it was considered whether the Court of Appeal was construing their power to receive such evidence too narrowly.[6] The Commission recommended a change to the relevant provision of the *Criminal Appeal Act 1968* (UK) that allowed for the reception of such evidence. The change was to allow 'greater scope for doing justice'.[7]

[1] *Report of the Interdepartmental Committee on the Court of Criminal Appeal* (Final Report, 24 June 1965) 4 [15].
[2] Ibid 1 [1].
[3] Ibid 30 [133].
[4] *Royal Commission into Criminal Justice* (Report, 2 June 1993) 1 [2].
[5] Ibid 172 [51].
[6] Ibid 173 [55].
[7] Ibid 174 [60].

4.1 The Donovan Committee

On 25 February 1964, the Lord Chancellor and Home Secretary appointed a committee headed by Lord Donovan to review the Court of Criminal Appeal.[8] It was specifically directed to consider and report on 'the constitution, powers, practice and procedure' of that Court.[9] The Donovan Committee conducted hearings, took evidence (written and oral) and conducted research.[10] It provided the *Report of the Interdepartmental Committee on the Court of Criminal Appeal* on 24 June 1965.

The chief criticism received by the Donovan Committee was that the Court of Criminal Appeal lacked the status of a 'real' Court of Appeal because it was constituted of trial judges, rather than specialist appellate judges.[11] As such, the chief aim of the Committee was to consider the merging of the Court of Criminal Appeal with the Court of Appeal. Two previous committees had investigated this possibility.[12] Other criticisms investigated by the Donovan Committee were 'the constitution of the Court, certain of its powers and certain restrictive interpretations placed by the Court upon the powers conferred on it'.[13] The Commission's recommendation for an amendment to the *Criminal Appeal Act 1907* s 4(1) is of most relevance to this thesis.

In relation to the proceedings of the Court of Criminal Appeal, the Donovan Committee explored the hearing of fresh evidence,[14] the power of the court to interfere with a conviction[15] and the proviso to the *Criminal Appeal Act 1907* s 4(1).[16] These are explored below.

4.1.1 Hearing of Fresh Evidence

In relation to the reception of fresh evidence, the Committee noted that this was governed by the *Criminal Appeal Act 1907* s 9, but that the legislation merely provided for admission if the evidence was 'necessary or expedient in the interests of justice'.[17] The prescribed condition for fresh evidence in the statute gave the Court significant discretion. As the Court was not a court of retrial, it was 'not surprising that the Court has had this situation well in mind when considering when it would, and

[8] *Report of the Interdepartmental Committee on the Court of Criminal Appeal* (Final Report, 24 June 1965) ii.
[9] Ibid 1 [1].
[10] Ibid 1–2 [2]–[3].
[11] Ibid 14 [46].
[12] The Committee on the Business of Criminal Courts (1933) presided over by Lord Hanworth and the Committee on Supreme Court Practice and Procedure (1953) presided over by Sir Raymond Evershed.
[13] *Report of the Interdepartmental Committee on the Court of Criminal Appeal* (Final Report, 24 June 1965) 4 [15].
[14] Ibid 30 [131]–[136].
[15] Ibid 31 [137]–[150].
[16] Ibid 35 [151]–[166].
[17] Ibid 30 [133].

when it would not, exercise its power to hear fresh evidence'.[18] The wide discretion allowed by the statute caused the Court to formulate its own rules for the exercise of its discretion; fresh evidence would not be admitted unless:

1) it was not available at the trial
2) it was relevant to the issues
3) it was credible evidence (ie, capable of belief).[19]

The practical reality, as found by the Donovan Committee, was that 'the conditions prescribed by the Court … have been criticised as too narrow'.[20] The Committee had a particular difficulty with the first of these criteria. As will be demonstrated in subsequent chapters, the emphasis placed on the question of why fresh evidence was not adduced at trial has at times been emphasised over the duty of the courts to do justice.

The Committee recognised that a bill had been placed before the British Parliament which, in part, sought to widen the grounds for the admission of fresh evidence and that, in the debate regarding that bill, the Lord Chief Justice had expressed the view that 'it is essential for the court to decide what evidence it will treat as admissible, it is not bound by its previous practice … and that it can and will review the practice in light of the Bill … the governing principle being to ensure so far as possible that there has been no miscarriage of justice'.[21]

The statement of the Lord Chief Justice heartened the Committee, and they merely added 'additional evidence should be received, if it is relevant and credible, and if a reasonable explanation is given for the failure to place it before the jury'.[22] As such, it recommended:

> The present practice of the Court in regard to the admission of fresh evidence in support of an appeal should be modified so as not to exclude altogether evidence which was available at the time of trial. The Court should be willing to receive such evidence if it is relevant and credible and if a reasonable explanation is given for the failure to place it before the jury at the trial.[23]

[18] Ibid 30 [132].
[19] Ibid.
[20] Ibid 30 [133].
[21] Ibid 31 [135].
[22] Ibid 31 [136].
[23] Ibid 72 Recommendation 12.

4.1.2 Power to Interfere with a Conviction

The Donovan Committee then examined how the Court of Criminal Appeal interpreted the statutory provision (outlined above) that empowered them to overturn a conviction. Section 4(1) of the *Criminal Appeals Act 1907* could be broken into three grounds for allowing an appeal:

1) that the conviction is unreasonable or cannot be supported having regard to the evidence, or
2) 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
3) on any ground there was a miscarriage of justice.[24]

The Committee was particularly interested in addressing the first ground of appeal. This ground empowers the court to overturn a jury verdict based merely on the court's assessment of the facts at trial. Such a provision struck at the heart of the concerns expressed in the debates over the creation of a right of appeal. As identified earlier, there was considerable resistance to the notion of appeals on the facts because it was felt this would undermine trial by jury. Over the ensuing decades, these concerns found expression in a judicial reluctance to resort to this ground of appeal, both in England and Wales (see Chapter 3) and in Australia.

The Committee identified that the Court of Criminal Appeal had 'acted upon a view that its functions are circumscribed in appeals which raise issues of fact'.[25] This was based on the pronouncements of the Court itself. As the Lord Chief Justice put it in in the first judgment ever delivered by the Court of Criminal Appeal:

> It must be understood that we are not here to re-try the case where there was evidence proper to be left to the jury upon which they could come to the conclusion at which they have arrived. The Appellant must bring himself within the words of Section 4(1). Here there was evidence on both sides, and it is impossible to say that the verdict is one at which the jury could not properly have arrived.[26]

The Committee was sympathetic with the Court's position, commenting that it was not empowered to re-try cases. However, it noted the issues raised by its inquiry: 'What has been questioned in this context, however, is whether the Court is, or should be, debarred from interfering with a jury verdict because there was some evidence to support it'[27] and, therefore, the verdict could not be described as

[24] Ibid 31 [137].
[25] Ibid 31 [138].
[26] *R v Williamson* (1909) 1 Cr App R 3.
[27] *Report of the Interdepartmental Committee on the Court of Criminal Appeal* (Final Report, 24 June 1965) 32 [140].

unreasonable. The Committee's view was that the Court's approach was correct on a plain reading of s 4(1) in that 'If there is credible evidence both ways, and the jury accepted the evidence pointing towards guilt, it is difficult to say the verdict was "unreasonable" or could not "be supported having regard to the evidence" '.[28] The Committee concluded: 'If there be some defect in the situation which requires to be remedied, the defect lies in the statutory language rather than in its judicial interpretation. A large body of informed opinion takes the view that such a defect does exist'.[29]

The Committee tested the legislation against factual scenarios of previous miscarriages of justice. As discussed in Chapter 3, the case of Adolf Beck was one of three cases that engendered so much public sympathy that the creation of a right of appeal was inevitable. The Committee explored the factual scenario that had occurred in Beck's case and in *R v McGrath* (which was similar to Beck, but had occurred 44 years later in 1948).[30]

The Committee pointed out that, provided the identification of the accused was credible, then the appeal provision in s 4(1) provided little protection from wrongful conviction because such evidence would always provide a basis for the jury's decision, even in the face of credible alibi evidence.[31] Thus, the conviction would not be 'unreasonable' but it would not be supported by the evidence.

To eliminate this problem, the Committee recommended a change to the wording of the statute; that it be amended to give the Court the power to allow 'an appeal where, upon the consideration of the whole of the evidence, it comes to the conclusion that the verdict is unsafe or unsatisfactory'.[32]

4.1.3 The Donovan Committee and the Proviso

Section 4(1) of the *Criminal Appeal Act 1907* contained an exception to the miscarriage of justice cases, which the Court of Criminal Appeal was empowered to overturn. Following the 'common form' provision already outlined, it continued: 'Provided that the court may, notwithstanding, that they are of the 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 occurred'.[33]

The Committee observed that this provision was not subject to debate when the Bill passed through the Parliament. The proviso was clearly designed to deny an appellant succeeding on a technical fault

[28] Ibid 32 [141].
[29] Ibid 32 [141]–[142].
[30] Ibid 32 [142]–[144].
[31] Ibid 33 [145].
[32] Ibid 34 [149], 72 Recommendation 13.
[33] *Criminal Appeal Act 1907* (UK) s 4(1).

in the trial. The Committee identified that there were two conflicting approaches as to how it applied. The first was to anticipate the likely opinion of the jury at trial if the problem complained of had not occurred, and the second was that the Court itself decided whether, despite the problem complained of, the appellant's conviction should stand. This second approach was phrased as 'whether *any* reasonable jury, properly instructed could upon the whole of the admissible evidence have done otherwise than convicted'.[34] Through an analysis of the cases, the Committee concluded that the Court of Criminal Appeal had originally adopted the first approach,[35] but in more recent years changed to the second approach.[36] The Committee considered that the second approach was the one in keeping with the words of the legislation.[37]

As to recommendations, the Committee identified that no one had recommended the abolition of the proviso.[38] Having concluded that the Court now construed the proviso in the correct manner, the Committee were not in favour of amendment, but for one exception. They felt that the word 'substantial' should be removed because '[i]t seems to us to be devoid of practical significance'.[39] As such, their final recommendation was: 'The proviso to s 4(1) of the Act should be retained in its present form (subject to the deletion of the word "substantial" which at present qualifies the reference to miscarriage of justice), and there is no occasion for any statutory amendment to alter the construction now placed upon it'.[40]

4.1.4 Changes Affected After the Donovan Committee

In response to the Donovan Committee's Report, the British Parliament passed the *Criminal Appeal Act 1968* (UK). The most sweeping changes occasioned by the Report were the abolition of the Court of Criminal Appeal and its jurisdiction being subsumed into the Court of Appeal's functions.

All three recommendations related to the power of an appellate court to overturn convictions were accepted. The original grounds of appeal established in the 1907 legislation were amended. Section 2 of the *Criminal Appeal Act 1968* provided:

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[34] *Report of the Interdepartmental Committee on the Court of Criminal Appeal* (Final Report, 24 June 1965) 35 [152] (emphasis added).
[35] See, eg, *R v Dyson* (1908) 1 Cr App R 13; *R v Stoddart* (1909) 2 Cr App R 217.
[36] See, eg, *R v Haddy* [1944] 1 All ER 319; *R v Stirland* [1944] 2 All ER 13.
[37] *Report of the Interdepartmental Committee on the Court of Criminal Appeal* (Final Report, 24 June 1965) 35 [153].
[38] Ibid 37 [163].
[39] Ibid 37 [164].
[40] *Report of the Interdepartmental Committee on the Court of Criminal Appeal* (Final Report, 24 June 1965) 72 Recommendation 14

(2) Except as provided by this Act, the Court of Appeal grounds for allowing an appeal against conviction were

(a) that the verdict of the jury should be set aside on the s. 1. ground that under all the circumstances of the case it is unsafe or unsatisfactory; or

(b) that the judgment of the court of trial should be set aside on the ground of a wrong decision of any question of law; or

(c) that there was a material irregularity in the course of the trial, and in any other case shall dismiss the appeal.

Provided that the Court may, notwithstanding that they are of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no miscarriage of justice has actually occurred.[41]

The Court of Appeal in England and Wales took this change of wording to change (and broaden) their powers when considering an appeal. It was said in *The Queen v Cooper (Sean)* (1969) 1 QB 267 at 271 that: 'the court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done'.

The English and Welsh courts have interpreted the phrase as allowing the appellate court to ask themselves the subjective question of whether they feel a lurking doubt about the conviction.[42] The reception of fresh evidence on appeal was included in the *Criminal Appeal Act 1968* s 23 which empowered the court to receive fresh evidence if:

(a) It appears to them that the evidence is likely to be credible and would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and

(b) They are satisfied that it was not adduced in those proceedings but there is a reasonable explanation for the failure to adduce it.[43]

This section created a new standard for the reception of evidence on appeal because it removed the distinction between new and fresh evidence (although this distinction was never great in English

[41] See <http://www.legislation.gov.uk/ukpga/1968/19/section/2>.
[42] *The Queen v Cooper (Sean)* (1969) 1 QB 267, 271. See also *Stafford v Director of Public Prosecutions* (1974) AC 878, 892.
[43] *Criminal Appeal Act 1968* (UK) ss 23(2)(a)–(b).

appeal judgments) and merely required a reasonable explanation for the evidence not being adduced at trial.

The Donovan Committee's observations regarding new and fresh evidence and the subsequent changes, seemed to have an immediate effect. In *The Queen v Harris*[44] ('*Harris*'), the Court of Criminal Appeal accepted evidence 'whilst it might not be fresh evidence in the strict sense' because the evidence 'appeared to be relevant' and was 'prima facie credible'.[45] The new evidence should be admitted because 'the justice of the case required that it should be heard'.[46] The Court exercised its new power and ordered a retrial.[47]

Unfortunately, *Harris* was not typical of cases over the next two decades. Judges slipped back into their restrictive approach to the admission of new and fresh evidence.

4.2 *The Queen v Stafford and Luvaglio*[48]

The decision of the House of Lords in *The Queen v Stafford and Luvaglio*[49] ('*Stafford & Luvaglio*') is worth analysing because in it the House of Lords considered the test set out in *Parks* and, in effect, formalised a two-step approach to the consideration of new and fresh evidence. In the central decision of Viscount Dilhorne, his Lordship expressly expounded the necessity for the appellant courts to first ask whether the new evidence is admissible before them before considering what effect that evidence might have had on the jury's decision in the case.[50] This decision is central to the reasoning of one of the appeals of the Birmingham Six considered below.

After the amendment of the criminal appeal provisions, English courts began to grapple with the problem of how to approach cases with fresh evidence. They questioned whether the court should assess what effect they think the fresh evidence would have had on the jury or whether the fresh evidence convinces the court that the verdict is unsafe of unsatisfactory. The problem has been articulated as:

> The difficulty this causes is that if the court is deciding on the basis of what it thinks of the evidence, this is essentially usurping the role of the jury. This moves the court away from its review function towards a rehearing one; it has to make assumptions about what the jury

[44] [1966] Crim LR 102.
[45] *R v Harris* [1966] Crim LR 102.
[46] Ibid.
[47] Ibid.
[48] [1974] AC 878.
[49] Ibid.
[50] *Stafford & Luvaglio v DPP* [1974] AC 878, 892–4.

> thought of the evidence it heard when convicting the defendant and marry that up with the new evidence the court has heard and decide whether the conviction is unsafe.[51]

Stafford & Luvaglio[52] dealt with this problem and decided that the court should focus on what effect new evidence would have had on the jury at trial. The 1974 judgment in that case bares resemblance to Australian case such as *Chamberlain*, *Mallard* and *Graham Stafford* (see Chapter 5).

Mr Stafford and his co-accused Luvaglio had been convicted of murder in 1967.[53] His application to adduce further evidence and his appeal were unsuccessful in 1968.[54] In 1972, the Home Secretary referred the matter to the Court of Appeal.[55] Mr Stafford and Mr Luvaglio called further evidence, which was heard by that Court but the appeal was dismissed in early 1973.[56] The matter was given leave to appeal to the House of Lords.[57] Viscount Dilhorne delivered the most comprehensive reasons that formed the basis of the majority decision. He dismissed the appeal.

Viscount Dilhorne reviewed the ratio of *Parker*. Counsel for Mr Stafford argued that *Parks* stood for the proposition that in assessing the new evidence an appellate court merely considered whether the evidence was relevant and capable of belief and not for the Court to consider whether the new evidence was to be believed or not.[58] His Lordship disagreed: 'I agree that in deciding whether to admit fresh evidence, the Court, which at that stage has not heard the evidence, has not to decide whether it is to be believed but I do not agree that, when the court has heard the evidence, it has not to consider what weight if any, should be given to it'.[59]

His Lordship then set out clearly how an appellate court should approach the reception of such evidence:

> Lord Parker's fourth principle as he called it, was that the court, after considering the evidence, would go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial. I cannot see how the court can consider this question without considering what weight should be given to the fresh evidence they had heard; and

[51] Stephanie Roberts, 'Fresh Evidence and Factual Innocence in the Criminal Division of the Court of Appeal' (2017) 81(4) *Journal of Criminal Law* 303, 311.
[52] [1974] AC 878.
[53] *Stafford & Luvaglio v DPP* [1974] AC 878, 891.
[54] Ibid.
[55] Ibid.
[56] Ibid.
[57] Ibid.
[58] Ibid 892.
[59] Ibid.

> I do not see that this principle is applicable to the question whether the evidence is to be admitted.[60]

His Lordship then explained how appellate courts should approach the question: '[i]t is only after it has been admitted and it may be subjected to cross examination, that its weight can be assessed and the court decided whether it might have affected the jury's verdict'.[61]

The appellants had raised the decision as authority for the proposition that if the Lords concluded that the fresh evidence might have caused the jury to have a reasonable doubt, that the Court would acquit the accused.[62] The argument and the Court's dealing with it demonstrates that how to deal with evidence not adduced at trial was a matter of controversy since the alteration in the test on appeal from 'unreasonable and cannot be supported having regard to the evidence' to 'unsafe and unsatisfactory'. Viscount Dilhorne stated:

> In our view this evidence does not give rise to any reasonable doubt about the guilt of the accused. We do not ourselves consider that an unsafe or unsatisfactory verdict was returned but as the jury who heard the case might conceivably have taken a different view from ours, we quash the conviction.[63]

Instead, his Lordship said: 'the House must come to the conclusion that the verdicts were unsafe and unsatisfactory'.[64]

However, his Lordship did not make allowances for the fact that *Parks* was decided at a time before the court had the power to order a retrial. As such, the judges would necessarily have to assess the effect the new evidence had on the conviction because their only option was to acquit the defendant or dismiss the appeal. By the time of *Stafford &* Luvaglio, the court had the power to order a retrial.

This fact was not lost on Lord Devlin who, in a later book, criticised that approach on the grounds that it usurped the role of the jury.[65] Mr Stafford's and Mr Luvaglio's appeals were dismissed.

4.3 The Irish Bombing Cases

The public feeling in England over IRA bombings lead to two of the most notorious miscarriage of justice cases in history: the Birmingham Six and the Guilford Four ('the Irish Bombing cases'). It is

[60] Ibid.
[61] Ibid 893
[62] Ibid 882–91.
[63] Ibid 894.
[64] Ibid 895.
[65] Patrick Devlin, *The Judge* (Oxford University Press, 1979) 148–76.

accepted that the criminal trial has limited powers to detect deliberately false police conduct and testimony. The Irish Bombing cases involved many problems, but the centrepiece of those miscarriages were the confessions obtained through torture. Once convicted (primarily based on those confessions), the defendants had considerable trouble convincing an appellate court to accept evidence further supporting their claims at trial of the torture.

The plight of the defendants in all of the Irish Bombing cases directly resulted in the Runciman Commission into the criminal justice system including the investigation into the acceptance of new or fresh evidence. Although the Guildford Four case is better known thanks to Daniel Day Lewis's portrayal of Gerry Conlon in the Hollywood film *In the Name of the Father*, the appellate court's attitudes to both the Guildford Four and Birmingham Six was the same. As such, this thesis will only look at the Birmingham Six cases as they aptly demonstrate the thesis proposed.

4.3.1 Birmingham Six

The cases of the Birmingham Six are an excellent example of the courts using the principle of finality and jury deference to deny appeals even in the face of significant new evidence. Through a series of appeals (and a civil trial), the appellants produced ever more evidence that the jury had not heard regarding both the scientific evidence and their claims of police brutality. No matter what was tendered before an appellate court, no judge was minded to quash the conviction. The Birmingham Six cases also demonstrate the two-step test established in *Stafford* provided the courts with a more difficult test for an appellant to satisfy.

The attempts by the six men to appealed against their convictions (or have their grievances aired in court) took seventeen years at least three appeals. Their first appeal was rejected in 1976 shortly after their conviction. One of the six, Richard McIlkenny then bought an action against West Midlands Police for injuries inflicted upon him after his arrest and while he was in police custody. The case was dismissed in 1981. In 1987, following the discovery of new scientific evidence, the British Home Secretary referred the conviction back to the Court of Appeal for a further appeal. Despite the new and fresh evidence, that court again upheld the convictions. Finally, in March of 1991, damning evidence of police fabrication of statements was placed before the courts and the Birmingham Six' convictions were finally quashed.

4.3.1.1 The Trial

The Birmingham Six[66] were convicted in August of 1975 of 21 counts of murder for the bombing of two public houses in Birmingham.[67] A summary of the prosecution case at trial was given in a later related litigation: 'The six men were tried before Bridge J and a jury at the Castle at Lancaster. There was evidence of the movements of the men on November 21 and traces of explosives found on two or three of them: but the evidence was quite insufficient to warrant a conviction unless the statements were in evidence'.[68]

At the trial, the defendants argued that their confessions were obtained by coercion and, therefore, were inadmissible. Central to that claim was the assaults perpetrated on them by the police and prison officers. A *voire dire* (or trial within a trial) was held.

The trial within the trial took eight days. After taking oral testimony from police officers and the defendants, the judge in his ruling said:

> Certainly according to the police evidence, no sort of violence was used and no sort of threats were addressed to any of the prisoners. On the other hand, the defendant all give evidence … of gross personal violence being used to them. … All of them … complain of the most outrageous threats as to what would happen to them or, in some cases, their families … all alleged that the whole of the police evidence was substantially fabricated evidence …. It is an inescapable conclusion that there is gross perjury being committed on one side or the other.[69]

Despite losing the *voire dire*, the defendants challenged the voluntariness of their statements before the jury by cross-examining the police officers and giving evidence of their treatment. In convicting the defendants, the jury did not accept that their statements had been coerced.[70]

One fact that emerged from the trial within a trial was that, at one of their first court appearances shortly after their arrest, all the defendants appeared badly bruised.[71] This fact was not new. It had been the subject of media comment at the time.[72] After their conviction, the defendants appealed unsuccessfully in March 1976.[73]

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[66] Richard McIlkenny, Patrick Hill, William Power, John Walker, Robert Gerard Hunter and Hugh Callaghan.
[67] *McIlkenny v R* [1992] 2 All ER 417, 418.
[68] *McIlkenny v Chief Constable of the West Midlands* [1980] 1 QB 283, 314.
[69] Ibid.
[70] Ibid 315.
[71] Ibid 314.
[72] Ibid 313.
[73] *McIlkenny v R* [1992] 2 All ER 417, 418.

Because it was demonstrable that the defendants had been assaulted and because the trial judge had accepted that the assault had not been perpetrated by the police, the prosecution service charged 14 prison officers with the assaults. In defending themselves, the prison officers produced a medical expert who examined photographs taken of the accused men while they were in custody and concluded that the defendants had been injured while in police custody and before they arrived at prison.[74] The prison officers were all acquitted.

4.3.1.2 McIlkenny v Chief Constable of the West Midlands & Another[75]

Subsequent to their trial and appeal, the defendant instituted civil proceedings against the police and prison officers for damages for assault.[76] The judgment cited was a decision on the Court of Appeal as to whether the proceedings were barred by issue estoppel. In the course of the judgment, the Court considered law in relation to fresh evidence. The defendants had succeeded at first instance and the police and prison officers appealed. The question arose as to the legal effect of the criminal trial. The question before the court was the legal effect of the decision of the judge on the *voire dire* and the decision of the jury.

The defendant's civil case relied on photographs and medical experts testimony from the trial of the prison officers.[77] The police argued that their action for assault was estopped because it had been decided by the trial judge and/or by the jury verdict.[78] Interestingly, the prison guards' lawyers conceded that the defendants had been assaulted in the jail.[79] Although there was a dissenting opinion, the majority of the Court of Appeal dismissed the appeal. The most comprehensive judgment was that of Lord Denning MR in which his Lordship found against the defendants. Despite the demonstrable evidence that the defendants were badly injured after their arrest and despite the supportive evidence of the photographs of their injuries and the medical experts testimony, the prospect of the defendants being right was 'such an appalling vista that every sensible person in the land would say: It cannot be right that these actions should go any further'.[80] These sentiments are an expression of the principle of finality.

[74] *McIlkenny v Chief Constable of the West Midlands* [1980] 1 QB 283, 316.
[75] *McIlkenny v Chief Constable of the West Midlands* [1980] 1 QB 283.
[76] Ibid 284.
[77] Ibid 314.
[78] Ibid 316.
[79] Ibid.
[80] Ibid 323.

In January 1987, the Home Secretary referred the case back to the Court of Appeal for a further appeal based on fresh evidence.[81] That evidence was both scientific and from a police officer who was a witness to intimidation of the defendants at the police station prior to their confessions.[82] The Court of Appeal was unpersuaded by this and other evidence of injuries suffered by the defendants while in custody and the appeal was again dismissed.[83]

4.3.2 *Callaghan & Ors v The Queen*[84]

In May 1988, the Birmingham Six were back in the Court of Appeal after yet another reference from the Home Secretary back to that court.[85] The report of the case appearing in the Criminal Appeal Reports contained the heading that 'this case is reported solely on the approach of the Court of Appeal in circumstances where it is alleged that fresh evidence might cast doubt on the correctness of the jury verdict',[86] and the following point of law of general public importance was involved in its decision: 'whether on a proper construction of section 2(1) of the Criminal Appeal Act 1968, in cases of fresh evidence has been admitted under section 23 of the Act, a conviction can be unsafe or unsatisfactory if the Court of Appeal concludes that it has a reasonable doubt about guilt in the light of the evidence'.[87]

Despite what the Criminal Appeal Reports say, the judgment has no new reasoning regarding the reception of fresh evidence. The Lord Chief Justice for the court merely sets out the relevant passage from *Stafford & Luvaglio* with which he agrees. The bulk of the reported judgment comprises a long procedural history of the case.[88] This thesis argues that this recitation is a reflection of the inherent reliance on the principle of finality. It focuses the reader's attention on how many times the Appellants have had the matter reviewed and how many times they have failed, thus supporting the decision to again reject their application. Further, the recitation of the procedural history contains some implied criticisms of the appellants' arguments. For example, the Lord Chief Justice notes that at the first appeal the appellants did not challenge the findings of the trial judge on the *voire dire* that the confessions were voluntary (and therefore admissible).[89] Finally, it is argued that it distracts from

[81] *McIlkenny v R* [1992] 2 All ER 417, 418.
[82] Ibid 423.
[83] Ibid.
[84] (1989) 88 Cr App R 40.
[85] Ibid 41.
[86] Ibid 41.
[87] Ibid 44–8.
[88] *Callaghan v The Queen* (1989) 88 Cr App R 40, 42–7.
[89] Ibid 43.

what the new evidence is and how that evidence (with the other evidence from previous reference and from the trial) might have affected the jury's verdict.

Citing at length Viscount Dilhorne's analysis of the rule regarding fresh evidence outlined in *Parks*,[90] the Lord Chief Justice concluded: 'Although the court may choose to test its views by asking itself what the original jury might have concluded, the question which in the end we have to decide is whether in our judgment, in all the circumstances of the case including both the verdict of the jury at trial upon the evidence they heard and the fresh evidence before this court that we have heard, the convictions must be quashed'.[91] What is not entirely clear from that passage was whether his Lordship was referring to all the evidence that had come to light since the trial and had been the subject of the referrals to the Court of Appeal or merely the latest part of the fresh evidence.[92]

4.3.3 *McIlkenny & Ors v The Queen* (1991)

In August 1990, the Home Secretary again referred the matter to the Court of Appeal.[93] In February 1991, before that appeal was heard, the Director of Public Prosecutions indicated to the Court of Appeal that they would not be resisting the appeal.[94] The Court decided to proceed with the appeal in the ordinary way and produced a judgment.[95] That judgment summarised the facts of the case the fresh evidence in 1987 and the Court of Appeal's reasoning on that evidence as well and the fresh evidence now before the court.[96] Finally, the Court identified they would finish 'with a brief consideration of the proper approach of the Court of Appeal in fresh evidence cases and the role of prosecution'.[97]

In concluding their analysis of the fresh evidence called in 1987 and on this appeal, the judges asked themselves what would have been the impact of the fresh evidence.[98] Earlier, the Lord Justices had observed: '[i]f the confessions had been shown to be unreliable, then the prosecution case would very probably have failed. This was a ground on which the Court of Appeal quashed the convictions in *Lattimore* (1975) 62 Cr.App.R 53'. Their Lordships seem to have forgotten that evidence calling into question the reliability of the confessions had also been before them in the 1987 and 1989 appeals

[90] Ibid 46–7.
[91] Ibid 47.
[92] Such piecemeal consideration of fresh evidence is an approach taken by appellate courts, as demonstrated in *Mallard* (see Chapter 5).
[93] *McIlkenny v R* [1992] 2 All ER 417, 418.
[94] Ibid.
[95] Ibid 419.
[96] Ibid 419.
[97] Ibid 418.
[98] Ibid 432.

which they dismissed. No doubt, with the prosecution service not opposing this appeal, their Lordships felt more comfortable opining: '[o]ne possibility [of the fresh evidence] is that the jury felt no doubt in accepting the police evidence at the trial. If so then the addition of the fresh evidence … might well have caused them doubt'.[99]

Their Lordships considered that:

> ...another possibility … is that the jury may have already been in doubt whether to accept the police evidence by reason of the inconsistencies in the written confessions or for some other reason. If so the scientific evidence … may well have carried the day. Either way the impact on the jury of the fresh evidence would have been considerable.[100]

One assumes this is a reference to the fresh evidence now before the Court of Appeal, rather than the fresh evidence before the court in 1987 or 1989. One wonders why the court did not take this approach in 1987 or in 1989 to the police officer who came forward with evidence of intimidation of the defendants at the police station and the injuries he witnessed being inflicted on them.[101]Why did the Court of Appeal not feel this evidence 'may well have carried the day' when they considered it in 1987 or 1989? Certainly, it would have supported the jury's doubt about the police evidence of the confessions.

The Court allowed the appeal and held that:

> ...there was no doubt that the case, as left to the jury depended on the scientific evidence of an expert and police evidence of their interviews with the appellants. So far as the police evidence was concerned the fresh evidence showed that in the absence of explanation, the police witnesses were at least deceiving the court. So far as the scientific evidence was concerned, it at least threw grave doubt on the prosecution expert's evidence, if not to destroy it altogether. Ts the convictions were both unsafe and unsatisfactory.[102]

That was the end of the confinement of Richard McIlkenny, Patrick Hill, William Power, John Walker, Robert Gerard Hunter and Hugh Callaghan.

While it might be argued that the Court of Appeals' refusal to overturn the convictions of these men based on new evidence was the result of the public feeling towards the IRA attacks, it is posited that such attitudes are in fact more common in criminal appeals then might be supposed.

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[99] Ibid.
[100] Ibid.
[101] Ibid 423.
[102] Ibid 418.

4.4 The Runciman Commission

On 14 March 1991, the Home Secretary announced to the House of Commons that a Royal Commission on Criminal Justice was to be established.[103] It was no coincidence that on that same day the Court of Appeal quashed the convictions of the Birmingham Six. The Home Secretary made clear that although the Commission was not appointed to look into individual cases,[104] a number of serious issues of concern to the public had been raised by the wrongful conviction of the Guildford Four, the Maguires and the Birmingham Six.[105] In its opening to the final report, the Committee noted:

> The widely publicised miscarriages of justice which have occurred in recent years have created a need to restore public confidence in the criminal justice system. That need has not diminished since we were appointed. In addition to the terrorist cases where convictions were quashed in 1990 and 1991, there has been since our appointment a fourth such case (Judith Ward) where the conviction was quashed in 1992. There has also been a number of cases not connected with terrorism, the most notable examples being those of the Broadwater Farm Three, Stefan Kiszko and the Cardiff Three.[106]

The Commissioner, Viscount Runciman of Doxford, and his committee examined the effectiveness of the criminal justice system in England and Wales in securing the conviction of those guilty of criminal offences and the acquittal of those who are innocent. They delivered their report on 2 June 1993 ('the Runciman Report'). The Committee took evidence (written and oral) and organised research studies by academic criminologists and lawyers.[107]

It is interesting to note that, like the impetus for the *Criminal Appeal Act 1907*, this Royal Commission was established as a result of the publicity surrounding some high-profile miscarriage of justice cases.[108] The Runciman Report noted that:

> ...the damage done by the minority of cases in which the system is seen to have failed is out of all proportion to their number. The maintenance of law and order is crucially dependent on public goodwill, not only in the need for the law as such to command general assent but in the dependence of the police, whose duty it is to enforce the law, on the willingness of individual citizens to cooperate with them.[109]

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[103] *Royal Commission into Criminal Justice* (Report, 2 June 1993) 1 [1].
[104] Sir John May had been appointed to inquire into the wrongful convictions of the Guilford Four and the Maguire Seven in October 1989.
[105] *Royal Commission into Criminal Justice* (Report, 2 June 1993) 1 [2].
[106] Ibid 6 [22].
[107] Ibid 236 Appendix 1 [1]–[2].
[108] 'Life of Crime', *BBC* (Web Page) <http://news.bbc.co.uk/hi/english/static/in_depth/uk/2001/life_of_crime/miscarriages.stm>. See also 'Action Urged over Miscarriages of Justice', *BBC* (Web Page, 1 February 2001) <http://news.bbc.co.uk/2/hi/uk_news/1006201.stm>.
[109] *Royal Commission into Criminal Justice* (Report, 2 June 1993) 7 [23].

Although the Runciman Report is best remembered for its recommendation of a new body to consider allegations of miscarriage of justice, which gave rise to the Criminal Cases Review Commission,[110] it is its investigation of the operation of the Court of Appeal that is of particular relevance to this thesis.

The Runciman Commission was given a very wideranging commission covering all aspects of the criminal process from the police investigation to the operation of criminal appeals. In relation to the latter, the Commission was appointed to examine, among other things, 'the role of the Court of Appeal in considering new evidence on appeal including directing the investigation of allegations'.[111] As it eventuated, the Commission investigated matters in relation to appeals far more broadly.

As the Donovan Committee had done before them, the Runciman Commission considered the Court's reluctance to overturn convictions where the ground was merely that the jury got it wrong. Further, the Commission considered the application of the proviso and the Court's approach to new and fresh evidence as the Donovan Committee had done. The Runciman Commission had access to a wider range of empirical data gathered by legal researchers. Where the Donovan Committee had provided its opinion based purely on evidence it had received or judgments from reported cases, the Runciman Commission could provide statistical evidence to support its propositions.[112]

The legislation governing criminal appeals was still contained in s 2(1) of the *Criminal Appeals Act 1968* as it had been enacted. The section had wording that was still remarkably close to the original 1907 statute. The biggest difference being the rewriting of the first ground of appeal from a jury verdict which was 'unreasonable and cannot be supported having regard to the evidence' to being 'unsafe or unsatisfactory'. Yet, the remaining two grounds of appeal were the same (a wrong decision on a question of law and on any ground whatsoever a miscarriage of justice). One important innovation of the 1968 Act was that it clearly delineated the three grounds of appeal, rather than lumping them into a one-sentence paragraph.

Despite the clear delineation of three distinct grounds of appeal, the Commission's research demonstrated that:

> It is not possible from the published statistics to identify how often each paragraph of subsection 2(1) is being used by the court nor the number of appeals dismissed after the proviso is applied. In almost half the cases studied by Malleson the court made no reference

[110] Ibid 217 Recommendations 331–52.
[111] Ibid ii [vii].
[112] See, eg, Ibid 163 [7], 164 [11].

> to which of the three grounds set out in subsection 2(1) it was applying. The presence of 'a wrong decision of any question of law' or of 'a material irregularity' was referred to in only some 10% of cases. The use of the term 'unsafe or unsatisfactory' was applied to a wide variety of cases involving both law and fact, fresh evidence and technicalities. It appears from Malleson's research that in practice the court often uses paragraph 2(1)(a) even when paragraph 2(1)(b) or (c) might seem more appropriate.[113]

This problem arose (in the view of the Commission) because of 'the confusing way in which the section [s 2(1)] is drafted'.[114]

In its exploration of the Court's power to reject the verdict of the jury, the Commission first looked at Court's approach to legal errors on appeal. The Commission noted that claims of a legal error at trial were by far the most common ground of appeal, with the most common error complained of being of an error in the judge's direction to the jury.[115] The Commission did not make a connection between the popularity of legal error of the ground of appeal and the reluctance of the Court to overturn convictions based on the facts alone. Certainly in the Australian context, practitioners are advised in at least one leading textbook that the first thing to consider when drafting a notice to appeal is to consider the judge's directions to the jury.[116] This situation has in all likelihood been brought about by the confusion and restrictive judicial approach that has prevailed over the last century.

Although the Commission did recommend a redrafting of the statute, in relation to how a court approached complaints of errors at trial, it recommended that the court consider what happened at trial and then:

1) if it believes that the conviction is safe despite the error, it should dismiss the appeal
2) if it believes that the error has rendered the conviction unsafe, it should allow the appeal, or
3) if it believes that the conviction may be unsafe as a result of the error it should quash the conviction and if possible order a retrial.[117]

The Commission had had a limited discussion of the proviso at this point, but consistent with its later findings it decided that if the Court approaches errors at trial as it suggested then considerations of the proviso would be redundant.[118]

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[113] Ibid 168 [28].
[114] Ibid 168 [29].
[115] Ibid 169 [35].
[116] Mirko Bagaric, *Ross on Crime* (Thomson Reuters, 8th ed, 2018).
[117] *Royal Commission into Criminal Justice* (Report, 2 June 1993) 170 [38].
[118] Ibid.

4.4.1 The Power to Interfere with a Conviction

The Runciman Commission noted that since its inception, the Court had been empowered to reject a jury's verdict, without the need for new or fresh evidence or legal error. It also noted that the Donovan Committee had considered that the Court had taken too narrow an approach to this power. Thus, the Donovan Committee had recommended the legislation be amended in the hope of encouraging the Court to more readily quash a conviction when they had doubts as to the validity of the jury's decision.

The Runciman Commission had 30 years' of jurisprudence from which to assess how successful the Donovan Committee's amendments had been. One statistic produced suggested that in the period from 1968–1989 the Court had only rejected the jury's verdict, without resort to legal error or fresh evidence, on six occasions.[119] However, other statistics demonstrated that of 102 decisions in 1992, 14 were successful on the grounds that the jury's verdict was unreasonable.[120]

Certainly, the evidence received by the Commission identified that the view of the Bar was that the Court of Appeal would not overturn a jury's verdict without legal error or fresh evidence. As one submission to the Commission put it: 'Time and again [the witness] has read counsel's advice on appeal to the effect that where the summing up has been impeccable and there are no mistakes of law, the Court of Appeal will not substitute its own opinion for that of the jury, however much it may disagree with it'.[121]

Although the Commission sympathised with the position the Court of Appeal found itself in, it recommended an alteration to the legislation in the hope of encouraging a more robust approach to the appellate process:

> We fully appreciate the reluctance felt by judges sitting in the Court of Appeal about quashing a jury's verdict. The jury has seen the witnesses and heard the evidence; the Court of Appeal has not. Where, however, on reading the transcript and hearing argument the Court of Appeal has a serious doubt about the verdict, it should exercise its power to quash. We do not think that quashing the jury's verdict where the court believes it to be unsafe undermines the system of jury trials.[122]

As such, the Commission recommended:

> As part of the redrafting of section 2 of the Criminal Appeal Act 1968 it should be made clear that the Court of Appeal should quash a conviction, notwithstanding that the jury

[119] Ibid 171 [43].
[120] Ibid.
[121] Ibid 171 [44].
[122] Ibid 171 [46].

> reached their verdict having heard all the relevant evidence and without any error of law or material irregularity having occurred, if after reviewing the case, the court concludes that the verdict is or may be unsafe.[123]

4.4.2 Hearing of Fresh Evidence

The way the Court dealt with fresh evidence on appeal was still a problem area for criminal justice despite it being addressed in the Donovan Committee's Report. The Runciman Report noted '[s]uccessful appeals based on fresh evidence are relatively rare'.[124] Like the Donovan Committee before it, the Runciman Commission thought that the statutory provisions were adequate, that the courts' interpretation of the provision was to narrow.[125] Interestingly, the Runciman Report perpetuates the notion that defendants would abuse the system of appeals should fresh evidence be readily accepted:

> It is understandable that the court should view fresh evidence with some suspicion. Obviously, there is a fear that fresh evidence can, and often will, be manufactured. Moreover, the court is right not to wish to encourage defendants and their lawyers to think the Crown Court trials as nothing more than a practice run which, in the event of a conviction, will leave them free to put an alternative defence to the Court of Appeal in whatever manner they please.[126]

Such assumptions on the part of the Commission are put forward as 'obvious' without any evidentiary support. This sentiment can be seen echoing down the ages and across continents, from *Shedden* in 1869 (see Chapter 3) to *Lawless* in Australia in 1979 (see Chapter 5). The general distrust of litigants expressed in *Shedden* (a civil case) becomes a distrust of the defence counsel in criminal appeals as seen in the Runciman Report and *Lawless*.

A further problem with the Runciman Commission's assumption is that it makes no allowance for the different burdens of proof in criminal and civil trials. The Runciman Report perceived two problems with the jurisprudence in relation to fresh evidence on appeal: how fresh evidence was defined and how the court proceeds after it has accepted fresh evidence.[127]

The Report identifies that in *Stafford & Luvaglio*, the House of Lords emphasised the two-step test the Court of Appeal must take when approaching new or fresh evidence, first to determine its admissibility and then decide on the impact of fresh evidence and whether it thinks the verdict is

[123] Ibid 216 Recommendation 319.
[124] Ibid 172 [51].
[125] Ibid 173 [55].
[126] Ibid.
[127] Ibid 172 [52].

unsafe or unsatisfactory.[128] The Report noted the criticisms of that approach by Lord Devlin and his view the it was usurping the function of the jury.[129] The Commission concluded that:

> In our view, the criticism made by Lord Devlin and others has force insofar as it concerns a decision by the court to hear and evaluate itself the fresh evidence and despite it to reject the appeal. In our view, once the court has decided to receive evidence that is relevant and capable of belief, and which could have affected the outcome of the case, it should quash the conviction and order a retrial unless that is not practical or desirable.[130]

The Commission noted that the reception of fresh evidence on appeal was governed by the *Criminal Appeal Act 1968* s 23 which empowered the court to receive fresh evidence if:

> (a) It appears to them that the evidence is likely to be credible and would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and
>
> (b) They are satisfied that it was not adduced in those proceedings but there is a reasonable explanation for the failure to adduce it.[131]

The evidence that the Commission received indicated that the Court had taken a narrow approach to these questions: 'It has been suggested to us that the attitude of the court to these questions has on occasion been excessively restrictive'.[132]

The Commission canvased two particular scenarios sometimes faced by the court in relation to fresh evidence: where a witness at trial subsequently changes their testimony and where evidence was available at trial but was not admitted due to the failure of the appellant's lawyers. The latter consideration is not an uncommon argument raised in Australian courts. The Runciman Commission encapsulated its view on this matter when it said:

> It cannot possibly be right that there should be defendants serving prison sentences for no other reason than that their lawyers made a decision which later turns out to have been mistaken. What matters is not the degree to which the lawyers were at fault but whether the particular decision, whether reasonable or unreasonable caused a miscarriage of justice.[133]

This goes to the principle of finality, which underpins part of the approach of appellate courts to new evidence. It is founded upon the principle that was asserted in *Brown v Dean* in 1910 (see Chapter 3)

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[128] Ibid 175 [62].
[129] Ibid.
[130] Ibid.
[131] *Criminal Appeal Act 1968* (UK) ss 23(2)(a)–(b).
[132] *Royal Commission into Criminal Justice* (Report, 2 June 1993) 174 [56].
[133] Ibid 174 [59].

that *interest reipublicae ut sit finis litium*[134] ('in the interest of society as a whole, litigation must come to an end') in that a defendant is bound by the forensic decisions of their counsel. However, that rationale needs to be modified for criminal trials in that the defendant is not a willing party to the proceeding, but is forced to participate by virtue of being charged with an offence. Further, most criminal trials are legally aided where the defendant often has little choice in who represents them. As the Runciman Commission noted, 'it cannot possibly be right that there should be defendants serving prison sentences for no other reason than their lawyers made a decision which later turns out to have been mistaken'.[135] Unfortunately, as will be seen in Chapter 5, Australian courts have never taken such an enlightened view.

Although the Commission felt that the powers expressed in s 23 were adequate,[136] it nevertheless recommended a slight amendment to 'give the court greater scope for doing justice'.[137] As such, it recommended that the phrase 'likely to be credible' in s 23(2)(a) be amended to be 'capable of belief'.[138]

4.4.3 The Runciman Commission and the Proviso

The final aspect of the Runciman Commission's considerations relevant to this thesis was its analysis of the proviso. After addressing the potential for overlap or confusion created by grounds of appeal established in the *Criminal Appeal Act 1968* s 2(1), the Commission turned its attention to the proviso noting that it too created potential scope for confusion. Per the Runciman Report:[139]

> If the court thinks that a conviction 'should be set aside on the grounds that it is unsafe or unsatisfactory' (paragraph a) or 'should be set aside on the grounds of a wrong decision of any question of law' (paragraph b), it is difficult to see how it can at the same time consider the proviso to be applicable. It seems from the decided cases, however, that the court does indeed consider whether the unsatisfactory nature of the conviction under either of those paragraphs is nevertheless outweighed by the consideration that no miscarriage of justice appears to have occurred.[140]

The Report continued:

> [The proviso] can hardly be applied if a conviction is unsafe. But if no miscarriage of justice has occurred, the proviso is unnecessary, since the conviction need not then be regarded as

[134] *Brown v Dean* (1910) AC 373, 374.
[135] *Royal Commission into Criminal Justice* (Report, 2 June 1993) 174 [59].
[136] Ibid 173 [55].
[137] Ibid 174 [60].
[138] Ibid 216 Recommendation 322. See also ibid 174 [60].
[139] Ibid 168 [30].
[140] Ibid.

> unsafe. When an error of law has occurred, the court can decide whether or not it is so serious that the conviction 'should be set aside' without the existence of the proviso. Similarly, in paragraph (c) it has been argued that the words 'material irregularity' make the proviso unnecessary since if the irregularity is not material to the jury's verdict the court should dismiss the appeal while, if it is material, that should be sufficient grounds for allowing it.[141]

As such, the Runciman Commission recommended that the proviso be removed from the legislation.[142]

4.4.4 Changes Affected After the Runciman Commission

The greatest change brought about by the Runciman Commission was the creation of the Criminal Cases Review Commission (CCRC) which improved access to justice for those who had exhausted all avenues of appeal. As previously stated, although access to justice post appeal is a worthy topic, it is beyond the scope of this thesis. Relevant to this thesis is the amendments to the statutory provision regarding the grounds of appeal.

In 1995, the recommendations of the Runciman Report were heeded and the *Criminal Appeal Act 1968* s 2 was significantly amended.[143] The new section (which is still currently in force in England and Wales) reads:

> Grounds for allowing appeal under s 1.
>
> (1) Subject to the provisions of this Act, the Court of Appeal—
>
> (a) shall allow an appeal against conviction if they think that the conviction is unsafe; and
>
> (b) shall dismiss such an appeal in any other case.

Thus, for the second time in the 90-odd years of its operation, the legislation empowering criminal appeals was amended and simplified. Just like the Donovan Committee before it, the Runciman Commission concluded that such change was necessary because of the strict or narrow way the courts had interpreted the legislation. The amendments were to clarify for appellate courts their power and encourage them to use it.

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[141] Ibid 168 [31].
[142] Ibid 168 [32].
[143] *Criminal Appeal Act 1995* (UK).

In relation to the provision regarding the reception of evidence, the Commission recommended that the section be altered from 'likely to be credible' to 'capable of belief'[144] in the hope that the courts would take a broad, rather than a narrow, approach.[145]

4.5 Post Runciman Commission

The most notable change to emerge from the Runciman Commission was the creation of the CCRC, a post-appeal mechanism for defendants to have their cases reviewed and, where appropriate, have a second appeal. The statistics demonstrate that appellate courts are still getting it wrong. In the 22 years of its operation, the CCRC has succeeded in 441 cases.[146] Meaning that the Court of Appeal is, on average, ruling incorrectly 20 times per year.

However, the slight revision to the wording of the *Criminal Appeal Act 1968* s 23 which aimed to encourage courts to be more liberal in their approach to the admission of fresh evidence seemed to be stillborn. Its reception was aptly summarised in a recent article: 'when the amendments to s 23 were introduced to the House of Lords, Baroness Blatch stated that her understanding from the Lord Chief Justice was that the amendments would not restrict fresh evidence being admitted nor change court practice'.[147] The *Criminal Appeal Act 1995* (UK) s 4 reflected the *Criminal Appeal Act 1968* s 23 with the minor variation recommended by the Runciman Commission. The change enacted in s 23 does not seem to have had the desired result. In a recent article, it was been noted that '[t]he main criticism of the court stem from its perceived difficulties in relation to appeals based on factual error. The main ground of appeal for errors of fact is fresh evidence'.[148]

The purpose of this thesis is to compare the development and approach to new and fresh evidence in Australia and England and Wales. Since the Runciman Commission, the British have not mounted any further inquiries into the working of the criminal justice sector. As such, there is no need to further track British courts' dealings with new and fresh evidence except to note that courts' rigidity in accepting such evidence is still a cause for concern.[149]

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[144] *Royal Commission into Criminal Justice* (Report, 2 June 1993) 216 Recommendation 322.
[145] Ibid 174 [56].
[146] 'CCRC Statistics', *Criminal Cases Review Commission* (Web Page) <https://ccrc.gov.uk/case-statistics/>.
[147] Roberts (n 51) 312.
[148] Ibid 304.
[149] Ibid 303.

4.6 Conclusion

The judicial interpretation of the common form and the judges' creation of rules relating to new and fresh evidence indicate reluctance to use the powers granted by the relevant legislation. The need for reform first found its voice in the late 1960s, and the Donovan Committee changed the wording of criminal appeal legislation. The *Criminal Appeal Act 1968* s 2(1) established the phrase 'unsafe and unsatisfactory'. This amendment was designed to (and initially did) encourage the courts to use their power to overturn verdicts more frequently. The re-enactment of the *Criminal Appeal Act 1907* s 9 into the *Criminal Appeal Act 1968* s 23 made little statutory change to the rules regarding the reception of new or fresh evidence. It was hoped that the Court of Appeal would change (and broaden) its powers when considering both overturning convictions and the reception of new evidence.

Yet, the miscarriages of justice under covered in the Irish Bombing cases (and others) revealed that appellate courts were not approaching appeals as the legislature intended. The Runciman Commission further simplified the statutory provisions and identified the issue regarding new and fresh evidence rules.

Both the Donovan Committee and Runciman Commission were satisfied with the statutory provisions regarding new and fresh evidence, but both bodies noted the concerns that the judiciary was too strict in their interpretation of the sections. In the Donovan Committee's Report, it was noted that the test applied for the reception for fresh evidence was a creation of the judges and that the statutory test was much broader. The Runciman Commission did not make such an observation, although the position was the same. Both bodies concluded in the hope that the judiciary would be more expansive in their reception of such evidence.

The next chapter explores how common form legislation developed in Australia and identifies that the Australian judiciary borrowed from their English brethren the jurisprudence of new and fresh evidence and jury deference. It charts the reception of the evidentiary rule from England and Wales and its cementing in the Australian judicial consciousness. Unfortunately, unlike England and Wales, Australia has not mounted reviews of the criminal justice system. As such, the rules in relation to the reception of evidence have remained stricter in Australia than the English and Welsh and have been part of the problem of miscarriages of justice in Australia.

Chapter 5: The Reception of the Common Form and Introduction of New and Fresh Evidence in Australian

At the turn of the twentieth century, Australia gained its independence from Britain yet Britain remained a dominant force in the Australian cultural and legal system for decades. The passing in England and Wales of the common form provisions creating an appeal from a jury's verdict was followed by the Australian states over the course of 20 years (see Appendix A). With this legislative reform came the associated jurisprudence and judicial reluctance to interfere with that other great English import, the jury system.

Yet, even as the Australian High Court sought to assert its own character and create its own jurisprudence, it looked to the courts of England and Wales for guidance on the reception of new and fresh evidence in criminal appeals and the interpretation of the common form.

However, unlike in England and Wales, where after the Second World War the government reviewed the operation of the criminal appeal legislation, Australia and each of its states, continued to use the common form without identifying any problems. Ironically, after the legislative changes following the Donovan Committee ended the use of the common form in England and Wales, Australian courts continued to use English and Welsh jurisprudence, adopting their new test of 'unsafe or unsatisfactory' despite the fact that the phrase did not appear in the Australian legislative provision. Such reasoning, which flew in the face of basic rules of statutory interpretation,[1] seemed to be adopted to help make sense of the complexities of the common form.

The importation of British jurisprudence included the rules on new and fresh evidence which appeared first in state appellate courts in 1912,[2] and then the High Court. In 1919,[3] the state courts accepted into their jurisprudence the rule on reception of fresh evidence that had developed in England and Wales. This thesis argues that Australian courts (like their English counterparts) did not account for the differing burdens of proof on the prosecution in criminal proceedings when receiving the test for fresh evidence from English decisions. Further, the English civil decisions were often

[1] For example, the 'Literal Rule' in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 161–2; the 'Golden Rule' in *Grey v Pearson* (1857) 6 HL Cas 61, 106; and the 'Purposive Approach' in *Repatriation Commission v Vietnam Veterans' Association of New South Wales Branch Inc* (2000) 48 NSWLR 548, 577–8.
[2] See, eg, *R v Moir* (1912) 12 SR (NSW) 111; *R v Waterhouse* (1911) 11 SR (NSW) 217.
[3] *Hargan v R* (1919) 27 CLR 13.

addressing issues of whether a retrial should be ordered, whereas in criminal appeals the issue is often the validity of the verdict.

Finally, this thesis identifies that the notion of jury deference, although in existence before criminal appeals, did not form a central rationale in fresh evidence appeals until the 1970s and 1980s. The principle of finality was a far more prevalent concern of the courts. This thesis also identifies that Australian courts often stray into assessing the fresh evidence and usurp the jury's function as the English did in *Stafford & Luvaglio* (an approach criticised in the Runciman Report). However, Australian jurisprudence has not had the benefit of inquiries into its approach and, as such, proceeds unchecked. Australia has made only perfunctory attempts to deal with the issues of criminal appeals that the English and Welsh took two inquiries to address. The analysis in this chapter focuses primarily on the High Court at the top of the Australian court hierarchy as indicative of criminal appeal jurisprudence as a whole.

5.1 Early Decisions on Retrials in Criminal and Civil Cases

Just as in English jurisprudence, there were early civil cases in Australia regarding the treatment of fresh evidence. As in the English cases (see Chapter 4), these involved an application for a retrial on the grounds of fresh evidence.

As noted in Chapter 3, prior to the passing of the *Criminal Appeal Act 1907*, an application for a new trial was available in criminal cases if convicted of a misdemeanour.[4] In Victoria, there is evidence that this included application for a new trial on the ground that the verdict was contrary to the evidence.[5] However, the position seemed to be different in felony cases. In *Attorney General for N.S.W. v Bertrand*[6] in 1867, it was held that a motion for a new trial could not be entertained upon conviction for felony.[7]

In *Ward v Hearne*,[8] the Full Court of the Victorian Supreme Court dealt with an application for a retrial from Mr Ward based on evidence he had found after the trial. Mr Ward had been sued in negligence for a collision that occurred when his horse and buggy had run into a cart, damaging the cart. Mr Ward had argued that he was not negligent because a lorry that turned suddenly in front of

[4] *R v Mawbey* (1796) 101 E.R. 736.
[5] Henry Field Gurner, 'The Practice of the Criminal Law of the Colony of Victoria' (Stillwell and Knight, 1871) 174 cited in *Chamberlain v R* (1983) 46 ALR 493, 548 [11].
[6] [1867] EngR 20; (1867) L.R. 1 P.C. 520; 10 Cox C.C. 618.
[7] *Attorney-General (NSW) v Bertrand* (1867) LR1PC 520.
[8] (1884) 10 VLR 163.

him had spooked his horse. Prior to trial, Mr Ward had made some enquiries to find evidence of the lorry but could not produce anything by the time of trial. At trial, the plaintiff, Mr Hearne, denied that there was a lorry and the other witnesses called either denied the existence of the lorry or could not recall seeing one. Mr Hearne was awarded £200 in damages.

Mr Ward then made further enquiries and finally found the man who was the driver of the lorry on the day. He argued that the evidence could not have been found by the time of trial because there was insufficient time and he had not understood that the plaintiff would entirely deny the existence of the lorry. Unfortunately, he found the court unsympathetic. Interestingly, the judges indicated that applications for retrials were governed by 'long established practice' that required them to be dealt with very strictly. Similar to the sentiments identified in *Shedden v Patrick* (and much later in *Lawless v The Queen*; see Chapter 4 and Section 5.3.4), the judges took the view that to relax the rule would encourage practitioners to not prepare for trial properly or encourage perjured testimony after trial:

> Applications of this nature are viewed with disfavour by Courts of justice, and it was not without some hesitation that we granted the Rule. Few applications of this kind are recorded; fewer still have been granted; and it is evident that any relaxation of a long-established practice with reference to such applications would not only tend to produce less care and diligence in the preparation of causes for trial, and would … make it difficult to refuse a new trial in any instance where the case had been badly got up, but would also increase in a serious degree the risk and temptation to perjury.[9]

The test, as outlined by the Court, focused on the explanation for the evidence not being at the first trial, rather than how material that evidence must be to ultimate issues the court considered at trial:

> First condition is that it must be shown clearly that the new evidence was not in the possession of the party applying, and could not by proper diligence have been procured by him at the time of the first trial. Secondly, it must appear that the newly discovered evidence is such as ought, if it had been brought forward at the first trial, to have led the jury to come to a different conclusion from that at which they have arrived.[10]

Unfortunately, the Victorian Full Court considered that Mr Ward could have obtained the evidence from the lorry driver had he been more diligent. Despite finding against him on that first element of the test, the Court went on to say that even if the evidence of the lorry driver had been before the jury, they were still entitled to find for the plaintiff at the trial. Mr Ward's application was dismissed.

[9] *Ward v Hearne* (1884) 10 VLR 163, 167.
[10] Ibid.

5.2 Introduction of the Common Form in Australia

The Australian federal structure was born in 1901 by the unification of the six self-governing colonies that inhabited the continent. Prior to Federation, these colonies had their own independent (although remarkably uniform) criminal justice systems. Criminal convictions and jury trials were a function of the laws of the individual colony. Upon Federation, the new federal government did not assume responsibility for the criminal law of the states (though the Commonwealth has its own criminal jurisdiction). As such, the adoption of the common form legislation and creation of appeals from jury verdicts was a matter for each individual state.

It took five years from the passing of the legislation in England and Wales for any of the Australian state jurisdictions to follow suit. Queensland had a robust Criminal Code that was a little over a decade old when it enacted the common form legislation, imported without alteration from England and Wales. However, in relation to the procedure, rather than create a separate appeal Act, the Queensland Parliament decided to create ss 2 and 9 of the *Criminal Code Amendment Act 1913* (Qld) which inserted the common form into the *Criminal Code 1899* (Qld) as s 668E. Also in 1913, the Western Australian Parliament was enacting a Criminal Code that was very similar to the Queensland Code. As such, the then-new idea of appeals from jury verdicts was incorporated into their code as s 689. The Victorians were the next state to enact the common form, when s 4(1) of the *Criminal Appeals Act 1914* (Vic) received royal assent. That Act lasted almost 50 years before it was repealed and the common form re-enacted without amendment in s 568(1) of the *Crimes Act 1958* (Vic) (see Appendix A).

When the Australian states enacted their own legislation creating criminal appeals, not only did they copy the wording of the legislation regarding the basis on which the conviction could be overturned, they also copied the ancillary powers that the appellate court could exercise in relation to appeals. The Acts identified above that enshrined the common form in Queensland, Western Australia and Victoria (and later in South Australia and Tasmania) also included a provision entitled ‘supplemental powers’. Just like the common form provision, that section was (until relatively recently) uniform through Australia. It reads:

> Supplemental powers
>
> (1) The Court may, if it thinks it necessary or expedient in the interests of justice—

(a) order the production of any document, exhibit, or other thing connected with the proceedings; and

(b) order any persons who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial, or order any such persons to be examined before any judge of the Court, or before any officer of the Court, or justice, or other person appointed by the Court for the purpose, and admit any depositions so taken as evidence; and

(c) receive the evidence, if tendered, of any witness (including the appellant) who is a competent, but not a compellable, witness; and

(d) where any question arising on the appeal involves prolonged examination of documents or accounts, or any scientific or local investigation, which cannot, in the opinion of the Court, be conveniently conducted before the Court, refer the question for inquiry and report to a commissioner appointed by the Court, and act upon the report of such commissioner so far as the Court thinks fit; and

(e) appoint any person with special expert knowledge to act as assessor to the Court in any case in which it appears to the Court that such special knowledge is required for the determination of the case;

(f) and exercise in relation to the proceedings of the Court any other powers which may for the time being be exercised by the Supreme Court on appeals or applications in civil matters, and issue any warrant or other process necessary for enforcing the orders or sentences of the Court.

The powers given to the court to conduct its own investigation are quite broad. The use that any of the intermediate appellate courts have made of these powers beyond the reception of further evidence is beyond the scope of this thesis. It has been noted that these powers have rarely been used by appellate courts.[11]

South Australia and Tasmania were a decade behind the rest of Australia. Section 6 of the *Criminal Appeals Act 1924* (SA) enacted the common form legislation into law in South Australia. In 1935, that Act was repealed by the *Criminal Law Consolidation Act* which subsumed the common form provisions into s 353. In 1924, the Tasmanian Parliament consolidated and codified the criminal law and procedure in that state into the *Criminal Code Act*, s 402 of which reproduces the common form legislation.

[11] Bibi Sangha, Kent Roach and Robert Moles, *Forensic Investigations and Miscarriages of Justice: The Rhetoric Meets the Reality* (Irwin Law, 2010) 156.

5.2.1 *Hargan v The King* (1919)

In one of the first judgments relating to the common form legislation, the High Court gave a relatively clear enunciation of how the statute was to be read. In 1919, Isaacs J acknowledged that the common form created three distinct grounds of appeal: 'states three grounds on which an appeal "shall" prima facie be allowed, viz.: (1) verdict unreasonable or not supported on the evidence; (2) error in law; (3) miscarriage of justice on any other ground'.[12]

It can be seen that the first ground related to an appeal on the facts. It is what would later be described as an error of outcome. The second ground Isaacs J identified was one which would later be described as an error of process. The third ground (which is actually the only ground to mention the phrase 'miscarriage of justice') is a catch-all provision and could be either an error of process, or an error of outcome, or both. Isaacs J only altered the words of the statute slightly and not in a material way. Unfortunately, later judges have not been so interested in delineating three separate grounds, nor have they been careful in how they summarise them.

In that judgment, Isaacs J admonished the NSW Supreme Court for not appreciating the breadth of the then-new criminal appeal legislation:

> It is the third ground that was relied on principally in the Supreme Court, was entertained and passed upon there, and is relied on here; and that is what I call the essence of the case. It is, therefore, not an answer to the appellant to say that what he complains of is not an error in strict law. If he can show a miscarriage of justice, that is sufficient. That is the greatest innovation made by the Act, and to lose sight of that is to miss the point of the legislative advance.[13]

It was clear to Isaacs J that the common form empowered the court to overturn an appeal on completely factual grounds. Self-evidently, this requires the court to form its own view of the facts of the case and to impose that view over the jury's verdict. Although the wording of the common form clearly establishes this approach, appellate courts, including the High Court, have not consistently accepted that this is the correct approach.

[12] *Hargan v The King* (1919) 27 CLR 13, 23 (per Issacs J).
[13] Ibid 23.

5.2.2 *Ross v The King* (1922)

The first occasion on which the High Court considered the admission on appeal of evidence not adduced at trial was *Ross v The King*.[14] The case initially proceeded through the Victoria Court of Criminal Appeal.[15]

The case involved the death of a 12-year-old girl. It was clear that she had been raped prior to her death. At trial, Mr Ross had given evidence to the effect that although he had seen the girl in the area in which she was found, he had not spoken or dealt with her in any way. The primary evidence against him was a confession he was alleged to have made. Mr Ross was convicted.[16]

The appellant's quite unpalatable argument on appeal was that his evidence at trial was wrong and in fact he had found her sleeping and had had sex with her.[17] Then, in an effort to keep her quiet, he had accidently strangled her to death. This was consistent with the alleged confession that the jury heard at trial.[18] Unsurprisingly, he found little sympathy from the majority of the Court. The appeal turned on whether the trial judge's summing up should have left the jury with the option of finding manslaughter rather than murder based on the acceptance by the jury of the confessional evidence. The Court was particularly conscious of not usurping the role of the jury: 'It is no part of the Court's function to put aside the verdict of the jury in order to form its own independent judgment on the evidence'.[19]

With a nod in the direction of the importance of finality, the Court then emphasised the important of focusing on the reason the evidence had not been before the trial court:

> It would be contrary to the whole administration of criminal justice, it would paralyse that administration, if the admission of new evidence were not coupled with the condition that the evidence was not such as might, with reasonable diligence, have been discovered during the trial or before the trial.

Unlike the judgments from England and Wales (see Chapter 4), the Court clearly turned their mind to the potential difference between the application of such a rule in civil or criminal case, but asserted '[t]hat general rule applies in every case—civil and criminal'.[20] The Court then turned their attention

[14] (1922) 30 CLR 246.
[15] *Ross v The King* [1922] VLR 329.
[16] *Ross v The King* (1922) 30 CLR 246.
[17] Ibid 253.
[18] Ibid 246.
[19] *Ross v The King* [1922] VLR 329, 333.
[20] Ibid 337.

to the level of cogency the new evidence and required that 'it must yet be shown that it is such as *would be likely* to have led the jury to come to a different conclusion from the conclusion to which they did come'.[21]

The Court then made allowances for the fact that the matter was criminal and not civil in nature:

> In civil cases the latter rule has been frequently stated in more drastic terms—namely, that the Court must be satisfied that the new evidence is such as if admitted would be practically conclusive to determine the trial the other way … We prefer, however, in this case to rest our judgment on the less drastic form of the rule already stated.[22]

In the view of the Court, most of the new evidence did not fulfil one or both of the requirements mentioned above. One witness, Mrs McKenzie, was heard and tested, but the Court concluded that the evidence was of a kind that would not and ought not to affect the mind of any rational jury on an issue of this kind.[23]

In a majority judgment (Knox CJ, Gavan Duffy and Starke JJ) the appeal was dismissed.[24] Isaacs J wrote a strong dissenting judgment. What is serious about this judgment was, first, that the Court did not refer to 'fresh' evidence and, second, that it did not deal in any meaningful way with the question of admission. In an eloquent and well-reasoned judgment, Isaacs J identified the problems with the conviction and would have ordered a retrial.[25] The majority disagreed.

As to the acceptance of the new evidence, surprisingly, Isaacs J was in agreement with the majority, even if for different reasons. The majority had summarily dismissed the question, saying: 'The only remaining ground was that a new trial should be had in order that the prisoner might bring forward new evidence. On this ground we find it unnecessary to say more than that we agree with the decision of the Full Court'.[26]

Isaacs J arrived at the same result, but by following an English civil case:

> I conclude, on the whole, that it should not be made the ground of a new trial in the circumstances. I think the principle stated in *Hip Foong Hong v. H. Neotia & Co.* by Lord *Buckmaster* for the Privy Council applies. It is there said with reference to such a point: 'If no charge of fraud or surprise is brought forward, it is not sufficient to show that there was further evidence that could have been adduced to support the claim of the losing parties; the

[21] Ibid 338 (emphasis added).
[22] Ibid.
[23] Ibid
[24] More specifically, special leave was not granted, but the issues raised on appeal were dealt with substantively.
[25] *Ross v The King* (1922) 30 CLR 246, 270.
[26] Ibid 256.

> applicant must go further and show that the evidence was of such a character that it would, so far as can be foreseen, have formed a determining factor in the result'. After carefully examining the new evidence, I am of the opinion that it falls short of this requirement.[27]

It is worth noting that in accepting the Privy Council's decision of *Hip Foong Hong*, Isaacs J saw no distinction between the admission of fresh evidence in civil or criminal cases as the High Court (and English criminal courts) later did.

The High Court on this occasion did not expound a set of criteria for the admission of such evidence. However, Isaacs J focused his attention on whether the new evidence demonstrated an error of outcome and did not address the question of whether the absence of the evidence from the trial was also an error of process. Ironically, the Court considered the question of new evidence in the context of ordering a new trial, which is the remedy available for an error of process. That was the way it focused on new evidence in the intervening years.

5.2.3 *R v Sayegh* (1924)

In this same year, there was a useful judgment delivered in the New South Wales Court of Criminal Appeal, *R v Sayegh*.[28] It was later to be cited by the High Court in fresh evidence cases. The case involved the prosecution of a group of people for a conspiracy to procure an abortion for a woman. The appellant was charged along with three others. At the first trial, the jury could not agree in relation to his charges but convicted the other three individuals. Those three appealed while the appellant was retried. On a second trial, the appellant was convicted. Meanwhile, the other three were successful on appeal after calling a doctor who had not given evidence at the original trial. A new trial was ordered for the three convicted, where evidence from a doctor (who gave evidence for the first trial) resulted in one being convicted and another being acquitted.

The appellant, who had not appealed his conviction, appealed on the grounds that the doctor's evidence was fresh and warranted an acquittal. He applied for leave on the ground that new evidence had not been available at the time of his trial. Interestingly, the NSW Court of Criminal Appeal identified that the English courts had no power to order a retrial:

> If the fresh evidence allowed by the Court of Appeal to be placed before it is of such weight and importance that it might reasonably have prevented the verdict of guilty being returned, then and in such case the Court of Appeal, considers a miscarriage of justice has taken place, and in England quashes the conviction and orders the release of the appellant. In this State

[27] Ibid 262.
[28] (1924) 25 SR (NSW) 61.

> the Court of Appeal, with wider powers than England, may instead of ordering the release of the appellant direct a new trial to take place.[29]

Despite identifying the different orders that Australian courts were empowered to give, the NSW Court of Criminal Appeal did not make any allowances for that fact, stating that the Court must:

> ... adhere strictly to the rule upon which this Court has consistently acted that before even giving leave to appeal and to call fresh evidence, and certainly before acting upon such fresh evidence and quashing the conviction, the Court must be satisfied on two points (1) that the fresh evidence is so material that without it being given at the first trial a miscarriage of justice may be said to have taken place, and (2) a satisfactory explanation must be given why the evidence now relied on was not put before the jury at the first trial.[30]

Unfortunately, when Street CJ applied that test, his Honour was not convinced that the evidence given by the doctor would have led to the accused's acquittal. Therefore, his appeal was dismissed and his conviction affirmed. Campbell J and Ralston AJ concurred.

The use by the Court of the test 'that the fresh evidence is so material that without it being given at the first trial a miscarriage of justice may be said to have taken place'[31] was an attempt by the Court to use to words from the supplementary powers that came with common form legislation. As we have seen, these supplemental powers do not provide a link directly to granting a new trial when new or fresh evidence is produced. This thesis asserts that such legislative oversight creates problems in interpretation. The use of the phrase 'miscarriage of justice' is one example. McHugh J remarked 82 years later: ' "Miscarriage of justice" has been a phrase familiar to lawyers for over two centuries. Despite the familiarity of the phrase and the uniformity of its use in criminal statues, the meaning of the phrase in [the common form provisions] and its equivalents has been the subject of much uncertainty'.[32]

5.2.4 *R v Stone* (1926)

Two years after *R v Sayegh*, the NSW Court of Criminal Appeal was again looking at a criminal appeal involving new and fresh evidence, *R v Stone.*[33] Again, the judgment became a touchstone for the High Court in later judgments. Mr Stone was tried with another man, Mr Brown, on an indictment charging them with assaulting and robbing a taxi driver at Bondi. Both were convicted. In an appeal

[29] Ibid 63.
[30] Ibid 63–4 (per Gordon J).
[31] Ibid.
[32] *TKWJ v The Queen* (2002) 212 CLR 124, 143 [64].
[33] (1926) 26 SR (NSW) 394.

by Brown, he produced an affidavit that completely exculpated Stone and became the main ground to appeal Stone's conviction.

The common form provided that an appellate court could allow an appeal and set aside a conviction if it was satisfied that there had been a miscarriage of justice. The common form provision did not contain any direction on how new or fresh evidence fit with the wording of the legislation. As such, the NSW Court of Criminal Appeal expressed how such evidence fit in to the common form provision: '[t]hat reason may be shown by producing fresh evidence before the Court of Appeal which satisfies the Court that the verdict of the jury arrived at without such evidence may be held to amount to a miscarriage of justice'.[34]

The NSW Court of Criminal Appeal identified that the question was not new to them, and that they had always insisted on a satisfactory reason for why the evidence was not a trial: 'This Court has consistently decided that before it allows fresh evidence to be called before it on appeal, some satisfactory reason must be adduced to explain why that evidence was not called on the trial of the appellant'.[35]

The Court accepted that the evidence adduced on Brown's appeal was not available to Stone at trial, and identified that the fresh evidence must be of significant weight:

> In our opinion the Court ought not to set aside a verdict of conviction arrived at by a jury upon fresh evidence, unless the witness or witnesses given such fresh evidence is or are witnesses to whom in the opinion of the Court a jury with full knowledge of all relevant facts might give credence even to the extent of creating a doubt in their minds as to guilt which would not exist without that evidence.[36]

The Court accepted that the evidence was of sufficient weight and granted the appeal.

5.2.5 *Meredith v Innes* (1930)

Interestingly, another NSW case came to be relied on in criminal appeals regarding new and fresh evidence despite it being a civil case. *Meredith v Innes*[37] was a negligence case involving a motor vehicle accident. It analysed the English authorities (among them *Brown v Dean* and *Copestake*)

[34] *R v Stone* (1926) 26 SR (NSW) 394, 399–400.
[35] Ibid 400.
[36] Ibid 400–1.
[37] *Meredith v Innes* (1930) 31 SR (NSW) 104.

regarding fresh evidence. The Court identified that the High Court had (in obiter) questioned the rule laid down in *Brown v Dean*.

The dispute involved a motorcycle rider who was involved in a collision with a taxi that, he said, was travelling on the wrong side of the road at the time. The motorcyclist was successful at trial, but the taxi driver later produced an affidavit that indicated that at the time of the accident the motorcycle was racing another motorcycle.

The Chief Justice of NSW sat on a three-judge bench to decided two points, one being the proper test for new and fresh evidence on appeal and some fresh evidence produced on appeal. First, the Chief Justice set out the test: 'In *Brown v Dean* Lord Loreburn said that where the ground for a new trial was alleged discovery of new evidence, the new evidence must be such as was presumably to be believed and such as, if believed, would be conclusive'.[38]

However, the Chief Justice noted that:

> The judgment in *Brown v Dean* has not been accepted in subsequent cases. In *Thomas v The Crown* (2 CLR 127) Griffith CJ (at p 130) expressed doubt as to the soundness of that test, and in *Spicer v Booth* (18 SR 20) Ferguson J said that without further consideration he was not prepared to assent to it.[39]

Having identified that the test from *Brown v Dean* was not without its detractors, the Chief Justice looked at other cases and their handling of the question:

> In *Guest v Ibbotson* (28 TLR 325) Lord Sterndale MR, laid down the rule rather differently. He stated: 'Before putting the successful party to the expense of a new trial the Court should have something definite to show that the evidence was weighty evidence, and would have an important bearing on the matter'.[40]

The Chief Justice continued by identifying that Scrutton LJ in *Copestake* had quoted *Nash v Rochford* quoting *Shedden v Patrick*, and had touched on the Privy Council's decision in *Hip Foong Hong*, before concluding that: 'in view of the strong body of judicial authority going to show that the law as laid down by Lord Loreburn [in *Brown v Dean*] … was expressed too widely, I think we should follow later decisions, and that we should hold in accordance with what was said by Scrutton LJ in *Copestake's Case* (supra)'.

[38] Ibid 107
[39] Ibid.
[40] Ibid 107.

The Chief Justice then signalled what would become a feature of new and fresh evidence in Australian jurisprudence: a strict approach to its reception. His honour said that for "...fresh evidence to be admissible must be of such importance as very probably to influence the decision or ... that it must be of such weight that if believed it would probably have an important influence on the result'.[41]

The other judges concurred and, after the new witnesses were called and cross-examined, a new trial was ordered.[42]

5.2.6 *Craig v The King* (1933)

In the 1930s, the High Court had two new and fresh evidence cases that cemented Australian courts' approach to that question and became the authoritative precedents until the Barwick and Gibbs Courts in the 1970s and 1980s: *Craig v The King*[43] in 1933 and *Green v The King*[44] in 1939.

Craig v The King was an appeal from the NSW Supreme Court which, in the course of submissions of the English case of *Brown v Dean* and the NSW cases of *The King v Stone* and *Meredith v Innes*, was canvased. It is an interesting case in that, like the Irish Bombing cases (see Chapter 4), it demonstrates that the blinkered approach appellate courts can take to appeals (in general) where new and fresh evidence is involved. *Craig v The King* was, at its heart, an identification case in which the jurisprudence suggest appellate courts should be more receptive. The facts of the case, its journey through the Court and the attitude of the majority of the High Court to it, bear significant resemblance to the *Mallard* case and its reception by the Western Australian Court of Appeal.

On the appeal, the majority (Rich, Dixon and Starke JJ) consisted of a strongly-worded judgment by Rich and Dixon JJ (with a short concurring judgment of Starke J) dismissing the appeal in no uncertain terms. The dissent was a well-reasoned judgment of the newer judges on the High Court, Evatt and McTiernan JJ.[45]

The facts of the case were that a young girl had been murdered. She had been beaten to death and left in a national park.[46] The undisputed evidence was that, on the day of her murder, a man in a Blue Essex Sedan had driven the victim from her home to the national park.[47] The issue at trial was whether

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[41] Ibid 108.
[42] Ibid 114.
[43] *Craig v The King* (1933) 49 CLR 429.
[44] (1939) 61 CLR 167.
[45] Evatt J was appointed on 19 December 1930 and McTiernan J on 20 December 1903: *Butterworths Concise Australian Legal Dictionary* (LexisNexis, 3rd ed, 2004).
[46] *Craig v The King* (1933) 49 CLR 429, 436.
[47] Ibid.

Mr Craig was that man.[48] The chief evidence against him was the identification of Mr Craig as the driver by three witnesses and Craig's statement to the police, 'Don't take me there', when the police told him he was to be escorted to the murder scene.[49]

Interestingly, it seems that the appellant had sought a new trial based on evidence that had not been before the jury, rather than seeking an acquittal.[50] The new evidence consisted on information from a witness who said that on the night of the murder he picked up an acquaintance he had met while in jail at 2 am, and the man had with him a bundle. After dropping the man off, the bundle was found to contain blood-stained trousers, a handkerchief and tire lever. This information had been told to police over a series of meetings, but the tire lever and trousers were never found.[51] However, the solicitors acting for Mr Craig after his conviction found the handkerchief with blood and the victim's initials on it.[52]

The majority of the High Court were unconvinced by the new evidence. Rich and Dixon JJ identified there was no express power to order a new trial on the grounds of fresh evidence,[53] but that under the legislation a new trial could only be ordered if the Court were convinced of a miscarriage of justice.[54] Therefore the Court 'has thrown upon it some responsibility of examining the probative value of the fresh evidence'.[55]

Their Honours then stated a test, which would recur in High Court jurisprudence:

> It cannot be said that a miscarriage of justice has occurred unless the fresh evidence has cogency and plausibility as well as relevancy. The fresh evidence must we think, be of such a character that if considered in combination with the evidence already given upon the trial the result ought in the minds of reasonable men to be affected.[56]

Rich and Dixon JJ then set out the identification evidence given at trial before turning to an examination of the new evidence.[57] The witness had a 'complete lack of personal credibility'.[58] His

[48] Ibid.
[49] Ibid 439.
[50] Ibid 436.
[51] Ibid 437.
[52] Ibid 438.
[53] Ibid 439.
[54] *Criminal Appeal Act 1912* (NSW) s 12; *Craig v The King* (1933) 49 CLR 429, 439.
[55] *Craig v The King* (1933) 49 CLR 429, 439.
[56] Ibid.
[57] Ibid 440–1.
[58] Ibid 441.

story was 'entirely contradictory'[59] and 'reeks with suspicion',[60] had 'many minor improbabilities'[61] and 'the inherent absurdity of the story would disentitle it to any serious consideration'.[62]

Starke J wrote a short dissenting judgment where he also dismissed the appeal, but for different reasons from Rich and Dixon JJ. His Honour placed great weight on the jury's decision and on that of the NSW Court of Criminal Appeal—both had the benefit of hearing and seeing the witnesses. Interestingly, Mr Craig had been tried three times (two previous juries being unable to agree) and the bench constituted for his appeal had consisted of three judges who had presided at these trials.[63] New evidence was given on affidavit and the deponent was cross-examined in the NSW Court of Criminal Appeal. As such, the intermediate court judges had heard and seen all the witnesses give their evidence.[64]

In a passage that would be echoed in High Court cases to come, Starke J said: 'The greatest weight must be attached to the finding of a tribunal which has seen and heard the witnesses: it has had an opportunity of observing the demeanour of these witnesses and judging their veracity and accuracy such as no other tribunal can have'.[65] That advantage made the judgment of the NSW Court of Criminal Appeal almost unassailable: 'It would be dangerous, indeed it would be subversive of the whole administration of criminal justice, if this Court intervened and gave leave to appeal from a decision reached in such circumstances'.[66]

Evatt and McTiernan JJ could not have disagreed more strongly. They began by asserting the failures of the NSW Court of Criminal Appeal, noting first that the *Criminal Appeals Act 1912* (NSW) seemed to suggest that the trial judge should not sit on the appeal from that verdict.[67] They opined that, on the appeal, the judges concentrated too much on what the new evidence was and were diverted from the outstanding feature of the case, 'the absence of any evidence implicating the applicant in the crime, other than the evidence, such as it was, directed to the question of identify'.[68] This criticism would be made 72 years later by the High Court against the Western Australian Court of Appeal in *Mallard*.

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[59] Ibid.
[60] Ibid.
[61] Ibid.
[62] Ibid.
[63] Ibid 431.
[64] Ibid 443.
[65] Ibid.
[66] Ibid.
[67] Ibid.
[68] Ibid.

Their Honours then examined weaknesses in the original case and pointed out some unusual features of the police investigation. When he was arrested, Mr Craig was 'subjected to an interrogation … for many hours throughout the night and early morning, the detectives conducting the examination in relays'.[69] The following day, he was taken by a large number of police officers to the murder scene. Their Honours noted:

> It is one thing to seek corroboration of the voluntary confession of a person under arrest by taking him to the scene of the crime so that he may be asked to point out in detail what he has already admitted. But it is very different thing to attempt to extract an admission or confession when, as in this case, the person under arrest has not made any.[70]

As to Mr Craig's supposed admission when he said 'Don't take me there', their Honours noted that this was 'quite consistent with the natural revulsion of an innocent person against being compelled to visit the scene of a murder'.[71]

Evatt and McTiernan JJ then analysed the main identification witness against Mr Craig. They began by noting that in criminal cases where the only real issue is that of the identity of the accused versus that of the person who was performing some apparently innocent act at a time long before the trial, all the surrounding circumstances have to be carefully considered, for we at once enter what has been described as that branch of proof 'so notoriously delicate as proof of identify'.[72] Their Honours pointed out that the main witness to identify Mr Craig had given a very detailed description, which he had reported to police months later and only after a reward had been offered.[73] That his description of the victim was most likely based on her photograph from the newspaper. In fact he had trouble picking Craig out from a police line-up and did so mostly from the recollection of a voice he heard once, months before.[74]

Evatt and McTiernan JJ opined that the trial judges summing up to the jury may have caused them to aggregate, rather than analyse, the four identification witnesses' evidence.[75] In concluding their analysis of the identification evidence, their Honours noted that innocent misidentification was the cause of miscarriages of justice in cases like Adolf Beck.[76]

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[69] Ibid 445.
[70] Ibid.
[71] Ibid.
[72] Ibid 445–6.
[73] Ibid 447.
[74] Ibid.
[75] Ibid 449.
[76] Ibid.

As to the freshness of the evidence, their Honours set out a chronology of when the witness had given statements to the police and how the police had dealt with that information. As it turned out, the police decided that the witness was not to be believed and, therefore, did not disclose the statement to the defence. Mr Craig and his lawyers were only aware of its existence after his conviction and sentence.[77] In the minds of these judges, that fact alone warranted a new trial being ordered:

> Whilst, therefore, expressing no opinion that the new material, of its own weight and force, should produce a different result upon a new trial, we are clearly of opinion that the circumstances of its non-disclosure to the defence supports the conclusion to which we come independently that this is a case where the Court of Criminal Appeal should have ordered a new trial.[78]

5.3 Jurisprudence in the 1930s on the Common Form and the settling of new and fresh evidence rules

Just 25 years after *Ross*, in 1937, the Latham Court, speaking with one voice, summarised the common form legislation as: 'whether upon the whole evidence as it in fact existed when it came to be laid before the jury, and having full regard to the treatment of the matter at trial, the actual verdict ought not stand because a miscarriage of the kind described occurred'.[79]

In relation to setting aside verdicts under the third ground of appeal (that on any ground whatsoever when there has been a miscarriage of justice), the Latham Court endorsed the phrase 'unsafe and unjust'.[80] Ironically, and as a great example of how confusing this area of law can become, the Mason Court cited this judgment in identifying the appropriate phrases to use when considering the first ground of appeal (whether the verdict was unreasonable or cannot be supported having regard to the evidence). In addition, this case (*Davis & Cody v The King*) involved an appeal against the admission of identification evidence and whether the judge's summing up was sufficient. These complaints are related to a complaint of an error of process which is usually regarded as relating to the second ground of appeal (that the court a trial made a wrong decision on a question of law). This confusing jurisprudence seemed to blend the three grounds of appeal into one, which significantly reduces the power of the common form provision and reduces the opportunities to successfully appeal.

[77] Ibid 451.
[78] Ibid 452.
[79] *Davies v The King* (1937) 57 CLR 170, 180–1.
[80] Ibid 180.

This Latham Court summary conflates what Isaacs J had identified as three separate grounds of appeal into one ground. It also negates the third ground applying to any case where there has been a miscarriage of justice.

The word 'substantial' is not used in the common form legislation that establishes the three grounds of appeal. It appears in the proviso when it says 'that no substantial miscarriage of justice has actually occurred'. The word 'substantial' has found its way into the tests enunciated by different courts in relation to the grounds of appeal. However, on occasion, it has been expressed as 'so substantial'[81] and 'very substantial'.[82]

In *Craig v The King*, a little over a decade later, the majority (Rich and Dixon JJ joint judgment with Starke J agreeing) again dismissed the appeal, despite the conviction relying entirely on identification evidence. This time, Evatt and McTiernan JJ wrote a strong dissenting opinion.

In this case, the majority identified the statutory power to admit fresh evidence. Section 12 of the *Criminal Appeals Act 1912* (NSW) authorises the Court, if it thinks it necessary or expedient in the interests of justice, to have witnesses examined before it. There is no power conferred expressly to grant a new trial on the ground of the discovery of fresh evidence. The authority to do so is contained in the power to set aside a conviction when a miscarriage of justice has occurred and to order a new trial when the miscarriage can best be so remedied.

The Court then considered on what occasions fresh evidence should be admitted and identified the importance of jury deference as a reason to proceed with caution: 'It is evident that the exercise of a power to direct a new trial because fresh evidence is forthcoming must be attended both with danger and with difficulty. It is the function of the jury to determine questions of fact in a criminal trial'.

The criteria (that in later judgments comes to be used for admissions of fresh evidence) was then discussed by the Court, but in terms of how the fresh evidence would affect the outcome of the appeal:

> A Court of Criminal Appeal has thrown upon it some responsibility of examining the probative value of the fresh evidence. It cannot be said that a miscarriage has occurred unless the fresh evidence has cogency and plausibility as well as relevancy. The fresh evidence must, we think, be of such a character that, if considered in combination with the evidence already given upon the trial the result ought in the minds of reasonable men to be affected. Such evidence should be calculated at least to remove the certainty of the prisoner's guilt which the former evidence produced. But in judging of the weight of the fresh

[81] 'Whether on the whole of the case the possibility of error is so substantial as to make the conviction unsafe': ibid 182.
[82] 'Verdicts of course ought not be and are not in practice, set aside except upon very substantial grounds': *Raspor v The Queen* (1958) 99 CLR 346, 352.

testimony the probative force and the nature of the evidence already adduced at the trial must be a matter of great importance.

This sets two criteria. The fresh evidence must:

1) have 'cogency and plausibility, as well as relevancy'
2) 'be of such a character that, if considered in combination with the evidence already given upon the trial, the result ought in the minds of reasonable men to be affected or at least to remove the certainty of the prisoner's guilt which the former evidence produced. Put another way, the Court should judge the weight of the fresh testimony taking into account the probative force and the nature of the evidence already adduced at the trial'.

In dissent, Evatt and McTieran JJ spent a considerable part of their judgment analysing the new evidence in light of the evidence given at trial and concluding that it was material that ought to have been before a jury for their consideration. It was in effect a non-disclosure case, because the evidence weakening the prosecution's witnesses as to identification was in the hands of the police prior to trial. In later years, the High Court recognised that the non-disclosure of material evidence automatically entitled the applicant to a retrial because the trial had not been fair in that all relevant evidence had not been placed before the jury. Thus, the point of enquiry in such cases was on an error of process, not the guilt or innocence of the accused (ie, error of outcome).

Interestingly, the very short decision of Starke J, concurring with Rich and Dixon JJ, revealed something about his Honour's (if not the Court's) mindset as to overturning criminal convictions when his Honour (without reference to the common form provision of 'unreasonable or cannot be supported having regard to the evidence') wrote: 'In my opinion this Court ought not to interfere with the course of criminal justice unless it is shown that exceptional and special circumstances exist, and that substantial and grave injustice has been done'.[83]

5.3.1 *Green v The King* (1939)

In 1939, the High Court's rules in relation to the admission of fresh evidence became more defined. In *Green v The King*,[84] Latham CJ wrote the only significant judgment and the other members of the court (Rich, Starke, Dixon and McTiernan JJ) agreed.

[83] *Craig v The King* (1933) 49 CLR 429.
[84] (1939) 61 CLR 167.

The accused was convicted of the shooting murder of two women. The primary evidence against him was a bicycle pump found near the scene of the murders, which was claimed to have come from the bicycle Mr Green was riding on the day of the murders. The boy who owned the bicycle gave evidence at a coronial inquest that the pump found was not from his bicycle. Subsequently, another bicycle pump, which was said to fit the description given by the boy of the one from his bike, was tendered in evidence at trial as being the missing pump and, thus, tying Mr Green to the time and place of the murders.

After the trial, Green's lawyers spoke to the boy (who had attended every day of the trial but not been called) and he denied that the second pump found was from his bicycle either. Mr Green then appealed on a number of grounds, the primary one being the fresh evidence of the boy identifying the second bicycle pump as not being his.

Latham CJ endorsed the criteria that the NSW Court of Criminal Appeal had enforced in relation to the reception of fresh evidence:

> It is a ground for a new trial that fresh evidence has been discovered, but the courts have always been most cautious in granting such applications. It has been required that the evidence should be evidence that could not with reasonable care have been discovered previously and that it should be of such a character that, if it had been tendered, it would have been of such weight as, if believed, to have an important influence on the result. These are general principles which should be applied to both civil and criminal trials (*R. v. Copestake; Ex parte Wilkinson* (1927) 1 K.B. 468, at p. 477; *Guest v. Ibbotson* (1922) 91 L.J.K.B. 558; *R. v. Sayegh* (1924) 25 S.R. (N.S.W.) 61; *R. v. Stone* (1926) 26 S.R. (N.S.W.) 394; *Craig v. The King* [1933] HCA 41, (1933) 49 C.L.R. 429. Reference may also be made to cases in which the Court of Criminal Appeal in England, which itself has power to hear fresh evidence, though not to order a new trial, has dealt with the question of fresh evidence (*R. v. Watkins* (1908) 1 Cr.App.R. 183; *R. v. Soper* (1908) 1 Cr.App.R. 63; *R. v. Starkie* (1921) 16 Cr.App.R. 61).

Without reference to the wording of the *Criminal Appeals Act 1914* (Vic) s 9, which established the only criteria for admission of fresh evidence as being that it was 'necessary or expedient in the interests of justice', the Chief Justice proclaimed that 'the courts have always been most cautious in granting such applications'. If his Honour was correct, then, at least in the first 25 years of the operation of the common form legislation, appellate courts approaching fresh evidence had been 'excessively restrictive'[85] like the British courts.

[85] *Royal Commission into Criminal Justice* (Report, 2 June 1993) 174 [56].

Again, the High Court focused on the question as to whether a new trial should be granted, rather than whether the new evidence was able to be admitted in appeal. The criteria, according to the Chief Justice, was now a two-step test. First, that the new evidence could not with reasonable care have been discovered previously and, second, that it should be of such a character that, if it had been tendered, it would have been of such weight as, if believed, to have an important influence on the result. Like Isaacs J before him, Latham CJ saw no difference between a civil or criminal appeal in terms of the admission of such evidence. The decision in *Green v The King* was the authority on the admission of fresh evidence until Barwick CJ's decision in *Ratten v The Queen* ('*Ratten*').[86]

Although the decisions in *Craig* and *Green* seemed to have settled the law in relation to new and fresh evidence in criminal appeals, in the late 1940s and early 1950s several civil cases[87] came before the High Court regarding the reception of fresh evidence, the last of which was cited by Barwick CJ in *Ratten*. It is worthwhile to take a brief look at the decision in *Orr v Holmes*[88] to see the reliance of the Australian courts on the English decisions explored in Chapter 3 in three later High Court decisions: *Commissioner for Government Tram & Omnibus Services v Vickery*,[89] *McCann v Parsons*[90]and *Council of the City of Greater Wollongong v Cowan* ('*Greater Wollongong v Cowan*').[91]

Orr v Holmes is also interesting because it demonstrates that, in civil judgments, courts do not cite criminal decisions on new and fresh evidence.[92] By 1948, when this case was decided, there had been more than 40 years of criminal appeal decisions in England and Wales and 35 years of them in Australia. Yet, when looking to justify the treatment of new and fresh evidence, Dixon J (as he was then) looked at the history of the rule. His Honour did not cite any criminal decisions. The decision in *Greater Wollongong v Cowan* from 1955 was relied on by Barwick CJ in *Ratten*. *Greater Wollongong v Cowan* relies particularly on the decision in *Orr v Holmes*, making the judgment worth exploring.

[86] (1974) 131 CLR 510.
[87] *Orr v Holmes* (1948) 76 CLR 632, *Commissioner for Government Tram & Omnibus Services v Vickery* (1952) 85 CLR 635 and *McCann v Parsons* (1954) 93 CLR 418.
[88] (1948) 76 CLR 632
[89] (1952) 85 CLR 635.
[90] (1954) 93 CLR 418.
[91] (1955) 93 CLR 435.
[92] The exception to this is *Copestake*, which, as discussed in Chapter 3, is not a criminal case heard in the Court of Criminal Appeal. It is also worth noting that Counsel for the second respondent cited *Green* in submissions, but the judges did not rely on it.

5.3.2 *Orr v Holmes* (1948)

Orr v Holmes involved a dispute over the members of a lotto syndicate. Mr Orr claimed that he, Mr Holmes and another had purchased a ticket that subsequently won the Golden Casket and a prize of £6,000.[93] Mr Holmes had several tickets in the lotto and denied that the ticket Mr Orr had contributed to was the winning ticket. Mr Orr sued Mr Holmes.[94] As to the trial, Latham CJ said '[t]here was a complete conflict of evidence upon all material matters and the decision in the case turned entirely upon the credibility of the plaintiff and the defendants respectively'.[95] Mr Orr's evidence was that the winning ticket was bought by him and the other members of the syndicate on Exhibition Monday, which the jury accepted.[96] After the trial, Mr Holmes (who had made some enquiries before the trial) was told by the Press Lottery ticket agents that the number of the winning ticket was not distributed to the news agency until the day after Exhibition Monday.[97] Mr Holmes applied for a new trial based on fresh evidence. The Full Court of the Supreme Court of Queensland granted a new trial and the matter was appealed to the High Court.

Lathan CJ wrote a short judgment allowing the appeal and overturning the Queensland Court's order of a retrial. Latham CJ first focused on the freshness of the evidence: 'The objections to granting such an application are obvious and the rule has been strictly applied that a new trial should not be granted on such a ground if by the exercise of reasonable diligence the "fresh" evidence could have been discovered in time to be used at the original trial'.[98] The Chief Justice concluded that the information could have been obtained prior to trial with the exercise of reasonable diligence.[99]

Latham CJ then identified that 'a new trial is granted on the ground of discovery of fresh evidence it must be shown at least that the evidence to be admitted is "of such importance as very probably to influence the decision": *R v Copestake; Ex parte Wilkinson*'.[100] Latham CJ concluded that the new evidence only went to the credit of the plaintiff and, therefore, was not sufficient to justify a new trial.[101]

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[93] (1948) 76 CLR 632, 635.
[94] Ibid.
[95] Ibid.
[96] Ibid.
[97] Ibid.
[98] Ibid.
[99] Ibid.
[100] Ibid.
[101] Ibid 635–6.

Rich J focused only on the question of whether the evidence of the Press Lottery ticket agents that the number of the winning ticket was not distributed to the news agency until the day after Exhibition Monday was fresh. His Honour noted that 'it was contended that further inquiries should have been made at the licensed shops [prior to trial]. These shops, however, are very numerous in number and carry on the lottery business not only in the city but also in the suburbs and the country'.[102] Dissenting from the majority, his Honour concluded: 'I, therefore, agree with their Honours that the defendants, in inquiring at the Office, had used such reasonable care and diligence as was requisite and possible in the circumstances'.[103]

Dixon J (as he then was) wrote the longest judgment which provided an analysis of the rules of a new trial be granted on the grounds of new or fresh evidence. He started with a sentence that encapsulates the principle of finality:

> If a trial has been regularly conducted and the party against whom the verdict has passed cannot complain that evidence has been wrongly received or rejected or that there has been a misdirection or that he has not been fully heard or has been taken by surprise or that the result is not warranted by the evidence, the successful party is not to be deprived of the verdict he has obtained except to fulfil an imperative demand of justice.[104]

Dixon J then identified that, unless it was almost certain that the new evidence would have produced a different result and that it could not have been found with reasonable diligence, a new trial would not be ordered. To support this test, his Honour cited several cases including a quote from the 1863 case of *Scott v Scott*:[105]

> No element in the administration of justice is so destructive of its efficiency as uncertainty; and no grievance more sorely felt by suitors than that which snatches success away at the moment of its accomplishment, and sets all abroad and in doubt again after one complete hearing and decision. Nothing shakes so much that confidence in the law which it is the first duty of all tribunals to uphold.[106]

Dixon J reviewed the test as expounded in *Scott v Scott*, *Brown v Dean*,[107] *Hip Foong Hong*,[108] *Copestake*,[109] *Meredith v Innes*[110] and others, and concluded that 'the evident purpose of all of them

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[102] Ibid 637.
[103] Ibid.
[104] Ibid 640.
[105] (1863) 3 Sw & Tr 319.
[106] *Scott v Scott* (1863) 3 Sw & Tr 319, 322, 326.
[107] (1910) AC 373, 374.
[108] (1918) AC 888, 894.
[109] [1927] 1 KB 468, 477.
[110] (1930) 31 SR (NSW) 104, 108.

is to ensure that new trials will not be granted because of fresh evidence unless it places such a different complexion upon the case that a reversal of the former result ought certainly to ensue'.[111] His Honour, like Latham CJ, felt that the evidence produced was neither fresh nor likely to alter the result in a new trial. As such, he upheld the appeal and restored the jury's original verdict.[112]

In 1955, as Chief Justice in *Greater Wollongong v Cowan*, Dixon CJ referred to his decision in *Orr v Holmes* as establishing the relevant test for the granting of a new trial on the grounds of fresh evidence.[113] As will be shown, Barwick CJ in 1974 looked to the civil case of *Greater Wollongong v Cowan* in enunciating the relevant test in *Ratten*.

By 1973, intermediate appellate courts were still expressing a view of the 'unreasonable' ground which limited this ground to verdicts that were 'plainly defective' or 'so weak or obviously unreliable that reasonable doubt as to guilt must necessarily exist however the whole of the evidence is viewed'.[114]

5.3.3 *Ratten v The Queen* (1974)

In 1974, Barwick CJ summarised the common form legislation when he wrote: 'It is convenient to first observe the powers given to the court of criminal appeal by [the common form legislation]. … Apart from lack or deficiency of evidence or misdirection in point of law, the court is to allow an appeal if on any ground there is a miscarriage of justice'.[115] Again, this summary rewords the legislation and, in doing so, changes the meaning and, therefore, the effect. If these are examples of the judicial approach to the interpretation of the section, it is no wonder that after 100 years there is still no established approach. The practical result of the common form establishing three different grounds of appeal is that in any given case there may be at least three tests that could be applied.

In *Ratten*, Barwick CJ, when considering whether the case should be granted special leave, said:

> The application for special leave to appeal does raise, in my opinion, a matter of general public interest namely what is the correct course to be adopted by a court of appeal in considering an appeal against conviction based upon the production of evidence not given at the trial. This matter has had judicial consideration on occasions when what might be thought to be diverse approaches or tests have been enunciated … There is in any case, in

[111] (1948) 76 CLR 632, 640–1.
[112] Ibid 645.
[113] (1955) 93 CLR 435, 444.
[114] *R v Hayes* (1973) 5 SASR 278, 281.
[115] *Ratten v The Queen* (1974) 131 CLR 510, 515.

> my opinion, room for a definitive pronouncement by this court of the appropriate principle so far as Australian courts are concerned.[116]

In his strong judgment, the Chief Justice endorsed the use of the phrase 'dangerous or unsafe'. When addressing the difference that now existed between the English and Australian legislation, he did not consider that there was any great difference between the two.[117]

Although the High Court's decision in *Ratten* did not overturn *Green*, and in fact was cited by Barwick CJ as an authority supporting his reasoning, *Ratten* did shift the High Court's focus from merely considering fresh evidence in relation to new trials to differentiating between the reception of such evidence in civil versus criminal cases and identifying that there was a distinction between fresh evidence demonstrating an error of process as well as an error of outcome.

Barwick CJ began by identifying that the chief reason the case was (in his opinion) worthy of special leave was that it raised a question of great importance: the validity of the appellant's argument that the Full Court of the Supreme Court of Victoria, when faced with 12 affidavits of evidence that were not made available at trial, were obliged to order a retrial.[118] That Court examined the test for admission of fresh evidence on appeal in civil cases:

> In civil cases, appeals upon the ground of the discovery or availability of additional evidence are limited by strict conditions. Putting on one side cases of surprise, fraud and malpractice, it must be shown in the first place that the appellant could not, by reasonable diligence, have adduced the additional evidence at the trial. Secondly, the additional evidence, as well as coming from a source not lacking credibility, must be so strongly persuasive of the immediate facts which it is relied upon to establish that if it had been given at the trial a contrary finding would have been improbable, if not unreasonable. And, thirdly, the facts which it thus tends to prove must be well-nigh decisive of the ultimate facts upon which the issue in the case depends: compare *Council of the City of Greater Wollongong v Cowan* [1955] HCA 16; (1955) 93 CLR 435 at pp. 444–5.[119]

The Full Court identified that 'these conditions are not directly applicable, because the Court's function, and the extent of its, discretionary jurisdiction, are defined by the direction in [the common form]'. Nevertheless, the rules from civil appeals 'have some obvious relevance'[120] and 'have in some cases been used as a prima facie test or rule of practice'.[121] In that sense, Barwick CJ's judgment

[116] Ibid 514–5.
[117] Ibid 516.
[118] Ibid 513 (per Barwick CJ).
[119] *Re Ratten* [1974] VR 201, 213.
[120] Ibid.
[121] Ibid.

proceeded to explain both the admission of fresh evidence and the interpretation of the common form in general.

Interestingly, *Green v The King* ('*Green*') was not mentioned in the reasons given by Barwick CJ. Menzies J referred to *Green* in his separate reason (although agreeing on the result) to identify what had been said by the Court in *Green* and the earlier case of *Ross*. Interestingly, Menzies J identified that it was a novel, although correct, proposition of law that the production of fresh evidence might demonstrate an error of process (that an accused has not had a fair trial) as well as an error of outcome.

> A miscarriage of justice of the first kind mentioned by the Full Court, i.e. the absence of a fair trial, is not a conception that, so far as I am aware, has previously been applied to the discovery of fresh evidence, but, having been stated as it was by the Full Court, the conception commands acceptance on fundamental grounds. If an accused did not have a fair trial, his conviction was a miscarriage of justice.[122]

The Chief Justice opened the discussion on the reception of new and fresh evidence, and more broadly on the test to be applied in relation to the broader question of how appellant courts approach overturning jury verdicts. He said:[123]

> The application for special leave to appeal does raise, in my opinion, a matter of general public interest, namely, what is the correct course to be adopted by a court of criminal appeal in considering an appeal against conviction based upon the production of evidence not given at the trial. This matter has had judicial consideration on occasions when what might be thought to be diverse approaches or tests have been enunciated… There is in any case, in my opinion, room for a definitive pronouncement by this Court of appropriate principle so far as Australian courts are concerned.[124]

It is worth noting that Barwick CJ identified that 'diverse tests have been enunciated', presumably in intermediate appeal courts. This demonstrates that despite the legislation having been in force for 60 years,[125] the jurisprudence was not settled.

The Full Court of the Victorian Supreme Court had discussed the implications of cases from several Australian jurisdiction, as well as New Zealand, to determine how it should deal with the new evidence. Curiously, the Chief Justice indicated that the existence of the English case *Stafford v Director of Public Prosecutions* (1974) AC 878 (which was handed down after the Victorian Full Court) necessitated making a pronouncement on the operation of the common form appeal provisions.

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[122] *Ratten v The Queen* (1974) 131 CLR 510, 525 (per Menzies J).
[123] The High Court used to hear the application for special leave at the same time as the substantive appeal.
[124] *Ratten v The Queen* (1974) 131 CLR 510, 515.
[125] In Victoria, the common form provisions were first enacted in 1914 in the Criminal Appeals Act.

This is despite the fact that *Stafford v Director of Public Prosecutions* was decided after the amendments recommended by the Donovan Committee:

> The amendment in 1966 in the United Kingdom of the formulation of the jurisdiction of the court of criminal appeal now appearing in s. 2(1) of the *Criminal Appeal Act 1968 (U.K.)*, as interpreted by the House of Lords in *Stafford v. Director of Public Prosecutions* (1974) AC 878 would seem to have increased the scope for the exercise by the court of its own assessment of the evidence in a case, though it has had no opportunity to hear the witnesses called before the jury. This amendment has not been made in Australian legislation, but this Court has recently reiterated the view that under the Australian provisions, a court of criminal appeal in Australia should allow an appeal if on its own view of the evidence it would be dangerous or unsafe in the administration of the criminal law to allow a verdict of guilty to stand (*Hayes v. The Queen* (1973) 47 ALJR 603). This decision may not have disclosed as great a discretion in a court of criminal appeal in Australia, as the decision of the House of Lords in *Stafford v. Director of Public Prosecutions* (1974) AC 878 has done for the United Kingdom. But the Court's decision is founded on the existence of the function of independent assessment of the evidence by the court of criminal appeal. This function is of particular importance when considering what a court of criminal appeal should do when asked to disturb a jury's verdict on the production of new evidence.[126]

Of the amended legislation in the United Kingdom, Barwick CJ said that 'it would seem to have increased the scope for the exercise by the court of its own assessment of the evidence' and overall the Chief Justice seemed to believe that there was not a significant difference between the powers of English and Australian courts:

> The amendment has not been made in Australian legislation, but this Court has recently reiterated the view that under the Australian provisions a court of criminal appeal in Australia should allow an appeal if on its own view of the evidence it would be dangerous or unsafe in the administration of the criminal law to allow a verdict of guilty to stand (*Hayes v The Queen* (1973) 47 ALJR 603). This decision may not have disclosed as great a discretion in a court of criminal appeal in Australia, as the decision of the House of Lords in *Stafford v Director of Public Prosecutions* (1974) AC 878 has done for the United Kingdom. But the Court's decision is founded on the existence of the function of independent assessment of the evidence by the court of criminal appeal.[127]

The irony in the High Courts understanding of the English amendments is that the Donovan Committee suggested them to encourage courts to exercise a power that existed in the common form legislation but was not being utilised by appellate courts. Barwick CJ and later incarnations of the High Court took the amendments as expanding the power of English appellate courts.

[126] *Ratten v The Queen* (1974) 131 CLR 510, 516.
[127] Ibid.

The Chief Justice cautioned against adopting the civil rules for the admission of evidence on appeal, particularly in relation to the 'freshness' of the evidence (ie, it could not have been obtained with reasonable diligence) as the Victorian Full Court had:

> The rule in relation to civil trials is that evidence on the production of which a new trial may be ordered, must be fresh evidence; that is to say, evidence which was not actually available to the appellant at the time of the trial, or which could not then have been available to the appellant by the exercise on his part of reasonable diligence in the preparation of his case. However, the rules appropriate in this respect to civil trial cannot be transplanted without qualification into the area of the criminal law.[128]

However, Barwick CJ went on to emphasise the continuing importance of the rule of finality in an adversarial system: 'But the underlying concepts of the adversary nature of a trial, be it civil or criminal and of the desirable finality of its outcome are valid in relation to the trial of the criminal offence'.[129]

If the evidence is not fresh, in that it was available actually or constructively to the accused at their trial, then it cannot be said that there has been an unfair trial. However, Barwick CJ recognised that such an assessment only addressed the notion of an error of process. In relating to new evidence affecting the conviction, his Honour said:

> Of course, if by reason of new evidence accepted by it though it may not be fresh evidence, the court is either satisfied of innocence or entertains such a doubt that the verdict of guilty cannot stand, the fact that the trial itself has been fair will not prevent the court upon that evidence quashing the conviction.[130]

In this way, the Chief Justice recognised the distinction between an appeal on an error of process and an appeal on an error of outcome. Later incarnations of the Court would not always approach the question with such charity, and would move to make the test in relation to the acceptance of fresh or new evidence far more restrictive. This was something identified by both the Donovan Committee and Runciman Commission in England and sought to be overcome through amendments to the appeal legislation.

Moreover, the Chief Justice went on to make it clear that, in his opinion (with McTiernan, Stephens and Jacobs JJ agreeing), the question of the freshness of the evidence was secondary to the consideration of errors of outcome: 'until a court decides that there is no miscarriage of this kind, it

[128] Ibid 517.
[129] Ibid.
[130] Ibid 518.

will not need to consider whether or not any part of the new evidence satisfied the criterion of fresh evidence'.[131]

Perhaps unhelpfully, Barwick CJ made a clear distinction between how new evidence, as opposed to fresh evidence, was to be treated. This sharp distinction became a feature of later jurisprudence:

> To sum up, if the new material, whether or not it is fresh evidence, convinces the court upon its own view of that material that there has been a miscarriage in the sense that a verdict of guilty could not be allowed to stand, the verdict will be quashed without more. But if the new material does not so convince the court, and the only basis put forward for a new trial is the production of new material, no miscarriage will be found if that new material is not fresh evidence.[132]

The Court dismissed the appeal with all judges agreeing, but *Ratten* continues to be cited both by the High Court and intermediate appellate courts, particularly in relation to the question of new and fresh evidence. Unfortunately, the real importance of the Chief Justice's judgment has not been fully appreciated and the distinction he drew between errors of outcome and process (although he did not use those terms) was substantially overlooked.

5.3.4 *Lawless v The Queen* (1979)

Lawless was on appeal from the Victorian Court of Criminal Appeal. Mr Lawless was convicted of murder after shooting a man in the head and then in the chest.[133] The evidence against him was strong. He was identified by a woman who knew him and was sitting in a car mere feet away from the shooting.[134] The victim was known to both the witness and Mr Lawless, and Mr Lawless and the victim had been in the car together before the fatal altercation. Another witness from the house outside which the shooting took place also identified Mr Lawless as the man who got back into the car after the witness heard gunshots.[135] That witness's wife, Mrs Telford, had also given a statement to police which, although it did not exonerate Mr Lawless, was different in some material respects from the other two witnesses.[136] Unfortunately, the police failed to disclose that statement and, when it surfaced, Mr Lawless petitioned the governor for a further appeal, which was granted. He lost that appeal and was granted special leave to the High Court.[137]

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[131] Ibid 519.
[132] Ibid 520.
[133] *Lawless v The Queen* (1979) 142 CLR 659, 662.
[134] Ibid.
[135] Ibid.
[136] Ibid 662–3.
[137] Ibid 662.

It was an odd case to become important in future jurisprudence on new and fresh evidence because the appellant's case was not strong and the judges did not depart from what had been said in *Ratten*. Further, each judge (Barwick CJ and Stephens, Mason, Murphy and Aickin JJ) wrote separate reasons for judgment, yet they all agreed.

Barwick CJ merely reiterated what he had said in *Ratten*, pointing out that '[i]n that case the court was at pains, first of all, to draw a sharp distinction between an application to quash a conviction unconditionally and an application for a new trial'.[138] After analysing the facts of the case the Chief Justice dismissed the appeal.

Barwick CJ strictly applied the notion of reasonable diligence:

> the proposed evidence, in my opinion, … does not in any event qualify as fresh evidence. The applicant and his advisers at his trial knew of Mrs. Telford's presence in the house, along with her husband, and that she was awake and, if they gave any thought to it, that she was at least possibly in a position to have seen something of what occurred in the street outside her residence. It is not an unduly strict application of the requirements of fresh evidence to say that the applicant could by reasonable diligence have ascertained what Mrs. Telford knew of the events of the evening.[139]

In his judgment, Stephens J merely relied on the decision in *Ratten* and Rich and Dixon JJ's judgment from *Craig*. Mason J's decision is of most the interest, in part because his Honour goes on to play such an influential role on the High Court's jurisprudence. In relation to the evidentiary issue, Mason J, like Barwick CJ in *Ratten*, drew a sharp distinction between cases involving new as opposed to fresh evidence: 'it is not permissible for a Court of Appeal to set aside a conviction if the newly adduced evidence, not being fresh evidence strictly so called, reveals no more than a likelihood that the jury would have returned a verdict of not guilty'.[140]

While this statement of itself is uncontroversial, his Honour's justification of it reveals a strong emphasis on the principle of finality. Mason J said that there were two reasons justifying his proposition:

> The first is that in a criminal trial the accused is entitled to decide how his case will be conducted, in particular, what evidence he will call. He makes this decision in the light of the knowledge that he is tried but once, unless error or miscarriage of justice results in a successful appeal. He cannot therefore conduct his defence by keeping certain evidence back in the expectation that, if he is convicted, the existence of the uncalled evidence will

[138] Ibid 665.
[139] Ibid 666.
[140] Ibid 675.

> provide a ground for a second trial at which a different or refurbished defence may be presented.[141]

The notion that to be too liberal in granting retrials would encourage unethical behaviour in lawyers or litigants is not new, but Masons J's reasoning seems to take into account that most criminal defendants are legally aided and, therefore, have little choice of (or influence over) the running of their appeals. Finally, the main objection to this emphasis on finality was given in the Runciman Report:

> It cannot possibly be right that there should be defendants serving prison sentences for no other reason than that their lawyers made a decision which later turns out to have been mistaken. What matters is not the degree to which the lawyers were at fault but whether the particular decision, whether reasonable or unreasonable caused a miscarriage of justice.[142]

The second justification given by Mason J for requiring a stricter approach to new rather than fresh evidence follows on from his earlier point and very much places the emphasis on defendants to run their best case at trial:

> there must be powerful reasons for disturbing a conviction obtained after a trial which has been regularly conducted. No such reason for disturbing a conviction presents itself if all that emerges is that the accused has deliberately chosen not to call evidence or that he has failed to search out evidence with reasonable diligence, unless the evidence not called at the trial demonstrates that the accused should not have been convicted of the offence charged.[143]

This justification seems to ignore the fact that the burden of proof lies on the prosecution.[144] The defendant does not have the resources to find witnesses of its own and has no legal responsibility to do so.

Mason J quoted *Craig* and identified that fresh evidence must have 'cogency and plausibility as well as relevancy'.[145] He concluded that the evidence was not fresh and, therefore, the appeal should be dismissed.[146] Murphy and Aickin JJ wrote separate judgments in which they cited *Ratten* and *Craig*. They also dismissed the appeal.[147]

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[141] Ibid 675.
[142] *Royal Commission into Criminal Justice* (Report, 2 June 1993) 174 [59].
[143] *Lawless v The Queen* (1979) 142 CLR 659, 675–6.
[144] *Woolmingtion v DPP* [1935] AC 462.
[145] *Lawless v The Queen* (1979) 142 CLR 659, 676.
[146] Ibid 677.
[147] Ibid 680–7.

5.4 Further Jurisprudence on the Common Form

The Gibbs Court in the 1980s had taken the view that English legislation mandated a very different approach. In *Whitehorn v The Queen* ('*Whitehorn*'), the Gibbs Court said that: 'Wide as the powers of an Australian Court of Criminal Appeal are, they do not, under the legislation which prevails in this country, empower a court to set aside a verdict upon any speculative or intuitive basis'.[148]

In *Whitehorn*,[149] when considering ground one of the common form, Gibbs CJ and Brennan J concluded that:

> a court of criminal appeal … should allow an appeal if having regard to all the evidence it concludes that it would be unsafe, unjust or dangerous to allow a verdict to stand. If the court reaches such a conclusion in a particular case, that means that it thinks it was not open to the jury to be satisfied beyond a reasonable doubt of the guilt of the accused.

Despite the fact that the court was addressing the first ground of appeal in this quote, it concluded that there had been a miscarriage of justice[150] (ground three), rather than concluding that the verdict was unreasonable or could not be supported having regard to the evidence (ground one).

One could be forgiven for believing that, after the decision in *Whitehorn*, the phrase 'unsafe and unsatisfactory' was inappropriate for use in Australia.

5.5 The Chamberlain Case (1983 and 1984)

Like the Irish Bombing cases in England, Australia in the 1980s had its own notorious miscarriage of justice, that of Lindy and Michael Chamberlain. The pair were convicted on 29 October 1982 of murdering their nine-week-old daughter Azaria at Ayers Rock two years earlier. By 1986, after a Commission of Inquiry into their convictions, both were pardoned and, in 1988, the Court of Criminal Appeal of the Northern Territory quashed their convictions and entered verdicts of acquittal. Unlike the English experience, the unearthing of this egregious error of justice did not lead to reform of the common form legislation or the rules regarding new and fresh evidence.

On 16 August 1980, the Chamberlains, a young family from Mt Isa in Queensland, arrived for a camping holiday at Ayers Rock (now Uluru).[151] The family consisted of father Michael (a pastor from

[148] Ibid 689.
[149] *Whitehorn v The Queen* (1983) 152 CLR 657, 660.
[150] Ibid 662.
[151] *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521, 539.

the Seventh Day Adventist Church); mother Alice Lynne (known as Lindy); and their three children, Aiden (then aged six), Reagan (then aged four) and Azaria, a nine-week-old baby girl.[152] The family pitched their tent at a camping ground on the eastern side of Uluru. The camping ground had cooking facilities and an ablutions block. There were also three residences and a motel within a few hundred metres of the campground.[153]

On 17 August 1980, the Chamberlain family visited Ayers Rock, a couple of kilometres west, and watched the sun set.[154] They returned to the campsite and prepared their dinner. By around 8 pm, the youngest boy Reagan was already asleep in the tent while Michael, Lindy, Aiden and Azaria were at the barbeque area preparing dinner with other campers.[155] As Azaria had fallen asleep, Lindy took her and Aiden back to the tent to put them to bed.[156] She returned between five and 10 minutes later to the barbeque area with Aiden.[157] Not long after, Lindy walked away from the barbeque area back towards the tent. She raised the alarm when she realised that Azaria was not in the tent.[158] Lindy said that she had seen a dingo at the entrance to the tent, which had runoff as she approached. She called out 'that dog's got my baby'.[159]

The Chamberlains, upon being convicted in the then-new Northern Territory Supreme Court, appealed to the Full Court of the Federal Court.[160] That Court consisted of the Sir Nigel Bowen CJ and Forster and Jenkinson JJ. The Chief Justice and Forster J wrote one judgment and Jenkinson J another, but all agreed that the appeal should be dismissed. The reasoning of Jenkinson J seemed to come remarkably close to upholding the appeal.

It might be said that, with the benefit of hindsight, the erroneous approach of the judges is obvious. It might equally be said that much of the information that the Royal Commission later used to assert Lindy and Michael Chamberlain's innocence was before the appellate courts. The decision of Bowen CJ and Forster J is an example of judges getting lost in the technicalities of the legal arguments and losing sight of the fundamentals of the case. What was never disputed was the evidence of the witnesses at the barbeque area on the night. Their evidence was called by the prosecution and not challenged by the defence. Their evidence demonstrated that the prosecution's case could not be

[152] Ibid.
[153] Ibid.
[154] Ibid.
[155] Ibid 540.
[156] Ibid.
[157] Ibid.
[158] Ibid.
[159] Ibid 541.
[160] *Chamberlain v R* (1983) 46 ALR 493.

correct. In what is surely one of the best examples of obfuscation and misdirection, the prosecution at trial spent two weeks calling scientific evidence they asserted was demonstrable of guilt.

Unfortunately, Prosecutor Ian Barker QC continued that misdirection on appeal. He objected on technical grounds to five grounds of appeal.[161] At its heart, the objections went to the powers of the Full Federal Court to hear criminal appeals.[162] A significant position of the joint judgment of Bowen CJ and Forster J was also absorbed with an analysis of the scientific evidence.[163] Their Honours also analysed the law in relation to the failure to object and its effect on the subsequent appeal. Arguments of this nature are, like the strict approach to new evidence, bound up in the principle of finality. This thesis proposes that such an approach places efficiency of the criminal justice system above individual justice.

Bowen CJ and Forster J held:

> The failure of counsel at the trial to seek a redirection … and his failure to object to the admissibility of evidence, cannot lead inevitably to the dismissal of an appeal … It is nevertheless a relevant factor to be considered. If experienced senior counsel at the trial is not moved to seek redirection or to object to the admissibility of evidence, his failure to do so carries a strong suggestion that in the atmosphere of the trial at which he was present, no miscarriage of justice occurred or was likely to occur because of matters later complained of.[164]

In relation to the new and fresh evidence, their Honours conducted a piecemeal examination of it and dismissed the affidavits as not being fresh. In relation to the evidence of the Park Ranger, for example, he had given evidence at trial but had not been asked certain questions as to the location and description of where the baby clothes were found.[165] Their Honours dismissed his evidence as not fresh, citing the test in *Ratten* and *Lawless*:

> We refused leave to tender Mr. Roff's evidence on the appeal. It was not fresh evidence in the accepted sense (*Ratten v The Queen* (1974) 131 C.L.R. 510; *Lawless v The Queen* (1979) 142 C.L.R. 659). It is true that the Federal Court may consider further evidence although it does not qualify as 'fresh' evidence. It will consider the further evidence together with all the evidence at the trial to see whether innocence or a reasonable doubt is established. In doing this it will pay regard to the facts as the jury having regard to its verdict may

[161] Ibid 494–5.
[162] Ibid 495–8.
[163] Ibid 515–35.
[164] Ibid 501.
[165] Ibid 499.

> reasonably have found them to be (*Ratten v The Queen* supra). In our view the new evidence of Mr. Roff lacked cogency in the relevant sense.[166]

In a manner reminiscent of how the Western Australian Court of Appeal dealt with the new and fresh evidence in *Mallard*,[167] Bowen CJ and Forster J then determined that the other affidavits produced (some from experts who had given evidence at trial and some from new experts)[168] also lacked cogency 'in the relevant sense'[169] in that they were available at trial if reasonable diligence had been exercised. It was only after the new evidence had been disposed of that their Honours commenced an analysis of the scientific evidence at trial. Unfortunately, they did not consider the lay evidence in detail and decided not to interfere with the verdict.

Their Honours determined that:

> In the present cases, there was a substantial body of evidence for the Crown and a substantial body of evidence for each of the accused. There were conflicts between these bodies of evidence the resolution of which would necessarily depend upon the assessment of the reliability of witnesses and other matters generally speaking within the province of a jury.[170]

Bowen CJ and Forster J concluded:

> We have also taken the view that it would be wrong for us to reconsider the evidence and resolve apparent conflicts between witnesses, whether expert or not, without bearing in mind that if there is a body of evidence on each side of a question which is prima facie credible, the jury is entitled to prefer one body of evidence to another. Of course, on a particular issue, one body of evidence may emerge from the printed page as so clearly to be preferred to another, that this Court could conclude that the jury should have accepted one rather than the other.[171]

Considered that the bulk of the Crown case was scientific opinion evidence, its value is in the opinion, not in the credibility, of the witness giving it. As such, it should not be a matter of witness demeanour. Certain Jenkinson J was of that view.

In a ray of hope for the appellants, the judgment of Jenkinson J supported the Chamberlains' contention that the evidence regarding the foetal blood spray under the dashboard of their vehicle, a Holden Torana, could not be relied upon beyond a reasonable doubt.[172] Jenkinson J's judgment

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[166] Ibid 499.
[167] *Mallard v R* (2003) 28 WAR 1.
[168] *Chamberlain v R* (1983) 46 ALR 493, 499.
[169] Ibid 499–500.
[170] Ibid 496.
[171] Ibid 513–4.
[172] Ibid 573.

analysed the scientific evidence from the trial in great detail. His Honour also analysed the Court's power to overturn a conviction and the law in relation to ordering new trials.[173]

Despite Jenkinson J's dismissal of the foetal blood under the dashboard, his Honour found that the weight given to the other blood evidence from the car and items in the car would be sufficient to secure a conviction.[174] Further, since the two affidavits from scientists that the Chamberlains sought to introduce on the appeal attacked the validity of the foetal blood conclusions, Jenkinson J held that had this evidence been before the jury at trial it would not have affected the result.[175]

As to the lay witnesses' evidence from the campsite that supported the Chamberlains' version of events, the Federal Court, but particularly Jenkinson J, felt constrained.[176] Ironically, the later Morling Inquiry, freed from the constraints of the deference to the jury's verdict, found considerable force in the testimony of all these witnesses. But in February 1983, before the matinee jacket[177] had been discovered, Jenkinson J retreated behind the screen of appellant ignorance as to the witnesses' demeanour to accept that these lay witnesses must have been mistaken:

> Of course no final determination of that issue could precede a consideration of the whole of the evidence, so much of which I have omitted to discuss. In particular, no final determination of the issue against the appellants could precede a consideration of their own sworn testimony and of the testimony of Sally Coral Lowe. No determination of the issue against the appellants is reasonable unless Mrs. Lowe's evidence, of hearing Azaria cry out immediately before the discovery of the child's disappearance, can be rejected. I do not think that Mrs. Lowe's evidence could reasonably have been found to be deliberately untruthful, but a conclusion that she was mistaken could in my opinion have been reasonably reached. Not having seen or heard those three witnesses, I cannot say that the jury's judgment of the appellants' veracity or of Mrs. Lowe's reliability as to the noise she swore she heard was unreasonable.[178]

The High Court appeal ran for five days and the Chamberlains' counsel agitated all the grounds that had been before the Full Federal Court. The justices of the High Court all took different views and produced separate reasons for judgment. Ultimately, the Chamberlains lost by the narrowest margin, three justices to two. The Court relied on the decision in *Stafford & Luvaglio* and the High Court's decision in *Ratten*.

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[173] Ibid 537–47 (for powers to overturn conviction), 547–57 (for power to order a new trial).
[174] Ibid 573.
[175] Ibid 583.
[176] Ibid 581.
[177] Azaria Chamberlain's matinee jacket was found in early 1986 which began a chain of events that resulted in the Royal Commission conducted by Justice Morling being convened.
[178] Ibid 581 (per Jenkinson J).

Counsel for the Chamberlains had argued that the dispute as to the correctness of the scientific evidence was not a matter of witnesses' demeanour in determining whether the scientific conclusions of the witnesses could satisfy them beyond a reasonable doubt. Such expert evidence was not a matter of the effectiveness of the communication skills of the witness, but had to be judged on the substance of that evidence. An appellate court was in just as good a position as the jury to decide such questions.

Unfortunately, the High Court, like the Full Federal Court before them, placed deference to the jury as the preeminent consideration when reassessing the evidence. Although Brennan J had been a great defence counsel as a barrister, his instincts for spotting injustice deserted him and he retreated behind judicial ignorance as to how a witness delivered their evidence to obviate the need to determine the cogency of the scientific evidence for himself:

> In my opinion this was a case where the question of guilty or not guilty turned entirely upon what evidence was accepted and what was rejected. That was pre-eminently a question for the jury and for the jury alone. An appellate court possesses no superior ability to decide whether facts should or should not be found when they are facts of the kind upon which the verdict in this case depended or, in the circumstances of this case, to decide whether or not an inference of guilt should be drawn. In my opinion, as there was evidence before the jury which entitled them to find Mr. and Mrs. Chamberlain guilty of the crimes charged against them, and as there was no error of law affecting the conduct of the trial, there was no ground for interfering with the jury's verdicts and the Federal Court was right to dismiss the appeals.[179]

In their joint judgment, although they did not ultimately use jury deference as a panacea for failing to come to grips with the evidence, the majority supported Brennan J's view that the appellate court should not usurp the jury's function merely because they disagree with that jury.[180]

Surprisingly, considering their ultimate decision, Gibbs CJ and Mason J found much in the lay witnesses' evidence to support the Chamberlains' position that a dingo had taken Azaria. Their Honours identified the evidence of witnesses at the campsite as to hearing Azaria cry out, the tracks in the sand, the demeanour of the Chamberlains and the lack of opportunity Lindy had to commit the murder as all being strongly suggestive of innocence.[181] But, unlike Morling J three years later, they decided that this evidence was overwhelmed by the scientific evidence produced by the Crown: 'These were all matters for the jury to consider and weigh. They were such that they must have raised

[179] *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521, 578 (per Brennan J).
[180] Ibid 534 (per Gibbs CJ, Mason J).
[181] Ibid 534.

doubts in the mind of a reasonable jury. However, in our opinion, the other evidence in the case was sufficient to remove the doubts'.[182]

For the Chief Justice and Mason J, the combination of scientific facts had allowed the jury to be satisfied beyond a reasonable doubt:

> None of these facts, regarded in isolation, would have entitled the jury to infer that Azaria had been murdered or that Mrs. Chamberlain was responsible for the murder. When the evidence of all these matters is considered together, however, its probative force is greatly increased. When, in addition, one considers the evidence as to the presence of the blood on Mrs. Chamberlain's tracksuit and track shoes, the presence of the tufts, and the conduct of the accused, including their statements which the jury were entitled to regard as false, the evidence as a whole entitled the jury safely to reject the hypothesis that the baby was removed from the tent by a dingo, and to be satisfied that the baby's throat had been cut in the car by Mrs. Chamberlain.[183]

It was Murphy J who would prefigure much of what was later found by the Morling Inquiry. His judgment identified the clear weakness in the Crown case. According to Murphy J, the case against the Chamberlains was premised on discounting their explanation of the dingo attack, rather than establishing their guilt:

> [the Crown case] established no motive for the alleged murder; to the contrary, it was to the effect that Mrs. Chamberlain was the loving mother of a normal child. Indeed, it would seem fair to comment that the Crown case was, perhaps of necessity resulting from the absence of both the baby's body and direct evidence against Mrs. Chamberlain, directed more to destroying Mrs. Chamberlain's defence of the dingo than to positively establishing her guilt.[184]

Murphy J concluded:

> I have finally come to a firm view that, notwithstanding the jury's verdict of guilty, the evidence did not establish beyond reasonable doubt that Mrs. Chamberlain killed Azaria. That being so, the verdict that she was guilty of murdering her child is unsafe and unsatisfactory and constituted a miscarriage of justice. It necessarily follows that the evidence failed to establish beyond reasonable doubt that Mr. Chamberlain was guilty of the crime of which he was convicted.[185]

But for Lindy and Michael Chamberlain it was not enough, with three of the five judges (Gibbs CJ and Mason and Brennan JJ) confirming the jury's verdict. Although the public debate over the

[182] Ibid 567–8.
[183] Ibid 568.
[184] Ibid 628.
[185] Ibid 630.

Chamberlains' guilt only intensified over the next three years, it would take a fresh piece of evidence before the verdicts would be legally scrutinised again.

5.6 Growing Realisation of the Problems with the Common Form

The High Court continued to add further analysis to the growing jurisprudence around the interpretation of the common form and the application of the proviso. Despite the change to the English common form legislation, 'Australian judges, using to their advantage decisions of the English courts in criminal appeals, fell into the habit of adopting the expression "unsafe and unsatisfactory" '.[186] In 2008, Kirby J said: 'After a century, one would expect that, given the imitation of the template throughout Australia and within the commonwealth countries, all controversies about the proviso would be settled. Yet the controversies over interpretation remain'.[187]

In 1998, Brooking JA in Victoria perhaps best summed up the attitude of the judiciary to the common form: 'Plutarch tells us that Homer died of chagrin because he was unable to solve a riddle. Ever since I encountered [the common form] I have wondered what it means … It is extraordinary that, 90 years after the legislation providing for appeals in criminal cases was first enacted, doubt should exist about its effect'.[188]

For example, Gibbs CJ in the mid-1980s, when discussing the introduction of fresh evidence, did not address the effect of it on the fairness of the trial (error of process), but focused only on the justice of the conviction (error of outcome). In *Gallagher*, he said that where the evidence is clearly of importance, the 'appellate courts will always receive fresh evidence if it can be clearly shown that a failure to receive such evidence might have the result that an unjust conviction or an unjust sentence is permitted to stand'.[189]

In fact, by the time of *Gallagher v The Queen*, the High Court had forgotten or misread what Barwick CJ had enunciated in *Ratten*, because they reasserted the importance of the evidence not having been available at trial. Gibbs CJ (Barwick's replacement as Chief Justice) said:

> The authorities disclose three main considerations which will guide a Court of Criminal Appeal in deciding whether a miscarriage of justice has occurred because evidence now available was not led at the trial. The first of these, is that the conviction will not usually be set aside if the evidence relied on could with reasonable diligence have been produced by

[186] *MFA v The Queen* (2002) 213 CLR 606, 620.
[187] *Gassy v The Queen* (2008) 236 CLR 293, 312.
[188] *R v Gallagher* [1998] 2 VR 671, 672–3.
[189] *Gallagher v The Queen* (1986) 160 CLR 392, 395.

> the accused at the trial … Two other matters that should be taken into consideration are whether the evidence is apparently credible (or at least capable of belief) and whether, if believed, the evidence might reasonably have led the jury to return a different verdict.

One of the chief difficulties with the proviso was when it should be applied. As noted above, the appellate courts have a tendency not to identify whether the appeal is one of outcome or one of process. The argument of this thesis is that the proviso has no application where the problem complained of is one of process.

This position was endorsed by a majority in the Gibbs's Court (although not Gibbs CJ himself) in *Wilde v The Queen*:

> The proviso has no application where an irregularity has occurred which is such a departure from the essential requirements of the law that it goes to the root of the proceedings. If that has occurred, then it can be said, without considering the effect of the irregularity upon the jury's verdict, that the accused has not had a proper trial and that there has been a substantial miscarriage of justice. Errors of that kind may be so radical or fundamental that by their very nature they exclude the application of the proviso.[190]

Although this statement seems clear and unequivocal, it would seem that in relation to the question as to whether the proviso applies to appeals on the grounds of a failure of process, intermediate appellate courts were still not getting the message. More than a decade later, Kirby J reinforced the point that the proviso had no application where the error resulted in the trial being unfair in *Grey v The Queen.*[191]

5.7 The Mallard Case (1995–2005)

On the evening of 23 May 1994, Pamela Lawrence, a Perth jeweller, was brutally murdered in her shop. Andrew Mallard, a petty criminal and vagrant with mental health problems, was charged and convicted of her murder. The case bears similarity to the Birmingham Six case (discussed in Chapter 4) in that the alleged confession Mr Mallard made was the only real evidence against him. Like the Birmingham Six, Mr Mallard had several failed appeals in 1995 and 2003 to the Court of Criminal Appeal in Western Australia. This was despite having a wealth of new material (including in 2003 evidence of police misconduct). Like the Birmingham Six, the appellate court obfuscated the need to interfere with the conviction after engaging in technically legal arguments about rules of evidence and the relevant test to overturn the conviction.

[190] *Wilde v The Queen* (1988) 164 CLR 365, 373.
[191] (2001) 184 ALR 593.

The Mallard case was the apotheosis of the judicial reluctance to interfere with a jury's verdict, and the convoluted process of reasoning engaged in by the Western Australian Court of Criminal Appeal was specifically identified and overruled by the High Court.

At around 6:30 pm on 23 May 1994, Pamela Lawrence was found lying at the back of her shop by her husband. She had serious head injuries and died later that night in hospital. It was clear that she had been struck with a blunt object several times in the head. It was identified that she had been attacked sometime between 5 pm and 5:30 pm.

A witness stopped at traffic lights outside Ms Lawrence's shop around 5:10 pm noticed a man standing in the store. When this man saw her looking at him, he ducked down out of sight. She made a sketch of him and wrote down a description when she returned to her house.

Andrew Mallard had been arrested earlier that day and released from the police station at around 3 pm. There was some conjecture as to his exact movements that day, which was central both to his conviction and eventual acquittal. At this time, Mallard was jobless and homeless. He was sleeping at an acquaintance's house. He was regularly using marijuana. Mallard's movements on that afternoon were pinpointed most accurately by two events, a taxi ride and train trip.

Within days, Andrew Mallard was a suspect in the murder of Pamela Lawrence and was interviewed by police several times. Most of those interviews were not recorded. There was a recorded interview which ran for 20 minutes and was effectively a summary of things that had been said in earlier interviews. Two of the interviews took place while Mr Mallard was an involuntary patient at Graylands Mental Hospital.

The evidence relied on by the Crown at trial fell into three broad categories: the scientific or forensic evidence both from the scene and from the autopsy, the sightings of persons in and around the area at the approximate time of the murder, and the interviews with police and alleged confession thereby obtained. The scientific and forensic evidence did not implicate Mr Mallard.

The Crown's case was that the injuries had been caused by a wrench. The evidence to support this theory was threefold. First, Mr Lawrence thought that a wrench was missing from the workshop. Second, the forensic pathologist could not rule out wrenches per se, although he did rule out a specific Sidchrome wrench which he tested on a pig's head. Third, in one of the interviews Mallard gave to the police, he posited that Ms Lawrence had been killed with wrench which he drew a picture of. This drawing was tendered at his trial.

Three days after the murder, Mallard was in Graylands Mental Hospital. He was interviewed by police and asked to account for his movements three days before. This interview was not recorded. The story he told detectives contained some discrepancies so that the two investigating police again attended Graylands to clear up these matters. Unfortunately, due to his poor mental condition, the details of his movements on the afternoon of 23 May 1994 were contradicted and changed. Rather than becoming clearer, Mallard's story was getting worse.

Taking this as a sign that Mallard was lying or had something to hide, the police quickly focused their attentions on him as the prime suspect. He was interviewed for brief periods at the hospital on 30 May 1994, 2 June 1994 and 10 June 1994. None of these interviews were electronically recorded. It was not mandatory to record such interviews until several years after this investigation.

The interview of 10 June was the longest and most controversial. It was conducted over nine hours. In the interview, Mallard gave conflicting accounts of his movements on the afternoon of 23 May, and said that he had visited the store to sell jewellery to Ms Lawrence. Later, he said that he had gone to the store to 'case' it for the purposes of robbing it later on. In this and earlier interviews, when it was directly put to him that he had murdered Pamela Lawrence, Mallard always denied it. Further, in the interview of 10 June he made other comments indicating that he was not the murderer, for example 'it's murder and that's not me'. However, he did describe in detail how the killer came upon and murdered Ms Lawrence. He always spoke in the third person though. It was also clear that he was very agitated in the latter part of the interview.

At trial, the Crown argued that there were 15 pieces of information that Mr Mallard had said in the police interviews that only the killer could know. As would later emerge, most of this information was broadcast in the media or could have been guessed relatively easily.

On 15 November 1995, Mallard was convicted of Pamela Lawrence's murder. The grounds of Mallard's first appeal were technical and, as later information demonstrates, they were misdirected. The notice of appeal was originally drafted by Mallard himself, although by the time of the hearing he was legally represented.

Typically for these, and most criminal appeals, one of the grounds was that the judge had misdirected the jury in summing the case up to them. There was a further attack on the admissibility of the confession evidence and some suggestion that reference would be made to new or fresh evidence, which was never forthcoming. All arguments failed on appeal and the Court of Criminal Appeal

dismissed Mallard's action on 11 September 1996. An application for special leave to appeal was also unsuccessful.

The reasoning of the Court of Criminal Appeal demonstrates the fixation by courts of appeal with the distinction between fresh and new evidence as well as their heavy reliance on the jury's verdict in circumstantial convictions. The reluctance of appeal courts to unravel convictions of circumstantial evidence belies the logic behind the construction of such a case provides a basis upon which it can be argued that courts may be more concerned with efficiency rather than justice.

The subsequent inquiry into the conviction by the Western Australian Corruption and Crime Commission identified that the Mallard was innocent of the murder. Further, it found that some investigating police and the prosecutor at the trial had engaged in misconduct sufficient to warrant sanction.

The decision in *Mallard* gives the clearest example of intermediate appellate courts flawed use of the test relating to new and fresh evidence, the application of the proviso and the lack of appreciation that when some prosecution evidence is weaknesses that weakens the entire prosecution case: 'it is elementary that evidence adduced at trial may assume an entirely different complexion in the light of the new or fresh evidence and facts either ignored or previously unknown may become crucial'.[192]

Certainly, the new and fresh evidence regime was subject to some criticism. In 1997, the Western Australian Court of Appeal, in *Nolan v The Queen*,[193] suggested that the distinction between fresh and new evidence was of minor, or of decreasing, significance.

However, in 2003, Andrew Mallard appeared before that court after a successful petition of pardon had been referred for a second appeal. On that appeal, the Western Australian Court of Appeal, which seemed to be moving away from an adherence to new and fresh evidence, reasserted the rules strictly. Astoundingly, they were encouraged to do so by the prosecution who argued that, on a pardon petition reference, the jurisdiction of the Court was confined to fresh material brought before the Court and that it could not re-adjudicate a ground of appeal already heard and disposed of, thus fragmenting the arguments of the appellant. To support this proposition, the prosecution in Mallard's appeal cited a Victorian authority older than the High Court's watershed decision in *Ratten*.[194] In a failure to apply rational standards of evaluation to the significant incidence of non-disclosure by both police and

[192] *Mallard v The Queen* [2005] HCA 68, [13].
[193] *Nolan v R* (Supreme Court of Western Australia, Malcolm CJ, Pidgeon and Murray JJ, 22 May 1997) 62–3.
[194] See *Re Matthews and Ford* [1973] VR 199.

prosecution, the Court set about cutting the appellant's fresh or new evidence off from the prosecution case as a whole and neutralising it.

In what is an all too rare occurrence, the High Court not only granted Mr Mallard special leave to appeal from the Court of Criminal Appeal in Western Australia, but also wrote a strong judgment rebuking the Western Australian Court.

The High Court's decision in *Mallard* was the strongest and clearest enunciation of the approach to miscarriage of justice case since *Ratten*. Referring to the Western Australian Court, the Higher Court stated:

> Insight into the cautious way in which the Court of Criminal Appeal here (Parker, Wheeler and Roberts-Smith JJ) conceived its function under the Act and the *Criminal Code* can be gained from these passages in that Court's unanimous judgment:
>
> > 'It was accepted on both sides that on reference the court had a duty to consider the "whole case". The court is required to consider the case in its entirety, subject only to the limitation that it is bound to act upon legal principles appropriate to an appeal. However, there was at times a tendency for counsel for the petitioner to refer to this proposition as if it justified the hearing afresh of evidence at trial and evidence called on the appeal, without regard either to the verdict of the jury or to the previous decision of the Court of Criminal Appeal in this case. That was particularly noticeable in the petitioner's opening submissions, in which very detailed submissions were put as to discrepancies between the evidence of various witnesses as to the timing of certain events. Those matters were before the jury at the petitioner's trial, although of course they were not marshalled and emphasised in precisely the way in which the petitioner now seeks to marshal and emphasise them.'
>
> > Their Honours then reviewed the authorities with respect to the identification and reception of evidence as fresh evidence. They drew a distinction between 'new evidence', that is, evidence available but not adduced at trial, and 'fresh evidence', which appellate courts ordinarily will receive, on the basis that it did not then exist, or, if it did, could not then have been discovered with reasonable diligence. Their whole approach thereafter proceeded on the basis of the passages that we have quoted, that is, as if there were serious inhibitions upon that Court's jurisdiction to consider, not just the evidence that was adduced at the trial, but also its relevance to the further evidence that the appellant sought to introduce and rely upon in the reference.
>
> > It seems to us that the approach was an erroneous one. Subject only to what we will say later about the words 'as if it were an appeal' which appear in s 140(1)(a) of the Act, the explicit reference to 'the whole case' conveys no hint of any inhibition upon the jurisdiction of the Court of Criminal Appeal on a reference. Indeed, to the contrary, the words 'the whole case' embrace the whole of the evidence properly admissible, whether

> 'new', 'fresh' or previously adduced, in the case against, and the case for the appellant.[195]

In the majority judgment in *Mallard*, the High Court seemed to deliver a *coup de gras* to arguments over new and fresh evidence when it said that the reference in the common form legislation to 'the case as a whole' required appellate courts to consider 'the whole of the evidence, properly admissible whether new, fresh or previously adduced'.[196] However, despite what the High Court said in *Mallard*, intermediate appellate courts have steadfastly clung to the requirements of new and fresh evidence.[197]

5.8 Harmonisation of Criminal Appeal Legislation (2010)

In 2010, in response to the Victorian Parliament re-enacting the common form legislation, the Standing Committee of Attorneys-General produced a discussion paper on the prospect of all Australian states amending their appeal provisions ('the Discussion Paper').

The Victorian legislative change was precipitated by the High Court's decision in *Weiss v The Queen*.[198] That case provided a new approach to the common form provision, particularly the proviso. It addressed the tension between the policy considerations of correctness of verdict verses fair trial principles.[199] An in-depth consideration of the problems with the common form legislation is beyond the scope of this thesis. However, the Discussion Paper identified several propositions regarding the common form that are relevant to consider.

The Discussion Paper noted:

> The common form provision is widely regarded as unclear, internally inconsistent, complex and outdated … The uncertainly, complexity and lack of transparency of the law on the common form provision has led to a situation where many pages of judgments are taken up with an analysis of what the common form provision means in addition to the substantive issues in the appeal under consideration, thus wasting valuable judicial resources. Moreover, unclear and complex provisions are often ineffective and can lead to unfair and inconsistent results.[200]

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[195] *Mallard v The Queen* (2005) 224 CLR 125, 130–1.
[196] Ibid 131.
[197] See, eg, the comments of Keane JA in *R v Stafford* [2009] QCA 407, [50].
[198] (2005) 224 CLR 300.
[199] Ibid 312. See also Standing Committee of Attorneys-General, *Harmonisation of Criminal Appeals Legislation* (Discussion Paper, July 2010) [5.7]–[5.19].
[200] Standing Committee of Attorneys-General, *Harmonisation of Criminal Appeals Legislation* (Discussion Paper, July 2010) [1.6], [1.21].

Although the Discussion Paper did not address new and fresh evidence, it did identify one of the issues for appellate courts was an assessment of the evidence:

> Another theme which is relevant to many cases on the common form appeal against conviction provision is the extent to which appellate courts are willing to substitute their own view for the views of a jury. Recently case law suggests that the traditional reluctance of appellate courts to undertake the task of weighing evidence and determining guilt for themselves is being overcome and the so called 'right' to trial by jury is not absolute.[201]

In an appeal on the ground of new or fresh evidence, the court must undertake an assessment of that evidence and deciding what effect it would have on a jury's verdict. As the review of cases (in this chapter and Chapter 4) has shown, that has been a cause of concern for appellate courts in both England and Wales and Australia.

The Discussion Paper further demonstrates that Australian courts struggle with the common form just as English Courts did. Yet, in England and Wales, legislative steps were taken after the Donovan Committee and the Runciman Commission to re-enact the provision to encourage courts to be less rigid in their approach to overturning convictions.

Unfortunately, the Discussion Paper is the only example of a national acknowledgement of the problems in Australia. It did not cover the problems of courts' approach to new and fresh evidence as the Donovan Committee and Runciman Commission did in England and Wales. Nothing came of the Discussion Paper and no state re-enacted their common form provision.

5.9 Conclusion

This chapter has explored the introduction of the common form legislation in Australia from the *Criminal Appeal Act 1907* (UK). The chapter touched on the interpretation issues with the common form legislation, which paralleled courts' approach to new and fresh evidence.

It explored the jurisprudence on new and fresh evidence and showed how the test applied to its reception is not contained in the statue. The principles used by judges to admit such evidence were subsumed from early civil cases in Australia and England and Wales. Until the late 1930s, the High Court looked to English decisions and state court decisions when dealing with new and fresh evidence. After the decisions in *Craig* and *Green*, the jurisprudence was settled. In the 1970s,

[201] Ibid [1.15].

Barwick CJ interpreted earlier decisions and made the distinction between the admission of new evidence, as opposed to fresh evidence, more defined.

Just as in England and Wales (see Chapters 3 and 4), an analysis of the jurisprudential interpretation and reinterpretation of the common form indicates the principle of finality and notion of jury deference were both justifications underpinning judicial reasoning in the tests for new and fresh evidence.

Unlike the English and Welsh experience, in Australia, although there was an acknowledgement of problems with the common form, almost nothing has been done. With the exception of the Standing Committee of the Attorneys-General's Discussion Paper almost a decade ago, no steps have been taken to rectify the problems.

Chapter 6: Recommendations and Conclusions

In Australia, the public interest in miscarriages of justice is longstanding. By 10 November 1880, the day before Ned Kelly was hanged, 30,000 Victorians had signed a petition requesting his sentence be commuted.[1] Further, the execution in February 1967 of Ronald Ryan led to enormous public protests and the abolition of the death penalty in this country. The question as to his guilt remains a matter of public debate.[2]

To demonstrate that a miscarriage of justices has occurred, appellate courts have required the appellant to provide fresh evidence. Fresh evidence is defined as evidence that was not adduced at trial and could not with reasonable diligence have been made available.[3] If evidence is not fresh, it is new, that being that although it was not adduced at trial it could have been.[4] The High Court has elucidated different tests for a court to apply in determining a miscarriage of justice based on whether the evidence is fresh or new.[5]

All Australian jurisdictions have the same statutory provision creating the right to appeal from a jury verdict, 'the common form' legislation. Not only does the common form legislation not mention a requirement for new and fresh evidence, it actually contains the requirement that appellate courts review 'the case as a whole'. This thesis has argued that the requirement for fresh evidence is a jurisprudential construct of the appellate courts. The jurisprudence that has developed around determining whether evidence is fresh or new, and then determining the weight to be given to that evidence and its subsequent effect on determination of the appeal, has increased the complexity of an already complex area of the law.

This thesis has demonstrated that, for decades, the appellate courts have not followed the wording of the common form. As noted by English academics Taylor and Ormerod, 'The Court of Appeal has never adhered to overarching principles but has instead played the numerous competing factors off

[1] Ian Jones, *Ned Kelly: A Short Life* (Hachette, 1995) 381.
[2] Gary Hughes, 'Ronald Ryan Did Not Kill Warder', *The Australian* (online, 20 December 2007). <https://www.theaustralian.com.au/news/nation/ronald-ryan-did-not-kill-warder/news-story/16688552f8598b739a26f455761be16a>.
[3] *Ratten v R* (1974) 131 CLR 510, 517–8
[4] Ibid.
[5] See Ibid; *Gallagher v R* (1986) 160 CLR 392, 399; *Mickelberg v R* (1986) 167 CLR 259, 273; *Lawless v R* (1979) 142 CLR 659.

against each other to provide what it considers to be the "just" conclusion. Schiff and Nobles have argued that the Court of Appeal has always interpreted its own powers as it sees fit'.[6]

This is born out in England by the two inquiries discussed in Chapter 4, which have been unsuccessful in encouraging courts to overturn convictions more often. This thesis posits that the same could be said of Australian appellate courts in their approach to new and fresh evidence—they interpret their powers to admit evidence as they see fit using principles that do not appear in the statute.

Certainly, the Standing Committee of Attorneys-General Discussion Paper (see Chapter 5) indicated that Australian jurisprudence suffered from the same problems as identified by the Donovan Committee and Runciman Commission. The Birmingham Six case was demonstrative of those problems. This thesis proposed that the Chamberlain and *Mallard* cases similarly demonstrate comparable issues in Australia. However, the Standing Committee of Attorneys-General Discussion Paper did not address the question of new and fresh evidence. This thesis has argued that the same issues with new and fresh evidence exist in Australian jurisprudence as they do in England and Wales.

In the 1960s, in England, the Donovan Committee found that s 9 of the *Criminal Appeal Act 1907* which governed the reception of new or fresh evidence, merely provided for it being 'necessary or expedient in the interests of justice'.[7] This gave the court significant discretion, which allowed judges to formulate their own rules for the exercise of its discretion. Using the common law relating to retrials in civil cases, judges decided that on criminal appeals fresh evidence would not be admitted unless:

1) it was not available at the trial
2) it was relevant to the issues, and
3) it was credible evidence (ie, capable of belief).[8]

The Donovan Committee found that 'the conditions prescribed by the Court … have been criticised as too narrow',[9] particularly the first criteria. The subsequent Bill that went before the British Parliament sought to widen the grounds for the admission of fresh evidence. In the ensuring debate,

[6] Nick Taylor and David Ormerod, 'Mind the Gaps: Safety Fairness and Moral Legitimacy' [2004] (April) *Criminal Law Review* 266, 269–70.
[7] *Report of the Interdepartmental Committee on the Court of Criminal Appeal* (Final Report, 24 June 1965) 30 [133].
[8] Ibid 30 [132].
[9] Ibid 30 [133].

the Lord Chief Justice said the court was 'not bound by its previous practice … and that it can and will review the practice in light of the Bill'.[10]

Despite this, in the 1990s, the Runciman Commission found that although that the statutory provision were adequate, but courts' interpretation of the provisions were too narrow.[11] The evidence the Commission received 'suggested to us that the attitude of the court to these questions has on occasion been excessively restrictive'.[12] The Commission perceived two problems with the jurisprudence in relation to fresh evidence on appeal: how fresh evidence was defined and how the court proceeds after it has accepted fresh evidence.[13] Although the Commission felt that the powers expressed in s 23 were adequate,[14] it recommended a slight amendment to 'give the court greater scope for doing justice'.[15] As such, it recommended that the phrase 'likely to be credible' in s 23(2)(a) be amended to be 'capable of belief'.[16]

Unfortunately, the dispute regarding to what extent the court can make factual findings on the reception of new or fresh evidence was not alleviated by this amendment.[17] This perhaps bears out Taylor and Ormerod's remark regarding courts' approach to criminal appeals:

> The Court of Appeal has never adhered to overarching principles but has instead played the numerous competing factors off against each other to provide what it considers to be the 'just' conclusion. Schiff and Nobles have argued that the Court of Appeal has always interpreted its own powers as it sees fit, and … it is doubtful that a respect for fundamental rights will replace the Court's traditional pragmatism.[18]

6.1 Recommendation

Certainly, this thesis contends that Australian courts take the same pragmatic approach. However, despite the lack of success through legislative intervention in England and Wales or Australia (in relation to the common form),[19] this thesis proposes that legislative change is the best option to affect jurisprudence.

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[10] *Report of the Interdepartmental Committee on the Court of Criminal Appeal* (Final Report, 24 June 1965) 31 [135].
[11] *Royal Commission into Criminal Justice* (Report, 2 June 1993) 173 [55].
[12] Ibid 174 [56].
[13] Ibid 172 [52].
[14] Ibid 173 [55].
[15] Ibid 174 [60].
[16] Ibid 216 Recommendation 322. See also ibid 174 [60].
[17] See, eg, *R v Pendleton* [2001] All ER (D) 180 (Dec) [9]–[21].
[18] Nick Taylor and David Ormerod, 'Mind the Gaps: Safety Fairness and Moral Legitimacy' [2004] (April) *Criminal Law Review* 266, 283.
[19] See, eg, *Criminal Appeals Act 2004* (WA) s 30; *Criminal Procedures Act 2009* (Vic) s 276.

Legislation as it currently stands in most states,[20] regarding new or fresh evidence, is as it appeared in the *Criminal Appeals Act 1907* (UK). That being:

> The Court may, if it thinks it necessary or expedient in the interests of justice …
>
> (c) receive the evidence, if tendered, of any witness (including the appellant) who is a competent, but not a compellable, witness.[21]

This allows for a broad discretion, only requiring the court to be satisfied its decision is 'in the interests of justice', but this thesis suggests more guidance be given to the court for the reception of new or fresh evidence.

The common form provisions have been subject to some legislative intervention. For example, in 2004, Western Australia reformatted (rather than reworded) the common form. Section 30 of the *Criminal Appeals Act 2004* reads:

> Appeal against conviction, decision on …
>
> (3) The Court of Appeal must allow the appeal if in its opinion—
>
> (a) the verdict of guilty on which the conviction is based should be set aside because, having regard to the evidence, it is unreasonable or cannot be supported; or
>
> (b) the conviction should be set aside because of a wrong decision on a question of law by the judge; or
>
> (c) there was a miscarriage of justice.

The proviso has been re-enacted verbatim in s 30(4).

This Western Australian legislation has been read as substantially identical to the original common form provision.[22] Interestingly, the provision regarding the powers of the court to receive new or fresh evidence underwent a more substantial change.

Section 40 of the *Criminal Appeals Act 2004* provides for general powers to deal with appeals including 'order a witness who would have been compellable at the trial in the lower court, whether

[20] The differences between Victoria, Western Australia and the Australian Capital Territory are identified below.
[21] See, eg, *Criminal Code 1899* (Qld) s 671B 'Supplemental powers'.
[22] Standing Committee of Attorneys-General, *Harmonisation of Criminal Appeals Legislation* (Discussion Paper, July 2010) [3.14]. See also *Beins v Western Australia [No 2]* [2014] WASCA 54 [100].

or not called at the trial, to attend and be examined before the appeal court'.[23] What is noticeable is that the requirement for it to be in the interests of justice was removed. This potentially gives judges an even broader scope to admit evidence.

As noted in Chapter 5, the Victorian common form legislation was changed after the High Court decision in *Weiss*. Note that it was a reformatting, rather than a significant rewording of the test as had been done in England and Wales in 1968 and 1995. Section 276 of the *Criminal Procedure Act 2009* headed 'Determination of appeal against conviction' read:

> (1) On an appeal under section 274, the Court of Appeal must allow the appeal against conviction if the appellant satisfies the court that—
>
> (a) the verdict of the jury is unreasonable or cannot be supported having regard to the evidence; or
>
> (b) as the result of an error or an irregularity in, or in relation to, the trial there has been a substantial miscarriage of justice; or
>
> (c) for any other reason there has been a substantial miscarriage of justice.
>
> (2) In any other case, the Court of Appeal must dismiss an appeal under section 274.

The provisions regarding introduction on new evidence on appeal were reworded and broken into different sections, but the requirement for the reception of evidence to be in the interests of justice remained the applicable threshold. For example, s 318 on the examination of witnesses reads:

> (1) For the purposes of this Part, if the Court of Appeal considers that it is in the interests of justice to do so, the Court of Appeal may order any witness who would have been a compellable witness at the trial to attend and be examined before the court, whether or not the witness was called at the trial.

The Australian Capital territory is another jurisdiction that does not have the common form legislation and different supplemental powers regarding the reception of evidence on appeal. Like Western Australia, the threshold of interests of justice is not present. Section 37N of the *Supreme Court Act 1933* (ACT) regarding evidence on appeal reads:

> (1) The Court of Appeal must have regard to the evidence given in the proceeding out of which the appeal arose.

[23] *Criminal Appeals Act 2004* (WA) s 40(1)(b).

(2) The Court of Appeal may draw inferences of fact from that evidence.

(3) The Court of Appeal may receive further evidence in any of the following ways:

(a) by oral examination before the court or a judge;

(b) on affidavit;

(c) by audiovisual link or audio link;

(d) any other way the court may receive evidence.

What is noteworthy is that the section specifically empowers the Court to draw its own inference of fact from the evidence given at trial. As identified in Chapters 4 and 5, courts in both England and Wales and Australia have grappled with the notion of usurping the role of the jury and the extent of an appellant court's power to assess evidence.

The Standing Committee of Attorneys-General Discussion Paper considered (among other options) using the wording of the *Criminal Appeals Act 1995* provision, creating appeals to replace the common form provisions in Australia.[24] This thesis proposes that an alternative to the supplemental powers provisions enacted with the common form legislation would be the re-enacted powers from s 23 of the *Criminal Appeal Act 1968 (Vic)*. Although the initial part of the provision is the same and has the threshold of 'necessary or expedient in the interests of justice',[25] sub-s 2 provides a test for the reception of such evidence:

(2) The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to -

(a) whether the evidence appears to the Court to be capable of belief;

(b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;

(c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and

[24] Standing Committee of Attorneys-General, *Harmonisation of Criminal Appeals Legislation* (Discussion Paper, July 2010) [10.51]–[10.70].
[25] *Criminal Appeals Act 1968* (UK) s 23(1).

(d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings.

This provision codified (and ameliorated) the test as distilled in *The Queen v Parks* identified in Chapter 3:

> First, the evidence that is sought to call must be evidence which was not available at the trial. Secondly, and this goes without saying, it must be evidence relevant to the issues. Thirdly, it must be evidence which is credible evidence in the sense that it is well capable of belief; that is not for this Court to decide it is to be believed or not but evidence which is capable of belief. Fourthly, the Court will, after considering that evidence, go on to consider whether there might have been a reasonable doubt in the mind of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at trial.[26]

A legislative provision that provides more guidance on how the court should deal with new or fresh evidence may go some way to helping appellate courts grapple such issues. The High Court, in *Craig v The King*, distilled the jurisprudence on the admissions of new or fresh evidence:

> A Court of Criminal Appeal has thrown upon it some responsibility of examining the probative value of the fresh evidence. It cannot be said that a miscarriage has occurred unless the fresh evidence has cogency and plausibility as well as relevancy. The fresh evidence must, we think, be of such a character that, if considered in combination with the evidence already given upon the trial the result ought in the minds of reasonable men to be affected. Such evidence should be calculated at least to remove the certainty of the prisoner's guilt which the former evidence produced. But in judging of the weight of the fresh testimony the probative force and the nature of the evidence already adduced at the trial must be a matter of great importance.

This passage sets up two criteria. The fresh evidence must:

1) have 'cogency and plausibility as well as relevancy'
2) 'be of such a character that, if considered in combination with the evidence already given upon the trial, the result ought in the minds of reasonable men to be affected or at least to remove the certainty of the prisoner's guilt which the former evidence produced. Put another way, the Court should judge the weight of the fresh testimony taking into account the probative force and the nature of the evidence already adduced at the trial'.

This thesis suggests that such criteria might form the basis of a new legislative provision.

[26] *R v Parks* (1961) 46 Cr App R 29, 32.

6.2 Power to Order a New Trial

As outlines in Chapter 3, the original Court of Criminal Appeal in England and Wales was not empowered to order a new trial. This affected its consideration of new and fresh evidence on appeal. As Chapter 5 demonstrated, despite the Australian intermediate appellate courts and High Court having the power to order a retrial, the jurisprudence on when new or fresh evidence made it appropriate to make such an order is still a matter of debate. However, a legislative provision specifically directed to this question could provide clarity to appellate courts. As was noted in Chapter 3, there is precedent for this.

The *Summary Jurisdiction (Married Women) Act 1895* s 7 provided for the reopening of a matter on application, provided fresh evidence was produced. This thesis noted that this Act used the term 'fresh evidence' in s 7 without defining it. This indicates that lawyers commonly understood it in the late nineteenth century. Also, use of the term 'fresh evidence' in the Act is a rare example of its use in legislation, as this thesis identified that 'fresh evidence' was not used in the *Criminal Appeal Act 1907 (UK)*. The standard rules of statutory interpretation[27] suggest the legislature did not intend for such a term to be applicable to the reception of evidence on criminal appeals. This thesis did not identify any case in which that statutory interpretation point was argued or considered by any court. The same argument would be applicable in Australia as the common form was enacted *verbatim*. Further, no Australian legislation used the term 'fresh evidence' until the twenty-first century,[28] and then only in relation to reception of evidence on a second or subsequent appeal or an application to reopen an acquittal.

Like the common form jurisprudence, this thesis asserts that appellate courts have often not considered the question of whether the new or fresh evidence warranted a retrial, but conflated such considerations with the challenge to the conviction itself.

Brooking JA commented that appellate courts' approach to the common form are equally apposite to their approach to considerations of new and fresh evidence and ordering of new trials:

> the failure of busy appellate courts to state in express terms, or at times even to consider, which of the three available bases of appellate intervention is in point and whether, in

[27] For example, the 'Literal Rule' in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 161–2; the 'Golden Rule' in *Grey v Pearson* (1857) 6 HL Cas 61, 106; and the 'Purposive Approach' in *Repatriation Commission v Vietnam Veterans' Association of New South Wales Branch Inc* (2000) 48 NSWLR 548, 577–8.

[28] See, eg, *Criminal Code 1899* (Qld) s 678D 'Fresh and compelling'; *Criminal Law Consolidation Act 1935* (SA) s 335A.

> relation to miscarriage of justice, the court is concerned with what must be shown by an applicant for the purposes of the body of the subsection or with the proviso. Innumerable examples exist of inability to determine whether a judge is applying the proviso or holding that no prima facie case for intervention has been made out.[29]

As such, a legislative provision should specifically articulate that the first consideration of the court when new or fresh evidence is submitted on appeal should be whether the court would order a retrial. In effect, a codification of what Lord Devlin and the Runciman Commission said: 'once the court has decided to receive evidence that is relevant and capable of belief, and which could have affected the outcome of the case, it should quash the conviction and order a retrial unless that is not practical or desirable'.[30]

6.3 Defining New and Fresh Evidence in Legislation

A further issue that this thesis has elucidated is the failure of courts to draw a distinction between the reception of evidence in criminal or civil appeals. The principle asserted in *Brown v Dean* in 1910 (identified in Chapter 4), that '*interest reipublicae ut sit finis litium*'[31] ('in the interest of society as a whole, litigation must come to an end'), particularly finds its expression in the definition of new as opposed to fresh evidence. Australian jurisprudence, particularly since *Ratten*, has drawn a distinction between the two:

> if the new material, whether or not it is fresh evidence, convinces the court upon its own view of that material that there has been a miscarriage in the sense that a verdict of guilty could not be allowed to stand, the verdict will be quashed without more. But if the new material does not so convince the court, and the only basis put forward for a new trial is the production of new material, no miscarriage will be found if that new material is not fresh evidence.[32]

The terms 'new evidence' and 'fresh evidence' have not been subject to much academic scrutiny. One of the leading textbooks on the law of evidence devotes a few sentences to it: 'An appellant court has power to receive evidence of matters occurring after the trial or hearing below [fresh evidence] … and more limited power to hear evidence which could have been procured for the trial [new evidence]'.[33]

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[29] *R v Gallagher* [1998] 2 VR 671.
[30] *Royal Commission into Criminal Justice* (Report, 2 June 1993) 175 [62]. See also Patrick Devlin, *The Judge* (Oxford University Press, 1979) 148–76.
[31] *Brown v Dean* [1910] AC 373, 374.
[32] *Ratten v The Queen* (1974) 131 CLR 510, 520.
[33] JD Heydon, *Cross on Evidence* (LexisNexis, 8th ed, 2010) 414 at [11150].

Footnote 330 on page 414 of the tenth edition of *Cross on Evidence* reads:

> It has been held that the discretion conferred [to admit new/fresh evidence] is to be exercised pursuant to common law principles [as set out in *Wollongong Corporation v Cowan* (1954) 93 CLR 435 at 444], namely that save in exceptional circumstances (*Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134 at 140), evidence will not be admitted on appeal after a trial on the merits unless the evidence could not have been obtained with reasonable diligence for use at the trial, unless there is a high degree of probability that the evidence would have produced a different verdict, and unless it is credible: *Akins v National Australia Bank* (1994) 34 NSWLR 155 at 160.

It also reads on page 415 at the end of footnote 330: 'The High Court also made the point [in *CDJ v VAJ* (No 1) (1998) 197 CLR 172] (at [97–103]) that tests worked out at common law cannot be authoritative in relation to statutory powers to admit fresh evidence'.[34] This is a reference to s 93A(2) of the *Family Law Act 1975* (Cth), which confers a power on the Full Court of the Family Court to admit further evidence in its discretion. The provision is similar to s 27 of the *Federal Court Act 1976* (Cth), which confers a similar power on the Full Court of the Federal Court. However, neither piece of legislation uses to term fresh evidence.

The High Court's comments in *CDJ v VAJ (No 1)*,[35] that previous common law decision 'have nothing authoritative to say about the admissibility of further evidence in respect of a statutory power to admit evidence on appeal',[36] is interesting considering that this is exactly what the High Court (and intermediate appellate courts) have done in both England, Wales and Australia in regard to new or fresh evidence in criminal appeals. In *CDJ v VAJ*, among the cases cited was *Council of the City of Greater Wollongong v Cowan*, which specifically denies application in civil cases of interpreting statutory provisions regarding the admission of evidence on appeal.[37] Yet, *Council of the City of Greater Wollongong v Cowan* was the decision cited by the Court of Criminal Appeal in Victoria in *Ratten*.[38]

Support for the legislating to encourage courts to take a more liberal approach to admission of evidence on appeal can be gain from Family Law. In 1975 the *Family Law Act* was passed by the Commonwealth Parliament. Section 29 of that Act set out the powers of the Full Court of the Family Court when hearing appeals. Section 29(3) empowers the court on an appeal to "receive further

[34] For a discussion of the position in Queensland, see WB Campbell, 'Appeals from a Judge Without a Jury: Some Notes' (1950) 1(2) *University of Queensland Law Journal* 83.
[35] (1998) 197 CLR 172.
[36] Ibid [97]
[37] (1955) 93 CLR 435.
[38] *Re Ratten* [1974] VR 201.

evidence upon questions of fact"[39]. It is noteworthy that, similar to the common form provisions, this statutory regime did not restrict the reception of evidence on appeal to merely fresh evidence. In fact, the wording of s29(3) created a wide discretion, as the common form provisions do.

In 1983 section 29 was re-enacted as s93A[40]. Section 93A(2) also provided that the Full Court of the Family Court could "in its discretion ... receive further evidence upon questions of fact"[41]. In 1998 this section was subject to the judicial scrutiny of the Gleeson High Court[42] in *CDJ v VAJ*[43]. In that case the High Court were encourage to accept that s93A(2) was governed by "the established rules of fresh evidence"[44] as established in *Wollongong Corporation v Cowan*[45]. As we have seen in Chapter 5 Barwick CJ relied on *Wollongong Corporation v Cowan* in his judgement in *Ratten.*

In *CDJ v VAJ* Gaudron J set out that the rule relating to fresh evidence required "the evidence in question was not available at the trial and could not have been obtained by the exercise of reasonable diligence"[46]. However, her Honour quickly rejected that argument pointing out that the reception of evidence in the Full Family Court was primarily governed by the Family Law Act not by any common law rules.

> "There is, in my view, no reason for thinking that the common law rules which govern the admission of fresh evidence apply automatically to confine the discretion to receive further evidence conferred by s93A(2) of the Act. Rather, the terms of that sub-section suggest otherwise in that they refer to "further evidence", rather than "fresh evidence". Moreover, the sub-section confers power on the Family Court to receive further evidence "in its discretion" and is silent as to any matter limiting or governing the exercise of that discretion."[47]

The only other justices to consider the point similarly took the view that s93A(2) was far wider in scope then the common law rules regarding fresh evidence. Justices Gummow and Callinan found that;

> "[t]he discretion conferred by s 93A(2) to receive further evidence on appeal is not expressed to be limited in any way. In particular, the sub-section contains no requirement, comparable with that often found in statutes conferring power on an appellate court to receive further

[39] s29(3) *Family Law Act 1975* (Cth)
[40] See Family Law Amendment Act 1983 and Explanatory Memorandum for the Family Law Amendment Bill 1983; "Clause 4.9 - Appellate, Jurisdiction of Family Court This clause inserts new section 93A, in similar form to repealed section 29, conferring appellate jurisdiction on the Family Court. New sub-section 93A(2), in similar form to repealed sub-section 29(2), prescribes the evidence-that may be considered by the Family Court in an appeal."
[41] s93A(2) *Family Law Act 1975* (Cth).
[42] Murray Gleeson was Chief Justice of the High Court from 22 May 1998 to 29 August 2008
[43] *CDJ v VAJ* [1998] HCA 67; 197 CLR 172; 73 ALJR 230; 157 ALR 686; 72 ALJR 1548 (10 December 1998).
[44] [51] per Gaudron J and [105] & [106] per Gummow and Callinan JJ *CDJ v VAJ* [1998] HCA 67; 197 CLR 172.
[45] (1955) 93 CLR 435.
[46] [51] per Gaudron J *CDJ v VAJ* [1998] HCA 67; 197 CLR 172.
[47] [52] per Gaudron J *CDJ v VAJ* [1998] HCA 67; 197 CLR 172.

> evidence, that "special grounds" or "special leave" be shown before the evidence can be adduced"[48]

It is noteworthy that the High Court did not take a similar view to the Common Form provision allowing the reception of evidence on appeal. In fact the High Court decisions in *Green* and *Ratten* did not even refer to the statutory provision. Though the interpretation of statutory provision is for the judicial arm of government, court must take into account the intention of the parliament when performing such interpretation. If the common form provisions were to be re-enacted but have the same effect the and the explanatory memoranda and second reading speech were to identify the deliberate chose of giving an unfettered discretion to admit evidence on appeal "whether new fresh of previously adduced" (to use Kirby J words from Mallard), the court would be bound to give effect to the purpose.

The term 'fresh evidence' is defined in the *Criminal Law Consolidation Act 1935* (SA). Section 353A of that Act provides for a second or subsequent appeal in criminal matters. The test set out is particularly strict to stop 'underserving applicants clogging up the court processes with unmeritorious appeals'.[49] This sentiment is similar to those made more than a century ago when the criminal appeals legislation was being debated in England. In the debates on the appeal bill in 1907, strong objection was based on the fear of the volume of appeals that would be created.[50] Parliamentarians prophesied that allowing an appeal on the facts would result in a breakdown of the system due to the pressure of innumerable applications.[51] Such prophecies of doom were proved to be unfounded, as identified in 1908 Lord James of Hereford:

> it was prophesied that it [the Court of Criminal Appeal] would be impossible to create and maintain such a Court in this country, that there would be a glut of appeals, that many judges would have to be appointed to administer it, that it would frustrate rather than support the acquittal of innocent people, that nothing but evil would result. Such prophecies were uttered in both Houses of Parliament; they were even uttered by Judges on the Bench. I now claim, as one who has always had the establishment of a Court of Criminal Appeal at heart, that the experience we have had of its working has proved all these prophecies to be unsound.[52]

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[48] [107] per Gummow and Callinan JJ *CDJ v VAJ* [1998] HCA 67; 197 CLR 172.
[49] South Australian Attorney General, 'Report on the Statues Amendments (Appeals) Bill 2012' quoted in Bibi Sangha and Robert Moles, *Miscarriages of Justice: Criminal Appeals and the Rule of Law in Australia* (LexisNexis, 2015) 177 [6.5.1].
[50] *Report of the Interdepartmental Committee on the Court of Criminal Appeal* (Final Report, 24 June 1965) 3 [10]–[11].
[51] Ibid 3 [10].
[52] Ibid 4 [14].

The response of the South Australian Attorney General to the introduction of a second or subsequent appeal strikes the same tone. A brief examination of the origin of this section demonstrates how rules relating to new and fresh evidence are the primary tool used by appeal courts to dismiss appeals. The thesis argues that the codification of the term "fresh and compelling" in the *Criminal Law Consolidation Act 1935* (SA). demonstrates this.

The term "fresh and compelling" was enacted into the Queensland Criminal Code in 2007 but for exactly the opposite reason then section 353A *Criminal Law Consolidation Act 1935* (SA). Section 678A-E of the Queensland Criminal Code created exceptions to the double jeopardy rules. Double jeopardy is a general principle of common law that a person should not be twice prosecuted for the same or similar offence.[53] Section s678D of the Queensland Criminal Code was part of a regime designed to permit a person who has been acquitted of murder to be retired if certain conditions are satisfied.[54] The primary condition is that new evidence be "fresh and compelling". These provisions were inserted into the Criminal code is the wake of the unsuccessful re-prosecution in *R v Carroll* (2002) 213 CLR 635. Several statutes in Australia now provide an exception to the double jeopardy rules and allow retrials for murder (or life sentence offences) on the basis of fresh and compelling evidence.[55] Each of these sections relies upon the same definition of “fresh” and “compelling” as appears in s678D of the Queensland Criminal Code and s353A(6) of the *Criminal Law Consolidation Act (SA).*

However, the policy justifications behind the interpretation of such statutes (putting an accused twice in jeopardy) are different from those behind s353A (ensuring that miscarriages of justice are identified and rectified). Because of the significance accorded to a jury verdict as conclusive and inscrutable, and because of the operation of the principle of finality, the power to order a second trial on the ground of fresh evidence has been limited.[56]

In *R v Hicks and Taylor*[57], Boddice J considered the meaning of “fresh and compelling” as defined in s678D of the Queensland *Criminal Code*:

> The power to re-try a person acquitted of murder arises as a consequence of relatively recent amendments to the Criminal Code. These legislative provisions have not been

[53] [29.7] Criminal Law in Queensland and Western Australia Cases and Commentary Colvin, McKechnie and Greene, 9th ed 2021 Lexis Nexus
[54] [15] Director of Public Prosecutions v TAL [2019] QCA 279.
[55] Section 337 of the *Criminal Law Consolidation Act (SA);* s678B of the Queensland *Criminal Code*; s327M of the Victorian *Criminal Procedure Act*; s100 of the New South Wales *Crimes (Appeal and Review) Act*.
[56] *Director of Public Prosecutions v TAL* [2019] QCA 279 at [24]
[57] [2010] QSC 376 at [21]

the subject of judicial determination. The power to order a retrial is extremely limited and can only occur if a subsequent court is satisfied there is fresh and compelling evidence and that it is in the interests of justice for the order to be made. "Fresh" evidence is a well-known expression in the criminal law. To be "fresh" evidence, the evidence must be evidence which was not known to a party at the time of the initial proceeding, and could not have been able to be ascertained by exercising reasonable diligence. "Compelling" is something less than conclusive. In *Roadshow Films Pty Ltd v iiNet Limited (No. 3)*,[58] a federal copyright case, the Court discussed whether one of the witnesses had provided "compelling evidence":

The word '*compelling*', according to the Oxford Dictionary, means '*demanding attention, respect*'. '*[C]ompelling*' does not mean 'conclusive'.

Section 353A(1) of the *Criminal Law Consolidation Act 1935* (SA) requires the court to consider whether there is evidence produced to the court that is "fresh and compelling". The amendments to the *Criminal Law Consolidation Act 1935* (SA) were first introduced to the South Australian Parliament by the Statutes Amendment (Appeals) Bill 2012, where it was reported that:

these definitions should not preclude genuine applications, but a reasonably high threshold is necessary to guard against unjustifiable applications by convicted applicants. An applicant must satisfy a court that the evidence is both "fresh" and "compelling".[59]

Therefore, section 678D of the Queensland Criminal Code is designed as procedural hurdle to limit the ability of the Crown to retrial its citizens. Enacted as it has been in s353A of the *Criminal Law Consolidation Act 1935* (SA) demonstrates the codification of the strict interpretation of new and fresh evidence rules that have developed in criminal courts in Australia. Similar provisions have been enacted in Victoria, Tasmania and Western Australia.[60] The broad acceptance for the use of such strict evidentary rules indicates that unlike the court of England and Wales, strict application of new and fresh evidence is accepted jurisprudence in Australia.

Unfortunately, the inclusion of the term 'fresh and compelling evidence' in the legislation created a higher threshold than a defendant's first appeal. As this thesis has demonstrated, the test for new and fresh evidence on a first appeal is too strict. This thesis proposes that legislative intervention should

[58] [2010] FCA 24 at [176]
[59] Attorney General of South Australia, 'Report on the Statutes Amendment (Appeals) Bill 2012 dated 27.11.2012
[60] Section 402A Tasmanian Criminal Code Act 1924; S326A Criminal Procedure Act 2009 (Vic); s35E Criminal Appeals Act 2004 (WA)

reduce the effect of the common law position on new and fresh evidence. As such, inclusion of the term 'fresh and compelling' in s 353A of the *Criminal Law Consolidation Act 1935* (SA) is a step in the wrong direction. That section provides the definition of 'fresh' as being if:

> (i) it was not adduced at trial of the offence; and
>
> (ii) it could not, even with reasonable exercise of reasonable diligence, have been adduced at the trial[61]

The subsection then goes on to couple the term 'fresh' with the term 'compelling':

compelling if:

> (i) it is reliable; and
>
> (ii) it is substantial; and
>
> (iii) it is highly probative in the context of the issues in dispute at the trial of the offence.[62]

This definition, with its use of terms such as 'reliable', 'substantial' and 'highly probative' bares resemblance to aspects of the decisions in *Craig v The King* which used expressions such as 'cogency', 'plausibility', 'relevancy' and 'remove the certainty':

> It cannot be said that a miscarriage of justice has occurred unless the fresh evidence has cogency and plausibility as well as relevancy. The fresh evidence must we think, be of such a character that if considered in combination with the evidence already given upon the trial the result ought in the minds of reasonable men to be affected. Such evidence should be calculated at least to remove the certainty of the prisoner's guilt which the former evidence produced. But in judging of the weight of the fresh testimony the probative force and the nature of the evidence already adduced at the trial must be a matter of great importance.[63]

It also resembles the Victorian Court of Criminal Appeal's decision in *Ratten* which uses expressions such as 'not lacking credibility', 'strongly persuasive' and 'well-nigh decisive':

> the additional evidence, as well as coming from a source not lacking credibility, must be so strongly persuasive of the immediate facts which it is relied upon to establish that if it had been given at the trial a contrary finding would have been improbable, if not unreasonable.

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[61] *Criminal Law Consolidation Act 1935* (SA) s 355A(3)(a).
[62] Ibid s 353A(6)(b).
[63] *Craig v The King* (1933) 49 CLR 429, 439.

> And, thirdly, the facts which it thus tends to prove must be well-nigh decisive of the ultimate facts upon which the issue in the case depends.[64]

This thesis submits that defining the terms 'new evidence' and 'fresh evidence' would ultimately reduce the effect of any distinction. It is accepted that there is some small necessity for courts to be given a reason for the evidence not being adduced at trial. However, this thesis submits that the observation of the Runciman Commission that:

> It cannot possibly be right that there should be defendants serving prison sentences for no other reason than that their lawyers made a decision which later turns out to have been mistaken. What matters is not the degree to which the lawyers were at fault but whether the particular decision, whether reasonable or unreasonable caused a miscarriage of justice.[65]

Any legislation should give effect to the High Court's decision in *Mallard* that appellate courts should consider all the 'evidence properly admissible, whether "new", "fresh" or previously adduced, in the case against, and the case for the appellant "whether new fresh or previously adduced" '.[66]

6.4 Summary and Conclusion

The common law does not provide for an appeal from the decision of a jury—it is a statutory creation. By the 1920s, all Australian states enacted similar legislation creating appeals from the verdicts of juries. Up until that time, decisions of juries were considered sacrosanct, although a very limited appeal existed for obvious legal errors.[67] It was believed that the adversarial criminal trial itself safeguarded the rights of accused sufficiently.[68] Several high-profile miscarriages of justice in the England and Wales provided the political impetus to pass legislation that acknowledged the need for appellant intervention in juries' decisions.[69] All Australian states followed the British example within a few years (see Appendix A). This statutory uniformity has allowed appellate reasoning in Australian states to be applicable in other states. Further, it has provided fertile ground for the High Court to impose its jurisprudence.

[64] *Re Ratten* [1974] VR 201, 213.
[65] *Royal Commission into Criminal Justice* (Report, 2 June 1993) 174 [59].
[66] *Mallard v R* (2005) 224 CLR 125, [10].
[67] See Writ of Error.
[68] Pattenden (n 3) 16.
[69] Ibid 12–16.

6.5 Judicial Interpretation of Procedural Aspects of the Common Form

When the Australian states enacted the common form legislation, they copied the wording of the British including the ancillary powers that the appellant court could exercise in relation to appeals. Just like the common form provision, that section was (until relatively recently) uniform through Australia. The relevant part of that evidence reads:

> The Court may, if it thinks it necessary or expedient in the interests of justice— receive the evidence, if tendered, of any witness (including the appellant) who is a competent, but not a compellable, witness.

This section empowers an appellant court to receive evidence that was not before the court at trial. The only criteria for admission is the ordinary rules of competency and compellability (ie, the general rules of admissibility that bind a trial court).

However, beyond those restrictions the legislation does not provide any criteria on the admission of evidence not adduced at trial. Yet, in Australia, there has developed a body of law in which courts have created criteria for admission of such evidence.

New and fresh evidence rules are used as a preliminary test by appellate courts as a threshold test when considering appeals. The court seeks to determine whether the appellant relies on 'new evidence' or 'fresh evidence' before considering the evidence and the appeal. It then applies a different test when deciding the appeal depending on the characterisation of the evidence. None of these tests are disclosed by the 'common form' statutory appeal provisions, but have instead been invented by appellate courts.

One aspect of this is the idea that the judiciary have an inherit bias against allowing criminal defendants to succeed on appeal.[70] The support for this comes from the Standing Committee of Attorneys-General's Discussion Paper. That Discussion Paper explores the history of the High Court's jurisprudence and, in doing so, demonstrates that there is no clearly articulated approach to criminal appeals.

[70] See, eg, discussion of judicial resistance to the passing of the *Criminal Appeal Act 1907* (UK) in Chapter 3 and the comments of the Lord Chief Justice in 1950 reported in Rt Hon Lord Goddard of Aldbourne, 'The Court of Criminal Appeal in England' (1950) 67(2) *South African Law Journal* 115.

It has been noted that the Criminal Division of the Court of Appeal in England and Wales has an inhibition on reassessing evidence.[71] The thesis asserts that a similar reluctance is demonstrable on an analysis of the Australian cases identified in Chapter 5 of this thesis.

Appellate courts are designed to review the decisions made in the court below. That requires an analysis of the facts and law considered by the court at first incidence. However, the appeal court rules provide for the possibility that there is cogent evidence that was not considered by the court at first instance which is relevant to the facts in issue.

The common law has developed rules for the way in which appeal courts are to approach such evidence. These common law principles were developed for sound public policy reasons. However, appeal courts have used these rules to avoid having to make a proper assessment of the whole case on appeal. As such, the rules relating to new and fresh evidence have become a barrier to accused seeking access to justice.

The rationale behind the distinction is important because, theoretically (at least since before *Mallard v The Queen*), the appellant court was to apply a different test depending on whether the evidence was new as opposed to fresh. The distinction was based on policy considerations that a person had a right to a fair trial; that is, one trial. The criminal justice system could not cope with accused persons running trials piecemeal with one set of evidence at one trial and, if unsuccessful, a second trial containing (at least some) new evidence.

When an accused person seeks to present new evidence to the appellate court, the court is faced with the competing considerations that a litigant is not to be given a second bite of the cherry and be allowed to re-litigate an issue using new evidence when that issue could have been litigated in that way at their trial. However, courts are mindful that they have an underlying mandate to do justice. An innocent person should not be made to suffer a guilty verdict simply because that person (or their lawyer) made poor forensic decisions at trial.

The Donovan Committee was appointed on February 1964.[72] It was not the first committee that the British Parliament had established to inquire into aspects of the criminal appeal system.[73] The

[71] Pattenden (n 3) 47.
[72] *Report of the Interdepartmental Committee on the Court of Criminal Appeal* (Final Report, 24 June 1965) 1 [1].
[73] The Committee on the Business of Criminal Courts (1933) and Committee on Supreme Court Practice and Procedure (1953). See ibid 20 [81], [82].

Committee held 27 meetings and took written and oral testimony from stakeholders.[74] The Committee received written and/or oral evidence from seven organisations including the Department of the Director of Public Prosecutions, The General Council of the Bar, the Council of the Law Society, the National Council of Civil Liberties, and the Solicitors Department of the Metropolitan Police.[75] The Committee received written and/or oral testimony from 32 individuals including the Lord Chief Justice, the Master of the Rolls, five Lords Justices of Appeal, six judges of the High Court (Queens Bench Division), and three Queens Council.[76] The Committee received written testimony from 13 organisations or people including the Home Office, the Lord Chancellor's Office, the Magistrates Association, the Registrar and former registrar of the Court of Criminal Appeal, and the Recorder of London.

The Committee was appointed to consider: 'If in the view of the Committee the court of Criminal Appeal should retain the whole or part of its current jurisdiction whether any and if so what changes are desirable: (a) in the constitution, power, practice and procedure of the Court'.[77]

In relation to new and fresh evidence, the Committee recommended:

> The present practice of the Court in regard to the admission of fresh evidence in support of an appeal should be modified so as not to exclude altogether evidence which was available at the time of the trial. The Court should be willing to receive such evidence if it is relevant and credible, and if a reasonable explanation is given for the failure to place it before the jury at the trial.[78]

That recommendation was not formally put into legislation.

The Runciman Commission was announced on 14 March 1991. The Commission was charged with 'examine the effectiveness of the criminal justice system in England and Wales in securing conviction of those guilty criminal offences and the acquittal of those who are innocent … [including] the role of the Court Appeal in considering new evidence on appeal, including directing the investigation of allegation'.[79] The Commission comprised 11 members including an Inspector of the Constabulary, two solicitors, a Queens Counsel, a retired Lord Justice, two professors (one of law and one of forensic psychiatry) and two public servants.[80] The Commission sat 43 times and received written

[74] *Report of the Interdepartmental Committee on the Court of Criminal Appeal* (Final Report, 24 June 1965) 2 [3].
[75] Ibid 76 Appendix.
[76] Ibid 77 Appendix.
[77] Ibid 72 Recommendation 12.
[78] Ibid 3 [11].
[79] *Royal Commission into Criminal Justice* (Report, 2 June 1993).
[80] Ibid 238 Appendix Two.

evidence from 600 organisations and/or individuals and took oral evidence from 27 of those.[81] The Commission made 352 recommendations, the most relevant being to encourage the appellant courts to take a 'broad approach' to the question of whether evidence was available at the time of trial[82] and that the test for receiving such evidence been relaxed to merely that the evidence is 'capable of belief'.[83] The proviso did not remain in English and Welsh legislation after the 1995 amendments.[84]

The only overarching inquiry in Australia regarding problems with criminal appeal jurisprudence was in July 2010. In that year the Standing Committee of Attorneys-General's Discussion Paper, entitled *Harmonisation of Criminal Appeals Legislation*, was produced subsequent to the review of Victoria's criminal procedure laws.[85] Though it made recommendations for legislative change to the common form provisions it did not address the provisions regarding the reception of evidence. Further, nothing came of this inquiry.

Appellate courts have two overarching responsibilities: to make sure innocent people are not convicted and to ensure all accused receive a fair trial. This is different from civil appeals because, while the appellate court has a role in making sure the civil system of justice is responsible for maintaining the integrity of the civil justice system by ensuring civil trials are procedurally correct, the parties in a civil proceeding do have a right to that as criminal defendants do.

Appellate courts in civil matters are responsible for the maintenance and correct application of the common law of Australia. The civil justice system is not impinged where a difference of legal opinion (between the trial and appellate judges or between intermediate court and High Court) results in one party winning and another loosing. However, where a person is innocent of a crime yet is convicted of it goes to the heart of the justice system and the rule of law. The appeal court should, therefore, appreciate that they cannot approach criminal appeals as a mere legal 'review', but are responsible for projecting the fundamental ideas that underpin the rule of law. They are empowered to decide the decision afresh if the circumstances warrant. The notion that an appeal from a jury verdict is more

[81] Ibid.
[82] Ibid 216 Recommendation 320.
[83] Ibid 216 Recommendation 322.
[84] Bibi Sangha, Kent Roach and Robert Moles, *Forensic Investigations and Miscarriages of Justice: The Rhetoric Meets the Reality* (Irwin Law, 2010) 60.
[85] Standing Committee of Attorneys-General, *Harmonisation of Criminal Appeals Legislation* (Discussion Paper, July 2010).

than a mere review is new. It is at odds both with the judgments[86] and the academic literature on the point.[87]

The appellate courts' misconception of a criminal trial being merely a legal review is bought about by several factors. Appeals from civil trials often do not have disputes of fact because appeals on questions of fact require leave of the court. As such, the court is merely reviewing the application of law. Second, appeals from a jury verdict on legal grounds are as of right, but on factual grounds are by leave. In practice, this question is seldom raised on appeal. This paper suggests that since half of appellate courts' work are civil appeals, and since civil appeals are legal reviews, appellate judges approach criminal appeals as merely legal reviews and are reluctant to involve themselves in assessments of the facts.

In this regard, the courts have tended to focus on legal tests such as new and fresh evidence, or applying the proviso, or assessing the circumstantial evidence in the case. The section that creates appeals from jury verdicts empowers the court to acquit the accused. The appellate court is, therefore, empowered to consider the matter itself. Courts shy away from this responsibility, or are blind to it, because the courts do not consider the common form legislation enough, or the court considers the proviso or the principle of jury deference as paramount. The proviso provides a disincentive to acquit and/or focuses the court's mind on maintaining the conviction.

Jury deference is warranted where watching witnesses give their evidence gives the jury an advantage. One of the reasons that may explain appellate courts' reluctance to review findings of fact and make findings of fact themselves (particularly if would be a finding against that of the jury) is because of the divided role the jury plays in the trial process. Issues of fact versus issues of law divide the role of judge and jury in a trial.

This thesis has argued that the common form legislation is unsatisfactory in its structure. This (coupled with the juris-cultural factors) has led to the reasoning of appellate courts in miscarriage of justice cases to be flawed. The failure of the statue to be correctly applied was recognised when the corresponding British statue (from which the Australian states copied theirs) was amended. One of the significant changes to the British legislation is reflected in s 2(1) of the *Criminal Appeal Act 1968* which established that an appellate court may set aside a conviction on the basis that it is 'unsafe and unsatisfactory'. English jurisprudence interpreted this phrase as requiring the court to ask itself the

[86] *R v Pendleton* [2001] All ER (D) 180 (Dec), [17].
[87] Sangha, Roach and Moles (n 66) 61.

subjective question of whether they were content to let the verdict of the jury stand or had a lurking doubt as to whether an injustice had been done.[88] It should be noted that formulating the test in this way allows the appellate court the scope to reason in a similar way to the jury's consideration of guilt or innocence.

The phrase 'unsafe and unsatisfactory' crept into the Australian jurisprudence despite the fact that the British statue no longer mirrored the common form legislation and that the words 'unsafe and unsatisfactory' do not appeal in any Australian statutory provisions. The Australian High Court identified that the amendments to the British legislation and subsequent jurisprudence of the courts demonstrated that the British Court of Criminal Appeal had been granted wider powers than that was allowed under the common form legislation.[89]

It is because the court has an overriding function to ensure innocent people are not convicted that questions of new and fresh evidence are not moot. The test in civil appeals in relation to new and fresh evidence is applicable in circumstances where the parties have a responsibility to avail themselves of the civil justice system provided, and in circumstances where that system did not work correctly there needs to be an inquiry into why a court should not interfere with a trial judge's decision when all relevant evidence was not presented to the original court. In civil law, the question of justice is as much about parties being able to avail themselves of the civil justice system as it is about the correctness of the result of that system. However, the criminal justice system is primarily about avoiding convicting someone who is innocent; a lesser consideration (although still important) is that an accused receives a fair trial.

The right to trial by jury results in appellate courts being conscious to avoid what they see as trial by court of appeal. This results in a reluctance to deal with the facts, because they are seen as the jury's prerogative. Appellant courts then retreat to a mere technical analysis of the trial process, and in any occasions that they are required to review facts they do so by reference to some legal requirement (be that new or fresh evidence, the proviso, or the Chamberlain test for circumstantial cases). It has been argued that this mistaken jurisprudential approach is both contrary to the underlying purpose of criminal appeals (to correct miscarriages of justice) and against the proper reading of the legislation.

[88] *R v Cooper (Sean)* (1969) 1 QB 267, 271 (Widgery LJ). See also, *Stafford v DPP* [1974] AC 878, 892 (per Viscount Dilhorne).
[89] *Whitehorn v R* (1983) 152 CLR 657, 688–9. See also *Ratten v The Queen* (1974) 131 CLR 510, 515–6; *Chamberlain v R (No 2)* 153 CLR 521, 533.

The application by intermediate appellate courts of the common form legislation is often flawed and results in the maintenance of convictions that should overturned. This thesis has demonstrated that because of two underlying attitudes, jury deference and the principle of finality, the court's interpretation of new and fresh evidence is often used to justify the court dismissing what are otherwise meritorious appeals.[90]

The comparison of the findings of two inquiries in England and Wales, the Donovan Committee in 1968 and Runciman Commission in 1995, and Australian jurisprudence demonstrated that Australians courts (like English courts) take a restrictive approach to new and fresh evidence. The British inquiries recommended legislative change to encourage courts to be more relaxed in their reception of new and fresh evidence. As the exposition of Australian case law and legislation indicated, no similar investigations have been undertaken to identify similar problems in Australia. In concluding, this thesis asserted the needed for legislative reform in relation to the reception of new and fresh evidence to encourage appellate courts to take a less restrictive approach in the hope that cases such as *Chamberlain* and *Mallard* do not occur again.

[90] Although there has been academic interest in the procedural deficiencies of the post-appeal review of convictions, this is not a focus of this thesis. See, eg, Sangha and Moles (n 39).

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Appendices

Appendix A

State	Act	Section
Queensland	*Criminal Code 1899*	S 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. (3) On an appeal against a sentence, the Court, if it is of opinion that some other sentence,

		whether more or less severe, is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal.
New South Wales	*Criminal Appeal Act 1912*	S 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. (2) Subject to the special provisions of this Act, the court shall, if it allows an appeal under section 5 (1) against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered. (3) On an appeal under section 5 (1) against a sentence, the court, if it is of opinion that some other sentence, whether more or less severe is warranted in law and should have

		been passed, shall quash the sentence and pass such other sentence in substitution therefore, and in any other case shall dismiss the appeal.
		(3)
Tasmania	*Criminal Code Act 1924*	Schedule 1 – S 402 Determination of appeals (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 a 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. (3) 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. (4) On an appeal against a sentence, the Court, if it is of opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in

		substitution therefor, and in any other case shall dismiss the appeal. (4A) The Court, on hearing an appeal that does or may require it to impose a sentence, or to vary a sentence imposed, on a person for an offence (whether the appeal was brought, made or lodged by the person or by the prosecutor) – (a) may take into account any matter relevant to the sentence that has occurred between when the court of trial dealt with the person and when the appeal is heard; but (b) despite paragraph (a), must not take into account the fact that the Court's decision may mean that the person is again sentenced for the crime. (5) If the Court allows an appeal against an order arresting judgment or against an acquittal, it may make any of the following orders which may be applicable: (a) that judgment be pronounced upon the offender; (b) that a conviction be entered against the offender; (c) that a venire de novo or new trial shall be had in such manner as the Court may direct; (d) that the offender shall appear at such time and place as the Court may direct to receive judgment –

		and any justice may thereupon issue his warrant for the arrest of the offender. (6) Any offender so arrested may be admitted to bail by order of the Court or a judge. (7) The Court may dismiss an appeal at any time, either on its own motion or on the application of either party to the appeal, if it is satisfied that – (a) the appellant has failed to take all reasonable steps to prosecute the appeal; and (b) it is necessary or expedient in the interests of justice to do so.
Victoria	*Criminal Procedure Act 2009*	S 276 Determination of appeal against conviction (1) On an appeal under section 274, the Court of Appeal must allow the appeal against conviction if the appellant satisfies the court that— (a) the verdict of the jury is unreasonable or cannot be supported having regard to the evidence; or (b) as the result of an error or an irregularity in, or in relation to, the trial there has been a substantial miscarriage of justice; or (c) for any other reason there has been a substantial miscarriage of justice. (2) In any other case, the Court of Appeal must dismiss an appeal under section 274
Western Australia	*Criminal Appeals Act 2004*	S 30 Appeal against conviction, decision on

		(1) This section applies in the case of an appeal against a conviction by an offender. (2) Unless under subsection (3) the Court of Appeal allows the appeal, it must dismiss the appeal. (3) The Court of Appeal must allow the appeal if in its opinion — (a) the verdict of guilty on which the conviction is based should be set aside because, having regard to the evidence, it is unreasonable or cannot be supported; or (b) the conviction should be set aside because of a wrong decision on a question of law by the judge; or (c) there was a miscarriage of justice. (4) Despite subsection (3), even if a ground of appeal might be decided in favour of the offender, the Court of Appeal may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.
South Australia	*Criminal Law Consolidation Act 1935*	S 353 Determination of appeals in ordinary case (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 judgment of the court before which the appellant was convicted should be set

		aside on the ground of a wrong decision on any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal; but the Full Court may, notwithstanding that it is of the 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. (2) Subject to the special provisions of this Act, the Full Court shall, if it allows an appeal against conviction, quash the conviction and either direct a judgment and verdict of acquittal to be entered or direct a new trial. (2A) On an appeal against acquittal brought by the Director of Public Prosecutions, the Full Court may exercise any one or more of the following powers: (a) it may dismiss the appeal; (b) it may allow the appeal and direct a new trial; (c) it may make any consequential or ancillary orders that may be necessary or desirable in the circumstances. (4) Where a new trial is directed, the Full Court may make such order as it thinks fit for the safe custody of the appellant or for admitting him to bail. (3A) If an appeal is brought against a decision on an issue antecedent to trial, the

		Full Court may exercise any one or more of the following powers: (a) It may confirm, vary or reverse the decision subject to the appeal; and (b) It may make any consequential or ancillary orders that may be necessary or desirable in the circumstances. (5) Subject to subsection (5), on an appeal against sentence, the Full Court must— (a) if it thinks that a different sentence should have been passed— (i) quash the sentence passed at the trial and substitute such other sentence as the Court thinks ought to have been passed (whether more or less severe); or (ii) quash the sentence passed at the trial and remit the matter to the court of trial for resentencing; or (b) in any other case—dismiss the appeal. (6) The Full Court must not increase the severity of a sentence on an appeal by the convicted person except to extend the non-parole period where the Court passes a shorter sentence

Appendix B

State	Act	Section
Queensland	*Criminal Code Act 1899*	S 671B Supplemental powers (1) The Court may, if it thinks it necessary or expedient in the interests of justice- (a) order the production of any document, exhibit, or other thing connected with the proceedings; and (b) order any persons who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial, or order any such persons to be examined before any judge of the Court, or before any officer of the Court, or justice, or other person appointed by the Court for the purpose, and admit any depositions so taken as evidence; and (c) receive the evidence, if tendered, of any witness (including the appellant) who is a competent, but not a compellable, witness; and (d) where any question arising on the appeal involves prolonged examination of documents or accounts, or any scientific or local investigation, which can not, in the opinion of the Court, be conveniently conducted before the Court, refer the question for inquiry and report to a commissioner appointed by the Court, and act upon the report of such commissioner so far as the Court thinks fit; and (e) appoint any person with special expert knowledge to act as assessor to the Court in any case in which it appears to the Court that such special knowledge is required for the determination of the case;

		and exercise in relation to the proceedings of the Court any other powers which may for the time being be exercised by the Supreme Court on appeals or applications in civil matters, and issue any warrant or other process necessary for enforcing the orders or sentences of the Court. (2) However, in no case shall any sentence be increased by reason of or in consideration of any evidence that was not given at the trial. (3) Subject to this chapter, the general rules may provide that any application under subsection (1)(a), (b), (d), or (e) may be heard and determined by a judge of the Court.
Victoria	*Criminal Procedure Act 2009*	S 317 Production of documents, exhibits or other things For the purposes of this Part, the Court of Appeal may order the production of any document, exhibit or other thing connected with the proceeding if the Court of Appeal considers that it is in the interests of justice to do so. S 318 Order for examination of compellable witness or the purposes of this Part, if the Court of Appeal considers at it is in the interests of justice to do so, the Court of ppeal may order any witness who would have been a mpellable witness at the trial to attend and be examined fore the court, whether or not the witness was called at the al. the Court of Appeal makes an order under subsection (1), it ay order that the examination of the witness be conducted, accordance with the rules of the court, before any person pointed by the Court of Appeal for that purpose. he Court of Appeal may admit as evidence any deposition

		a witness taken in an examination under subsection (2). S 319 Evidence of competent but not compellable witness For the purposes of this Part, if the Court of Appeal considers that it is in the interest of justice to do so, the Court of Appeal may receive the evidence of any witness (including the appellant) who is a competent but not compellable witness) **Note** As to competence and compellability of witnesses, see Division 1 of Part 2.1 of Chapter 2 of the **Evidence Act 2008**. S 320 Reference of question to special commissioner (1) The Court of Appeal may appoint a special commissioner to inquire into and report on any question referred to the special commissioner by the court if- (a) the question arises on an appeal under this Part or an application for leave to appeal under this Part; and (b) the question involves- (i) prolonged examination of documents or accounts; or (ii) any scientific or local investigation; and (c) the court considers that the examination or investigation cannot conveniently be conducted before the court; and (d) the court considers that it is in the interests of justice to do so. (2) The Court of Appeal may act on the report of a special commissioner to the extent that the court considers appropriate to adopt the report. (3) The Court of Appeal may determine the remuneration of a special commissioner.

New South Wales	*Criminal Appeal Act 1912*	S 12 Supplemental powers of the court (1) The court may, if it thinks it is necessary or expedient in the interests of justice: (a) order the production of any document, exhibit, or other thing connected with the proceedings, and (b) order any persons who would have been compellable witnesses at the trial to attend and be examined before the court, whether they were or were not called at the trial, or order any such persons to be examined before any judge of the court or before any officer of the court or other person appointed by the court for the purpose, and admit any deposition so taken as evidence, and (c) receive the evidence, if tendered, of any witness (including the appellant) who is a competent, but not a compellable witness, and (d) where any question arising on the appeal involves prolonged examination of documents or accounts, or any scientific or local investigation, which cannot, in the opinion of the court, be conveniently conducted before the court, the court or any judge thereof may refer the question for inquiry and report to a commissioner appointed by the court, and act upon the report of any such commissioner so far as the court thinks fit, and (e) appoint any person with special expert knowledge to act as assessor to the court in any case in which it appears to the court that such special knowledge is required for the

		determination of the case, and exercise in relation to the proceedings of the court any other powers which may for the time being be exercised by the Supreme Court on appeals or applications in civil matters, and issue any warrant or other process necessary for enforcing the orders or sentences of the court: Provided that in no case shall any sentence by increased by reason of, or in consideration of any evidence that was not given at the trial. (2) The Court of Criminal Appeal may remit a matter or issue to a court of trial for determination and may, in doing so, give any directions subject to which the determinations is to be made.
South Australia	*Criminal Procedure Act 1921*	S 166 Supplemental powers of Court For the purposes of this Act, the Full Court may, if it thinks it necessary or expedient in the interests of justice- (a) order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to it necessary for the determination of the case; and (b) order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in the manner provided by rules of court before any judge of the Supreme Court or before any officer of the Supreme Court or justice of the peace or other person appointed by the Full Court for the purpose, and allow the admission of any statements so taken as evidence before the Full

		Court; and (c) receive the evidence, if tendered, of any witness (including the appellant) who is a competent but not compellable witness; and (d) where any question arising on the appeal involves prolonged examination of documents or accounts or any scientific or local investigation which cannot, in the opinion of the Full Court, conveniently be conducted before the Court, order the reference of the question in the manner provided by rules of court for inquiry and report to a special commissioner appointed by the Court and act on the report of any such commissioner so far as it thinks fit to adopt it; and (e) appoint any person with special expert knowledge to act as assessor to the Full Court in any case where it appears to the Court that such special knowledge is required for the proper determination of the case; and (f) exercise in relation to the proceedings of the Court any other powers which may for the time being be exercised by the Supreme Court on appeals or applications in civil matters; and (g) issue any warrants necessary for enforcing the orders or sentences of the Court, but in no case will any sentence be increased by reason of, or in consideration of, any evidence that was not given at the trial.
Western Australia	*Criminal Appeals Act 2004*	S 40 General powers to deal with appeals (1) For the purposes of dealing with an appeal, an appeal court may do any or all of the following – (a) order the production of any record or thing,

		whether or not an exhibit, that is or may be relevant to the appeal; (b) order a witness who would have been compellable at the trial in the lower court, whether or not called at the trial, to attend and be examined before the appeal court; (c) if a person was a compellable witness, or would have been a compellable witness if called, at the trial in the lower court – (i) order the person to attend and be examined in accordance with rules of court or the direction of the appeal court before a person appointed by it under subsection (2); and (ii) order the evidence of the person to be recorded and the recording to be admitted as evidence in the court; (d) subject to the *Evidence Act 1906* section 9, admit the evidence of a witness, including a convicted appellant, who is a competent but not compellable witness; (e) admit any other evidence; (f) if a question in the appeal involves a lengthy examination of records, or a scientific or local investigation, that the court considers cannot be done conveniently before the court – (i) appoint a special commissioner to inquire into and report on the question; and (ii) act on the report so far as the court thinks fit; (g) appoint a person with special expert knowledge to act as an assessor to the court if

		it considers that the knowledge is required to properly decide the appeal; (h) require the person or persons who constituted the lower court to supply a report about the decision or the case in which it was made or any aspect of either; (i) order a party to give particulars to support a ground of appeal; (j) if there are inadequate particulars to support a ground of appeal, strike it out without deciding it; (k) amend of add a ground of appeal; (l) exercise any power that the Supreme Court may exercise in a civil case; (m) issue any warrant or document, and make any order, that is necessary to give effect to its decision on the appeal or that may be necessary as a result of the discontinuance or dismissal of the appeal; (n) issue any warrant or other document for the purpose of enforcing an order or sentence of the court. (2) For the purposes of subsection (1)(c)(i)- (a) in an appeal under Part 2 a single judge may appoint a magistrate, JP or some other officer or person to conduct the examination; (b) in an appeal under Part 3 the Court of Appeal may appoint a judge of appeal, Supreme Court judge, District Court judge, magistrate, JP or some other officer or person to conduct the examination. (3) If a person is appointed as a special commissioner or assessor, the reasonable fees of and expenses

		incurred by the person in performing his or her functions are to be fixed by a registrar of the Supreme Court and paid by the State. (4) The *Criminal procedure Act 2004* sections 31 and 32, with any necessary changes, apply respectively to and in respect of any warrant or summons issued by a court dealing with an appeal.
Tasmania	*Criminal Code Act 1924*	S 409 Supplemental powers (1) For the purposes of this chapter the Court may, if it thinks it necessary or expedient in the interests of justice- (a) order the production of any document, exhibit, or other thing connected with the proceedings; (ab) order a person convicted, or a person who is a respondent to a prosecution appeal, to attend before the Court on the hearing of an appeal in relation to the person or to receive judgment in relation to the appeal; (b) order any persons who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial, or order any such persons to be examined before any judge of the Court, or before any officer of the Court, or justice, or other person appointed by the Court for the purpose, and admit any depositions so taken as evidence; (c) receive the evidence, if tendered, of any witness (including the appellant) who is a competent, but not compellable, witness; and if the appellant makes application for the purpose, of the husband or wife of the appellant, in cases where the

		evidence of the husband or wife could not have been given at the trial except on such application (d) where any question arising on the appeal involves prolonged examination of documents or accounts, or any scientific or local investigation, which cannot, in the opinion of the Court, be conveniently conducted before the Court, refer the question for inquiry and report to a commissioner appointed by the Court, and act upon the report of such commissioner so far as the Court thinks fit; and (e) appoint any person with special expert knowledge to act as assessor to the Court in any case in which it appears to the Court that such special knowledge is required for the determination of the case – and exercise in relation to the proceedings of the Court any other powers which may be exercised by the Supreme Court on appeals or applications in civil matters, and issue any warrant or other process necessary for enforcing the orders or sentences of the Court (2) In no case shall any sentence be increased by reason of or in consideration of any evidence that was not given at trial.
Northern Territory	*Criminal Code Act 1983*	S 419 Supplemental powers (1) The Court may, if it thinks it necessary or expedient in the interests of justice: (a) order the production of any document, exhibit or other thing connected with the proceedings; (b) order any persons who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they

		were or were not called at the trial, or order any such persons to be examined before any person appointed by the Court for the purpose and admit any depositions so taken as evidence; (c) receive the evidence, if tendered, of any witness (including the appellant) who is a competent, but not a compellable, witness; (d) where any question arising on the appeal involves prolonged examination of documents or accounts, or any scientific or local investigation, that cannot, in the opinion of the Court, be conveniently conducted before the Court, refer the question for inquiry and report to a commissioner appointed by the Court and act upon the report of such commissioner so far as the Court thinks fit; and (e) appoint any person with special expert knowledge to act as assessor to the Court in any case in which it appears to the Court that such special knowledge is required for the determination of the case, and exercise in relation to the proceedings of the Court any other powers that may for the time being be exercised by the Supreme Court on appeals or applications in civil matters and issue any warrant or other process necessary for enforcing the orders or sentences of the Court. (2) In no case shall any sentence be increased by reason of or in consideration of any evidence that was not given at the trial.