HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ

Matter No S233/2008

RAFAEL CESAN — APPELLANT

AND

THE QUEEN — RESPONDENT

Matter No S236/2008

RUBEN MAS RIVADAVIA — APPELLANT

AND

THE QUEEN — RESPONDENT

Cesan v The Queen
Mas Rivadavia v The Queen
[2008] HCA 52
Date of order: 3 September 2008
Date of publication of reasons: 6 November 2008
S233/2008 & S236/2008

ORDER

Matter No S233/2008

1. *The appeal be allowed.*

2. *The orders of the Court of Criminal Appeal of the Supreme Court of New South Wales made on 5 September 2007 dismissing the appellant's appeals against conviction and sentence be set aside and, in their place, there be orders:*

(a) The appeal to the Court of Criminal Appeal against conviction be allowed and the appellant's conviction be quashed.

(b) There be a new trial of the appellant.

Matter No S236/2008

1. The appeal be allowed.

2. The orders of the Court of Criminal Appeal of the Supreme Court of New South Wales made on 5 September 2007 dismissing the appellant's appeals against conviction and sentence be set aside and, in their place, there be orders:

(a) The appeal to the Court of Criminal Appeal against conviction be allowed and the appellant's conviction be quashed.

(b) There be a new trial of the appellant.

On appeal from the Supreme Court of New South Wales

Representation

T A Game SC with H K Dhanji for the appellant in S233/2008 (instructed by Fragomen Global)

G O'L Reynolds SC with J C Hewitt for the appellant in S236/2008 (instructed by Legal Aid Commission of New South Wales)

W J Abraham QC with J G Renwick and L K Crowley for the respondent in both matters (instructed by Commonwealth Director of Public Prosecutions)

Interveners

M G Sexton SC, Solicitor-General for the State of New South Wales with R A Pepper intervening on behalf of the Attorney-General for the State of New South Wales (instructed by Crown Solicitor (NSW))

P M Tate SC, Solicitor-General for the State of Victoria with K L Walker intervening on behalf of the Attorney-General for the State of Victoria (instructed by Victorian Government Solicitor)

CATCHWORDS

Cesan v The Queen
Mas Rivadavia v The Queen

Criminal law – Appeals – Trial judge asleep for periods during trial – Whether "miscarriage of justice" under *Criminal Appeal Act* 1912 (NSW), s 6(1) – Whether consequences of conduct of trial judge a departure from proper conduct of trial – Whether trial judge exercised sufficient supervision and control over trial process to ensure jury paid attention to evidence – Whether supervision and control over trial so indispensable to trial by jury that failure itself gives rise to miscarriage of justice – Whether trial judge's conduct distracted jury from attending to evidence – Whether distraction of jury resulted in miscarriage of justice – Whether appearance of unfairness sufficient to constitute miscarriage of justice – Duties of trial judge and counsel in trial by jury.

Criminal law – Appeals – Proviso – Whether no substantial miscarriage of justice actually occurred – Demonstration to appellate court from record of trial that accused guilty beyond reasonable doubt necessary but not sufficient condition for application of proviso – Natural limitations of appellate court acting on record of trial – Relevance of letter sent to trial judge by accused, after jury returned guilty verdict, but before sentence passed, to determining whether there was no substantial miscarriage of justice.

Words and phrases – "miscarriage of justice", "substantial miscarriage of justice".

Criminal Appeal Act 1912 (NSW), s 6(1).

FRENCH CJ.

Introduction

1 After a trial lasting 17 days in 2004 Rafael Cesan and Ruben Mas Rivadavia were convicted on 28 June 2004 of conspiracy to import ecstasy into Australia. They were sentenced to terms of imprisonment in March 2005. They appealed out of time to the New South Wales Court of Criminal Appeal against both their convictions and sentences. The Court gave them leave to appeal. A common complaint in their appeals was that the trial judge had been asleep during significant parts of the trial.

2 The appeals to the Court of Criminal Appeal were dismissed by majority on the basis that there was no demonstrated error or prejudice to the appellants flowing from the trial judge's conduct. The appellants obtained special leave to appeal to this Court on a number of grounds. Those grounds included, among other things, that there had been a miscarriage of justice and no trial by jury as required by s 80 of the Constitution in relation to indictable offences against laws of the Commonwealth. At the commencement of the appeal the Court invited the parties to address it on the question whether, the constitutional issues apart, there had been a miscarriage of justice.

3 At the close of oral argument the Court indicated that it would allow the appeals, set aside the convictions and remit the matters for retrials. The Court made orders to that effect. I now publish my reasons for joining in those orders.

4 As these reasons indicate, the case invited consideration of the duty of the judge in a trial by jury. That duty extends to the supervision and control of the conduct of the trial. Where the judge is noticeably and repeatedly asleep or inattentive during the trial, there can be a miscarriage of justice. Putting to one side minor lapses, a substantial failure of that kind in the judge's duty may have imponderable effects upon the outcome of the trial which cannot be assessed by an appellate court. The trial in such a case is flawed in a fundamental respect. However apparently strong the evidence against the accused person may have been, it cannot generally be said with any confidence that there has been no substantial miscarriage of justice. The trial in this case was so flawed. There was a miscarriage of justice. It could not be said that the miscarriage was not substantial.

Factual and procedural background

5 On 31 May 2004, the appellants were charged upon indictment that between about 12 February 2002 and about 24 April 2002, at Sydney, they conspired with each other and others to import into Australia a prohibited import to which s 233B of the *Customs Act* 1901 (Cth) applied, namely narcotic goods consisting of a quantity of the narcotic drug commonly known as ecstasy. The

weight of the drug involved was 642.5 grams and so exceeded the "commercial quantity" prescribed for the purposes of s 233B of the Act which was 500 grams. The conspiracy alleged was an offence against s 11.5 of the *Criminal Code* (Cth). Section 233B was repealed by the *Law and Justice Legislation Amendment (Serious Drug Offences and Other Measures) Act* 2005 (Cth) the relevant provisions of which commenced on 6 December 2005. An equivalent offence-creating provision was incorporated in Pt 9.1 of the *Criminal Code*.

6 After a trial by jury, which commenced on 31 May 2004 and occupied 17 hearing days, the appellants were found guilty on 28 June 2004. They were not sentenced until 18 March 2005. The appellant Cesan was sentenced to imprisonment for 13 years six months, with a non-parole period of nine years. The appellant Mas Rivadavia was sentenced to imprisonment for 11 years.

7 The appellants lodged notices of appeal against conviction and applications for leave to appeal against sentence. Those notices and applications were out of time but extensions of time were granted by the Court of Criminal Appeal. There were substantial delays between conviction and sentencing and in relation to the lodging of the notices of appeal. Those delays are not material for present purposes save to the extent that they may have affected the recollection of witnesses called to give evidence in the Court of Criminal Appeal concerning the conduct of the trial.

8 So far as they related to conviction, the amended grounds of appeal filed on behalf of Cesan on 21 June 2007 included the ground that:

> "A miscarriage of justice was occasioned as a result of the fact that the trial judge was asleep for significant parts of the trial."

The amended grounds of appeal filed on behalf of Mas Rivadavia on 3 July 2007 included the same ground.

9 The Court of Criminal Appeal received affidavit evidence relevant to whether the trial judge had been asleep from time to time during the trial and the number, duration and effect of his sleep episodes. There was cross-examination on the affidavits. The Court also received two reports by a medical practitioner in respect of the trial judge and correspondence relating to the judge's retirement on the grounds of permanent disability.

10 On 5 September 2007 the Court of Criminal Appeal, by majority (Grove and Howie JJ, Basten JA dissenting), made orders dismissing the appeals in the following terms (identical for each appellant):

> "1. Grant an extension of time for leave to appeal.
>
> 2. Dismiss the appeal against conviction.

3. Grant leave to appeal against sentence.

4. Dismiss the appeal against sentence."

On 16 May 2008 each of the appellants was granted special leave to appeal to this Court from the whole of the judgment and orders of the New South Wales Court of Criminal Appeal.

Grounds of appeal

11 The grounds of appeal for the appellant Cesan were in the following terms:

"2.1 The Court of Criminal Appeal erred in holding that there was no miscarriage of justice arising from the fact that the trial judge was asleep during the course of the trial.

2.2 The Court of Criminal Appeal, having found that the trial judge was asleep during the trial, erred in failing to hold that the trial did not comply with the requirements of 'trial by jury' as required by s 80 of the *Commonwealth of Australia Constitution*.

2.3 The Court of Criminal Appeal, having found that the trial judge was asleep during the trial, erred in failing to find that the trial was held in a court which met the minimum requirements of a court for the purposes of Chapter III *Commonwealth of Australia Constitution.*

2.4 The Court of Criminal Appeal, having found that the trial judge was asleep during the trial, erred in holding that the trial was held 'before a judge' for the purposes of s 11 of the *District Court Act*, 1973."

The grounds of appeal for the appellant Mas Rivadavia were substantially the same.

12 The Court invited the parties to address it first on the question whether, Ch III and s 80 of the Constitution apart and s 11 of the *District Court Act* 1973 (NSW) apart, there was a miscarriage of justice within the meaning of s 6(1) of the *Criminal Appeal Act* 1912 (NSW), whether no substantial miscarriage of justice actually occurred within the meaning of that sub-section, and whether, even if no substantial miscarriage of justice actually occurred, the proviso to s 6(1) of the *Criminal Appeal Act* was incapable of applying.

The statutory framework

13 Although the indictment did not so specify on its face, the offence with which each of the appellants was charged was, as indicated on the reverse of the indictment, the offence created by s 11.5 of the *Criminal Code* which is scheduled to the *Criminal Code Act* 1995 (Cth). The offence-creating part of that section provides:

> "(1) A person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, is guilty of the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed."

The remaining sub-sections of s 11.5 are not material for present purposes.

14 Section 233B(1) of the *Customs Act* provided, at the relevant time:

> "(1) Any person who:
>
> …
>
> (b) imports into Australia any prohibited imports to which this section applies or exports from Australia any prohibited exports to which this section applies; or
>
> …
>
> shall be guilty of an offence."

15 The District Court of New South Wales, in trying the indictments, was exercising the federal jurisdiction conferred upon the several courts of the States and Territories by s 68(2) of the *Judiciary Act* 1903 (Cth). The New South Wales Court of Criminal Appeal in hearing and deciding the appeals was also exercising jurisdiction under that provision[1].

16 When a State or Territory court tries a person on indictment for a Commonwealth offence in the exercise of jurisdiction conferred by s 68(2) then, by force of s 68(1), the laws of the State or Territory respecting, inter alia, the trial and conviction of accused persons on indictment apply. That application is subject to the other provisions of s 68. The laws of the State or Territory with respect to the hearing and determination of appeals arising out of any such trial or

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1 See generally Zines, *Cowen and Zines's Federal Jurisdiction in Australia*, 3rd ed (2002) at 224-233.

conviction also apply by virtue of s 68(1). Their application in this case was not in dispute.

17 The jurisdiction of the District Court of New South Wales is dealt with in the *District Court Act* and, for present purposes, in the *Criminal Procedure Act* 1986 (NSW). The criminal jurisdiction of the Court is defined in the former Act as the jurisdiction conferred by Pt 4[2] thereof and the jurisdiction conferred "by or under any other Act or law on the Court in its criminal jurisdiction"[3]. Under the *Criminal Procedure Act* the District Court "has jurisdiction in respect of all indictable offences" other than offences prescribed by regulation[4].

18 The only prescribed offences excluded from the jurisdiction thus conferred upon the District Court are those specified in ss 12 and 19A of the *Crimes Act* 1900 (NSW) namely treason and murder[5]. The jurisdiction thereby conferred on the District Court attracted "the like jurisdiction" under s 68(2) of the *Judiciary Act.*

19 Section 11(1) of the *District Court Act* provides:

> "All civil and criminal proceedings in the Court, and all business arising out of any such proceedings, shall, subject to this Act and the *Jury Act 1977*, be heard and disposed of before a Judge, who shall constitute the Court."

Sub-section (2) is not material. Section 11(1) is to be read with s 131 of the *Criminal Procedure Act* which is found in Pt 3 of Ch 3 of that Act entitled "Trial procedures" and which provides:

> "Criminal proceedings in the Supreme Court or the District Court are to be tried by a jury, except as otherwise provided by this Part."

There is an option for trial by judge alone in s 132(1) but, in respect of the trial on indictment of an offence against a law of the Commonwealth, s 80 of the Constitution requires that it be by a jury.

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2 *District Court Act*, s 9(2)(a) and s 166.

3 *District Court Act*, s 9(2)(b).

4 *Criminal Procedure Act*, s 46.

5 Criminal Procedure Regulation 2000 (NSW), cl 4, as it stood at the time of trial and to the same effect now Criminal Procedure Regulation 2005 (NSW), cl 22.

20 The *Criminal Appeal Act* provides for appeals against conviction. Section 5 of that Act confers upon a person convicted on indictment a right to appeal to the Court of Criminal Appeal:

> "(a) against the person's conviction on any ground which involves a question of law alone, and
>
> (b) with the leave of the court, or upon the certificate of the judge of the court of trial that it is a fit case for appeal against the person's conviction on any ground of appeal which involves a question of fact alone, or question of mixed law and fact, or any other ground which appears to the court to be a sufficient ground of appeal, and
>
> (c) with the leave of the court against the sentence passed on the person's conviction."

21 Section 6 provides:

> "(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."

Section 6(3) is not material for present purposes.

22 Section 8 of the Act provides:

> "(1) On an appeal against a conviction on indictment, the court may, either of its own motion, or on the application of the appellant, order a new trial in such manner as it thinks fit, if the court considers that a miscarriage of justice has occurred, and, that having regard to all the circumstances, such miscarriage of justice can be more adequately remedied by an order for a new trial than by any other order which the court is empowered to make.

(2) Provision shall be made by rules of court for detaining the appellant until the fresh trial has terminated, or for ordering the appellant into any former custody."

Evidence before the Court of Criminal Appeal

23 The Court of Criminal Appeal received affidavit evidence from a number of persons who had been present at the trial. They were the appellant Cesan, the Crown Prosecutor Mr Bellew SC, the appellant Cesan's mother, his sister and four friends. Affidavits were also received from the appellant Mas Rivadavia's sister and his aunt. Mr Cesan's solicitor, Mr Kessels, swore a short affidavit to the effect that he had made inquiries about the existence of tapes of the trial and had been informed by the Reporting Services Branch of the Attorney-General's Department of New South Wales that no tapes existed.

24 The Court of Criminal Appeal was divided in its opinion. The majority held in substance that there was no demonstrated error or prejudice flowing from the trial judge's conduct. Because of the majority judges' effects based approach, their findings of fact about the conduct of the trial judge were somewhat ambulatory in character. That is not a criticism of those findings, but an explanation of how the majority's reasoning affected their form. Because I do not agree with the approach taken by the majority, it is necessary to have regard to the evidentiary basis for the findings of fact made by the dissenting judge which were not inconsistent with those of the majority. A review of that evidence follows.

25 The appellant Cesan said that, on or about the second day of the trial, when recordings of some telephone intercepts were being played to the jury, the judge was "slumped in his chair and appeared to be asleep". He raised the matter with his solicitor. His solicitor said words to the effect:

"Look mate it doesn't really matter, it happens with this judge."

The next day he again noticed that the judge appeared to be asleep. He would slump in his chair and his head would fall forward and it would stay down for some time. He would suddenly lift it and appear to wake up before "nodding off again". This happened several times for up to five or more minutes at a time.

26 The judge appeared to him to be asleep on many occasions in the second week of the trial. A lot of tapes were played during that time. These episodes appeared to occur more in the afternoons than in the mornings. He did not know exactly how frequently or for how long the judge slept, but the episodes seemed to be for periods of 10, or 15, or even 20 minutes. Members of the jury often looked at the judge. He raised the matter again with his solicitor after a few days. His solicitor said that Cesan did not want to be upsetting the trial judge but he

would bring it up with counsel. Cesan later spoke to counsel who said that there was nothing they could do about it.

27 When Cesan gave his evidence, he faced the bar table and the jury. The judge was behind him. At times during cross-examination he heard a "deep rumbling noise" from behind. He eventually realised it was the sound of snoring. Some of the jury looked at the judge, rather than at Cesan or the prosecutor. Some appeared surprised and others smiled. When he first heard the noise it was soft and not particularly distracting but eventually he found it hard to concentrate on the questions. When the snoring was at its loudest the prosecutor seemed to stop asking questions. Cesan turned to the judge's associate, who shrugged her shoulders. There was a loud banging noise behind him and he looked back and saw the judge looking up startled. Questioning resumed, but after about 10 minutes he heard the snoring again. This happened a number of times while he was giving his evidence. Under cross-examination in the Court of Criminal Appeal Cesan was challenged on his estimates, but stood by them:

> "I have said that I heard him snoring for a period for 20 – period from between 15 and 20 minutes, and then his assistant would make some noise and then the snoring would stop."

Cesan acknowledged that he had written a letter to the judge before sentencing. The letter was dated 13 December 2004. It began with the following words:

> "I would like to take this opportunity to thank you for what was a very fair trial, one wherein I accept the decision made by my peers and I am today at your mercy, asking for some leniency in my sentencing."

He wrote of a change in his perspectives, recognition of the impact of his drug abuse on members of his family and other people around him and his commitment to a good Christian life. The letter went on:

> "I sincerely hope you have taken into account the above when deciding my sentence. I once again thank you and the institution you represent for allowing me very [sic] opportunity to defend myself in a fair and just trial. In no way do I hold a grudge against any of the authorities involved, since they have given me the chance to become a new man."

He acknowledged in cross-examination that he had accepted that he had a very fair trial.

28 Cesan's mother was present at the trial on every day except 31 May 2004. She had a clear view of the entire courtroom including the judge. When the judge was participating in the trial he would look at the witnesses, the jury or the lawyers and talk to them. He would turn pages, move items on his table, accept documents, move his glasses to read or look at counsel or a witness and make

other small, but definite, movements. On 3 June 2004, she observed the judge sitting upright but slumped in his chair. His head was slightly forward as if he were reading. He was completely still. He had his arms resting on his desk and his hands clasped in front of his chest. He jerked abruptly when he woke up. On this occasion, he was asleep for about 10 minutes.

29 Cesan's mother raised the matter with his solicitor in the presence of her daughter and two other friends who also gave evidence to the Court of Criminal Appeal. She asked the solicitor if he had seen the judge sleeping. The solicitor said that 85% of all the judges that her son could have had would have been much worse. This was evidently a reference to judges thought to be less favourable to accused persons. The solicitor told her that the judge fell asleep in court, but there was nothing that could be done about it. She pressed him and he said he would speak to counsel and they would talk about it later. She said that she spoke to the solicitor on at least one other occasion.

30 Cesan's mother said that the judge fell asleep on practically every day of the trial, sometimes for only a few minutes and sometimes for up to 20 minutes. He fell asleep at least once a day every day. Some days he fell asleep a number of times in the morning and the afternoon. She began to look at her watch to see how long he slept. She was able to say that the time was between five and 20 minutes. On some occasions it would be 10 or 12 minutes, and on some occasions as long as 20 minutes. Members of the jury would smile or shrug their shoulders and look at each other and the judge.

31 In cross-examination Cesan's mother denied that there were any days that she did not observe the judge being asleep. She acknowledged that she was not at the trial on 31 May. She denied that there was any occasion upon which she thought the judge was asleep simply by reason of the fact that he had his eyes closed. She referred to his posture and immobility.

32 Ivan Amaro, a friend of Cesan, was present for the majority of the trial. In the early days of June he and a few others had noticed that the judge would slump back in his chair and close his eyes. He recalled joking about the fact that the judge was "just having a nap". This ceased to be a laughing matter as they suspected he was truly asleep. During quiet moments in the courtroom, a light but persistent snoring could be heard. The judge slept for anywhere between a few minutes and up to 20 minutes. This happened at the very least once a day but often more frequently. He described what happened when Cesan was giving evidence as one of the more memorable moments of the judge's sleeping patterns. He heard a loud snore. He saw the judge slumping back in his chair, eyes closed, and arms crossed. Another snore was clearly heard throughout the courtroom. He said:

> "What must have been 5-10 seconds seemed to be an eternity as everything and everyone came to a standstill."

The judge's associate made a commotion with some papers and books and noticeable banging of the table until the judge opened his eyes. Members of the jury looked at the friends and family of Cesan during the proceedings and smiled, rolled their eyes, stared, laughed and engaged in "similar behaviour". This was most apparent when Cesan was on the stand and the judge was sleeping.

33 In cross-examination Mr Amaro denied that the judge normally appeared to be asleep for only a few minutes. He could only recall one specific occasion of the judge sleeping while Cesan was giving evidence. He did not recall snoring on other occasions but did remember heavy breathing.

34 Veronica Cabrera was a friend of Cesan who was present during most of his trial during June 2004. On each day that she attended the court she sat through the whole day. She said that her view was unobstructed. On 3 June 2004, towards lunch time she observed that the judge was sleeping. She mentioned this to the person beside her. Those present began murmuring amongst themselves. She continued to look at the judge to make sure she was not mistaken. She described him as slumped in his chair whereas previously he had been sitting upright. His head was tilted forward, his chin resting on his chest and his movements "erratic as if he was in and out of sleep". She said she had observed this behaviour for about 15-25 minutes before the lunch break interrupted. She said that the judge continued to sleep at various times throughout the trial. Often he would fall asleep six or more times in one session and would be asleep anywhere between five and 20 minutes. When taped evidence was being played the judge often slept for 15-20 minutes at a time.

35 Ms Cabrera said that some of the jurors and officials dozed unchecked throughout periods when the judge was sleeping. She observed court officers attempt to wake him by banging their books loudly. She said:

"It seemed as if the whole courtroom slipped into a state of irreverence."

During Cesan's evidence she heard the judge snoring. The snoring subsided after a court officer banged on the table with some papers. The judge slept at some point on every day of the trial, except one day which was shorter than the others. She was cross-examined along lines similar to those of the preceding witnesses and gave broadly similar answers.

36 Patricia Lawson, another friend of Cesan and his family, attended at least nine days of the trial in June 2004 and was there each day in the morning until lunch time. She remembered attending on days when taped telephone conversations were being played and the days when Cesan and Mas Rivadavia gave evidence, and when a witness for Cesan gave evidence. She could see everybody in the courtroom including the judge.

37 Although she could not remember exactly what she saw on each separate occasion, she observed at various times at the trial that the judge would cross his arms, sit upright in the chair, begin to slouch a little, close his eyes, and tilt his head slightly forward and to the left. Sometimes he would jerk awake and his eyes would open suddenly, and then he would slowly close them and his head would tilt to the side again. As to the duration of these incidents, she said he would doze off many times, at least four or five during each morning or afternoon session which she attended, and seemed to be asleep for at least five minutes. She believed it was 15-20 minutes when tapes were being played and when counsel were making their submissions to the jury. She could clearly recall the judge being asleep at various times when Cesan was giving his evidence.

38 In cross-examination she testified about the techniques used to wake the judge. These included counsel clearing their throats or knocking a microphone and a court officer moving and shuffling papers. She claimed in cross-examination that the judge was asleep for most of the trial. The shorter periods were "[p]robably a little bit longer than 5 minutes". At one point she said in cross-examination that the judge "was asleep most of the time, from my observation".

39 Gabriela Cesan, Cesan's sister, was present on every day of the trial except the first day. In the first few days the judge would sleep for short periods, maybe two or three minutes at a time. As the trial progressed he would sleep for longer periods. If things were dragging on a bit he would sleep for 10 or 15 minutes at a time, and possibly longer. Sometimes she noticed members of the jury looking at the judge, and then looking at each other and then looking back to the judge very intently. She said:

> "During the times when the judge was asleep for long periods I noticed that many of the jurors appeared not to be paying attention to what was being said and would appear restless. They would fidget, look at each other, watch the judge, look around, appear to be scribbling and generally appeared to lose concentration. This was very different to how the jury reacted when the judge was awake. At those times they would appear to be paying attention, generally looking at whoever was speaking or at their papers when asked. It was very obvious to me that there was a real difference in the jury's behaviour when the judge was asleep."

In cross-examination, she deposed to the snoring that occurred when Cesan was giving his evidence. She also deposed to the conversations her mother had with Cesan's solicitor who, according to her recollection, said there was nothing they could do.

40 Another friend, Juan David Uribe, attended the trial on two days. On the first day he was there until lunch time. On the second occasion he was there for the full day. On both days he saw the judge sleep during the proceedings. It was

more than half a dozen times on each day. He heard snoring. He saw people in the jury smirking and heard giggling "from the jury area". In cross-examination Mr Uribe said that counsel were making submissions on the first day that he attended the trial and that the judge appeared to be asleep while they were talking. He thought that the judge was asleep for periods of five to 10 minutes. He based his opinion that the judge was asleep on the fact that the judge's eyes were closed and the body language that he observed. On a few occasions the lawyers paused and waited for the judge to wake up. Sometimes they just kept on talking.

41 Catalina Cal was the appellant Mas Rivadavia's sister. She had tried to attend the trial two or three times a week to give support to her brother. When at court she had a clear view of the judge. She noticed that he tended to fall asleep in the afternoons, although she could not remember exactly how many times he fell asleep each day. She saw the associate hitting or striking the bench or making noises to wake the judge up and saw the jury smiling at the loud noises the associate was making. The sleeping periods kept occurring throughout the three weeks she was at the trial. In oral evidence she said she didn't really know how long the judge had been asleep. She knew there were periods of minutes. There were no concessions in her cross-examination.

42 Magalli Locaputo was Mas Rivadavia's aunt. She attended her nephew's trial about two or three times a week including the day her nephew gave evidence. On that day she heard snoring coming from where the judge was sitting while Mas Rivadavia was giving evidence. The judge had his head down and his eyes closed on many occasions. There were three occasions in one day on which she saw one of the court officers tapping to wake the judge. She did not observe the jury during that time but did notice a woman juror falling asleep on one occasion. In oral examination-in-chief, she said that she had heard the judge snore on a few occasions. He would snore for a short time then wake. Asked about the longest period for which the judge was asleep she said it could have been 10 to 15 minutes but she did not recall. In cross-examination she said on some occasions the judge appeared to be asleep for just a few minutes and sometimes longer than a few minutes.

43 Prosecuting counsel at the trial, Mr Bellew SC, swore an affidavit in which he referred to the various affidavits that had been filed on behalf of Cesan. He recalled that there were occasions during the course of the trial in which the trial judge appeared to be asleep. He was not able to specify the number of those occasions although he thought it was less than the estimates given in some of the affidavit material adduced for Cesan. He had no recollection of raising his voice or clearing his throat to wake the judge.

44 It was put to Mr Bellew in cross-examination that his focus was not necessarily on the judge at any given time. He said that when leading evidence from a witness or cross-examining his focus would be on the witness. The

occasions on which he looked at the judge were generally limited to those on which he was addressing him directly. He recalled turning towards the judge on one occasion, at about the time of the morning break, to ask whether it was a convenient time to adjourn. The judge, who had his head on his chest and appeared to be asleep, responded with what he would probably call a "startle". He could not put a figure on the number of times the judge fell asleep. Asked whether he conceded that it was possible that the judge's sleeping was as widespread as indicated in the affidavit evidence he said:

> "It's possible, because those who have sworn the affidavits probably were in the position of observers only whereas I was dealing with a range of other things that I was in the position of at the time."

No evidence was called from the solicitor or counsel who represented the appellants at trial.

45 The medical evidence showed that at the time of the trial the judge was suffering from severe obstructive sleep apnoea. That condition was later brought under control but he developed a variable anxiety state and his capacity for continued judicial work was limited. He sought to retire from his office on the grounds of permanent disability. It is not in contention that he did retire.

The judgment of the majority in the Court of Criminal Appeal

46 The reasons for judgment of the majority in the Court of Criminal Appeal were delivered by Grove J. Howie J agreed with the reasons and the proposed orders. It is only necessary to refer to that part of the judgment relevant to the trial judge's conduct.

47 Grove J observed that no application had been made at trial about the judge's sleep episodes. No omission, misdirection or error was said to have resulted. The complaint about the judge's sleep episodes was raised for the first time on appeal. The letter which Cesan had written to the trial judge before he was sentenced was "not … insignificant"[6]. It had not been contended that the verdicts of the jury were unreasonable or could not be supported. What was sought was a repeat trial.

48 Grove J referred to the evidence before the Court of Criminal Appeal as summarised by Basten JA. He focussed on the absence of any suggestion that the trial judge had missed anything relevant or that Cesan himself had made any error in his evidence as a result of the judge's sleep episodes. His Honour

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6 *Cesan v Director of Public Prosecutions (Cth)* (2007) 174 A Crim R 385 at 427 [175].

observed that Cesan's mother had not linked her observations of the trial judge's conduct to any aspect of the course of trial contemporaneous with her observation. Implying some scepticism about the witnesses' estimates of the duration of the sleep episodes, Grove J referred to Ivan Amaro's observation that:

> "What must have been five – ten seconds seemed to be an eternity"

and characterised it as "a more realistic description of what was happening"[7] during Cesan's testimony.

49 His Honour rejected, as an exaggeration, Patricia Lawson's testimony that the judge was asleep most of the time during the nine days she attended the trial. He referred to Gabriela Cesan's evidence and noted she did not time the longer episodes of sleep to which she deposed. Juan David Uribe's evidence was said to be, in some respects, incompatible with the record of the proceedings on the days to which he referred. But even assuming that what he said was basically correct it carried the issue no further. He also referred to the evidence of Catalina Cal, Magalli Locaputo and Mr Bellew without comment.

50 Two important passages of his Honour's judgment followed his reference to the evidence. He said[8]:

> "It is necessary to make findings of fact in respect of these matters for the purpose of dealing with the grounds. I accept that the judge was asleep from time to time. In reference to the evidence of Cesan, Basten JA has commented 'commonsense suggests that (his) estimates must have been subject to a significant margin of error'. I agree and would apply that comment also and particularly to those witnesses who testified to lengthy periods of fifteen to twenty minutes. I find the probability to be that, from time to time, the judge was 'nodding off' and on other occasions, notably when he was heard to snore, was asleep in a real and practical sense. I am persuaded by the tenor of all the evidence that it was on these latter occasions that the associate or perhaps the court staff, or Mr Bellew by clearing his throat, restored the judge's attention.
>
> I do not accept that three counsel would press on, remaining mute about the situation, if something of genuine significance was occurring without then, or even at a later time, drawing his Honour's attention to what he had apparently missed. The importance I have ascribed to this is that, in my view, the mere fact that the judge has been asleep (on and off) during the trial does not, without more, demonstrate that the trial had been

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7 (2007) 174 A Crim R 385 at 428 [180].

8 (2007) 174 A Crim R 385 at 429 [188]-[189].

> unfair, or, put in the terms of the *Criminal Appeal Act 1912* (NSW), that there had been a miscarriage of justice."

51 His Honour quoted with approval observations made in a judgment of the Court of Appeal for England and Wales in *R v Betson*[9]. In that case, which involved conspiracy to rob the De Beers Millennium exhibition at the London Dome, the judge had slept, for a time, during the speeches of counsel for two of the accused. The Court of Appeal was prepared to accept that he was also asleep during a few other occasions, sometimes to the extent that he woke himself by the sound of his snoring. Their Lordships rejected a contention that he had been asleep on two specific occasions during the testimony of one of the appellants. No point was made of the judge's sleep episodes at trial. There was evidence that the jury had noticed the judge's behaviour.

52 The argument on the appeal was evidently put on the basis that the appellants had been unfairly prejudiced and that the jury would have formed the impression, in respect of the appellant Betson, that the judge took such a dim view of the defence case, he could not be bothered to stay awake.

53 The appeal was dismissed on the basis that the judge's sleep episodes were not shown to have led to error. Although observing that it was "highly regrettable" that he had fallen asleep, their Lordships said[10]:

> "But because a judge falls asleep or, for any other reason, allows his or her attention to wander, it does not necessarily follow that the trial is unfair, or that any ensuing conviction is unsafe. It is the effect, not the fact, of such inattention which is crucial. This must, in each case, depend on all the circumstances, including the period of inattention, both absolute and as a proportion of the length of the whole trial; the stage of the trial at which the inattention occurs; and, of primary importance, the impact of that inattention, if any, on the course and conduct of the trial."

54 The Court found that it had not been shown that the judge missed, and failed to sum up to the jury, any significant feature of the evidence or speeches on account of his sleep episodes. His summing-up was "comprehensive and balanced, accurate as to the law and detailed as to the evidence"[11]. The Court also rejected the contention that the jury was, even arguably, unfairly prejudiced against any defendant having regard to the length of the trial, the full fair and

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9 [2004] EWCA Crim 254. An abbreviated report of the case appears at [2004] 2 Cr App R (S) 52 but does not contain the passages quoted by Grove J.

10 [2004] EWCA Crim 254 at [47].

11 [2004] EWCA Crim 254 at [48].

accurate summing-up, the lengthy period of retirement, a pertinent question asked by the jury and "the compelling, powerful evidence against the defendants"[12].

55 Grove J drew a parallel between *Betson* and the present case. He rejected a distinction between the unconsciousness of a sleeping judge and the inattention of a judge who is not asleep. He said[13]:

> "The posited distinction is between causes, but what should be considered is effect. A judge (or anyone else) whose mind is disengaged from what is occurring by distraction, by deliberate choice or otherwise is as much a non participant as one whose mind has been disengaged by sleep."

His Honour also rejected analogies between a sleeping judge and a judge who absents himself from court during the address of counsel to the jury[14].

56 After referring to s 6(1) of the *Criminal Appeal Act* and observations by Gleeson CJ in *Nudd v The Queen*[15] about the width of the concept of "miscarriage of justice"[16] his Honour said[17]:

> "There has been no identified act or omission of the trial judge which has produced consequence [sic] that is asserted to be different from that which would have occurred if the judge had been bright-eyed throughout the entire process. Of course, as was observed in *Betson*, it is regrettable if a judge falls asleep or is inattentive but it is the effect not the fact which is crucial. The appellants have pointed to no adverse effect on the canvass of issues at trial nor upon their determination which has been derived from the judge's episodes of dormancy. There has been no failure of process of such a kind as to make it impossible for this Court to decide that the convictions were just."

His Honour went on to consider further arguments based upon s 11(1) of the *District Court Act* and s 80 of the Constitution.

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12 [2004] EWCA Crim 254 at [48].

13 (2007) 174 A Crim R 385 at 430 [192].

14 *Bateson v State* 80 SW 88 (1904).

15 (2006) 80 ALJR 614; 225 ALR 161; [2006] HCA 9.

16 (2006) 80 ALJR 614 at 618 [7]-[8]; 225 ALR 161 at 164.

17 (2007) 174 A Crim R 385 at 431 [196].

The dissenting judgment

57 Basten JA accepted that "it was clear from the evidence of the witnesses before this Court that the judge did fall asleep, although there was a further factual issue as to the extent to which that occurred"[18]. He carefully reviewed the evidence adduced in the Court of Criminal Appeal. He noted that neither of the appellants called evidence from the legal representatives at the trial. The fact that no objection was taken and the subjective reasons why no other steps were taken would arguably have been irrelevant. That matter was not explored before the Court of Criminal Appeal. His Honour also noted that all the witnesses called on the appeal were friends or relatives of the two appellants. There was a significant degree of consistency between their accounts but none were challenged in cross-examination on the basis of interest clouding perception or recollection. There was no suggestion of collusion. Basten JA observed that while such factors could not be ignored as potentially relevant, in the assessment of the evidence, they should be given limited weight.

58 His Honour's findings of fact in summary were[19]:

1. The trial judge was asleep on a number of occasions during the 11 days of the trial when evidence was being given.

2. When he was asleep he was not conscious of what was occurring in the courtroom.

3. The trial judge slept for a period of several minutes on at least one occasion on most of the 11 days and on two or possibly three occasions on a handful of days. In support of this inference his Honour noted that the transcript showed that, on most days, there were long periods with no intervention by the judge. The regularity of this behaviour was supported by the fact that the judge was suffering from severe obstructive sleep apnoea, a condition consistent, before the judge obtained treatment, with a continual lack of adequate sleep at night.

4. On a number of occasions, possibly between two and five, the judge was asleep for a period of between 10 and 15 minutes. On a majority of occasions he was asleep for between two and 10 minutes.

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18 (2007) 174 A Crim R 385 at 392 [18].

19 (2007) 174 A Crim R 385 at 402-403 [62]-[65].

5. There were a number of occasions on which the sleeping was accompanied by heavy breathing. There was an occasion during the cross-examination of Cesan when either a court officer or the judge's associate made a noise to wake the judge up.

6. The judge's snoring when Cesan was giving evidence was to an extent disruptive and caused him to look around at the trial judge on two occasions.

7. The trial judge slept during parts of the evidence of Mas Rivadavia but did not snore in a vigorous and audible manner so as to disrupt Mas Rivadavia's concentration.

8. The jury was distracted at least during Cesan's cross-examination, and probably to a degree on other occasions, by the behaviour of the trial judge.

9. Some members of the jury found the behaviour of the trial judge amusing and some emulated his apparent inattention.

59 Basten JA referred to s 11 of the *District Court Act* and s 131 of the *Criminal Procedure Act.* In the context of their combined requirement for a trial by judge and jury, he considered the essential characteristics of such a trial by reference to authorities dealing with s 80 of the Constitution[20]. His Honour identified two principles in issue. The first was a jurisdictional debate about whether the Court was properly constituted. The second invited attention to the content of the process because the judge, by his behaviour, tended to distract the jury or trivialise the proceedings.

60 His Honour referred to the role of the trial judge in a jury trial and the principle enunciated by the United States Supreme Court in *Capital Traction Company v Hof*[21] that trial by jury was a trial of an issue by jurors "under the

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20 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 354-356 per Griffiths CJ, 375 per O'Connor J, 385-386 per Isaacs J; [1909] HCA 36; *Maher v The Queen* (1987) 163 CLR 221; [1987] HCA 31; *Cheatle v The Queen* (1993) 177 CLR 541; [1993] HCA 44; *Katsuno v The Queen* (1999) 199 CLR 40; [1999] HCA 50; *Wu v The Queen* (1999) 199 CLR 99; [1999] HCA 52; *Cheng v The Queen* (2000) 203 CLR 248; [2000] HCA 53; *Brownlee v The Queen* (2001) 207 CLR 278; [2001] HCA 36.

21 174 US 1 (1899).

direction and superintendence of the court"[22], noting that "[t]his direction and superintendence was an essential part of the trial"[23].

61 In this context and after extensive review of authority, his Honour found a failure to comply with s 80 of the Constitution. There was therefore no need for the appellants to demonstrate that the conduct of the trial judge led to some consequential error demonstrating a miscarriage of justice.

62 Notwithstanding the constitutional context of his conclusion, his Honour also characterised the trial as irreparably unfair, citing Gleeson CJ in *Nudd*[24]. He considered whether the judge's behaviour had the capacity to affect the jury's assessment of the appellants' cases. The proper test was an objective one. Applying that approach it could be assumed that the conduct of the judge would have had two related effects. First, it tended to undermine the routine directions given at the commencement of the trial to listen carefully to the evidence. Secondly, it tended to undermine the likelihood that the directions which he gave to the jury would be taken seriously and carefully applied. They might have been; it was impossible to know. The trial judge's behaviour constituted a distraction. His Honour concluded[25]:

> "Accordingly, there was a real possibility that the judge's conduct adversely affected the jury's performance of its function, in a material respect, which was sufficient to render the trial unfair and to deprive the proceedings of an essential characteristic of trial by jury."

63 His Honour also considered the operation of the proviso to s 6(1) of the *Criminal Appeal Act* and held that it could not apply because there had been a failure to comply with s 80 of the Constitution. That failure either gave rise to a substantial miscarriage of justice or was one to which the proviso had no application.

Miscarriage of justice

64 The first question in these appeals is whether there was a "miscarriage of justice" within the meaning of s 6(1) of the *Criminal Appeal Act*. The second question is whether, if there were a miscarriage of justice, it was nevertheless not "substantial" within the meaning of the proviso to s 6(1).

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22 174 US 1 at 15 (1899).

23 174 US 1 at 15-16 (1899).

24 (2006) 80 ALJR 614 at 618-619 [7]-[9]; 225 ALR 161 at 164-165.

25 (2007) 174 A Crim R 385 at 413 [109].

65 The term "miscarriage of justice" appears in a number of Commonwealth, State and Territory statutes, predominantly in relation to the disposition of criminal appeals. It is convenient to begin with its ordinary meaning before turning to relevant authorities.

66 In the second edition of the *Oxford English Dictionary* "miscarriage of justice" is defined as "a failure of a court to attain the ends of justice". Applied to a system of laws the ends of justice will incorporate normative requirements relating to the way in which laws are applied and dispositions made under them. The conviction of an innocent person would be recognised by all observers as a miscarriage of justice. But the concept goes beyond that, particularly in a criminal justice system that is committed to fair process. One general definition from a perspective external to the system is[26]:

> "A miscarriage occurs as follows: whenever suspects or defendants or convicts are treated by the State in breach of their rights, whether because of, first, deficient processes or, second, the laws which are applied to them or, third, because there is no factual justification for the applied treatment or punishment; fourth, whenever suspects or defendants or convicts are treated adversely by the State to a disproportionate extent in comparison with the need to protect the rights of others; fifth, whenever the rights of others are not effectively or proportionately protected or vindicated by State action against wrongdoers or, sixth, by State law itself."

To the extent that that definition incorporates perceived deficiencies in the law it runs wider than any definition that could be applied in a statutory setting. Within the statutory framework for criminal appeals under consideration in this case, the range of events, acts or omissions which can constitute a miscarriage of justice will depend upon the necessary conditions of "justice" in the criminal justice system. One class of necessary condition can be gathered under the general rubric of judicial process. A broader concept, which embraces but is not limited to the trial process, is that of "due process of law"[27].

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26 Walker, "Miscarriages of Justice in Principle and Practice", in Walker and Starmer (eds), *Miscarriages of Justice – A Review of Justice in Error*, (1999) 31 at 33. See also Greer, "Miscarriages of Criminal Justice Reconsidered", (1994) 57 *Modern Law Review* 58 esp at 61-62.

27 As to the term "due process of law" and its origins and use in the Magna Carta see the helpful discussion by Priestley JA in *Adler v District Court of New South Wales* (1990) 19 NSWLR 317 at 345-353. In the constitutional context see Wheeler, "Due Process, Judicial Power and Chapter III in the New High Court", (2004) 32 *Federal Law Review* 205.

67 This is not a case about the judicial power of the Commonwealth nor implications to be drawn from Ch III of the Constitution. This Court, in allowing the appeals, did so on the basis that it was not necessary to decide the case by reference to the requirements of Ch III or s 80. Nevertheless the character of the judicial process as an element of the exercise of judicial power derives from the history and nature of the judicial function which in turn informs the constitutional concept.

68 There have been many judicial observations which lend support to that general proposition. In *Robins v National Trust Co*[28] the Privy Council said of the concept of "miscarriage of justice" in relation to judicial proceedings generally[29]:

> "It means such departure from the rules which permeate all judicial procedure as to make that which happened not in the proper use of the word judicial procedure at all."

69 In *Srimati Bibhabati Devi v Kumar Ramendra Narayan Roy*[30] a "miscarriage of justice" was seen as such a departure from the rules which permeate all judicial procedure as to make that which happened not judicial procedure in the proper sense of the words. It does not necessarily require the demonstration of a wrong decision. As Asprey JA said in *Wilson v Wilson*[31]:

> "What will constitute a miscarriage of justice may vary, not only in relation to the particular facts, but also with regard to the jurisdiction which has been invoked by the proceedings in question; and to reach the conclusion that a miscarriage of justice has taken place does not require a finding that a different result necessarily would have been reached in the proceedings said to be affected by the miscarriage. It is enough if what is done is not justice according to law." (citation omitted)

70 Windeyer J said, in *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd*[32], that the concept of judicial power "inevitably attracts consideration of predominant characteristics and also invites comparison with the

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28 [1927] AC 515.

29 [1927] AC 515 at 518.

30 [1946] AC 508 at 521.

31 (1967) 69 SR (NSW) 23 at 35; see also at 27 per Wallace P, 29 per Walsh JA.

32 (1970) 123 CLR 361 at 394; [1970] HCA 8.

historic functions and processes of courts of law". In the joint judgment in *Bass v Permanent Trustee Co Ltd*[33] their Honours said:

> "Judicial power involves the application of the relevant law to facts as found in proceedings conducted *in accordance with the judicial process*." (emphasis added; footnote omitted)

71 There are elements of the judicial process which can be said, at least in a metaphorical way, to play a part in maintaining public confidence in the courts irrespective of their relationship to the actual outcome of the process. The appearance of impartiality is one such. In *North Australian Aboriginal Legal Aid Service Inc v Bradley*[34] the joint judgment quoted with approval the observation by Gaudron J in *Ebner v Official Trustee in Bankruptcy*[35]:

> "Impartiality and the appearance of impartiality are necessary for the maintenance of public confidence in the judicial system."

The somewhat elusive criterion of "public confidence" is in some cases, such as the appearance of bias, subsumed in what a fair and reasonable observer would think. The courts nevertheless depend in a real sense upon public confidence in the judicial system to maintain their authority. The maintenance of that authority depends, inter alia, upon that element of the judicial process which requires that parties before the court be given and be seen to be given a fair hearing. It is necessary to a fair hearing that the court be attentive to the evidence presented by the parties and to the submissions which they make. The appearance of unfairness in a trial can constitute a "miscarriage of justice" within the ordinary meaning of that term[36].

72 The appearance of a court not attending to the evidence and arguments of the parties and control of the conduct of the proceedings is an appearance which would ordinarily suggest to a fair and reasonable observer that the judicial process is not being followed. That is not to say that every minor distraction, inattention, sign of fatigue or even momentary sleepiness constitutes a failure of the judicial function. The courts are human institutions operated by human beings and there must be a margin of appreciation for human limitations. Otherwise the judicial system would be rendered unworkable by the imposition

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33 (1999) 198 CLR 334 at 359 [56]; [1999] HCA 9.

34 (2004) 218 CLR 146 at 162 [27]; [2004] HCA 31.

35 (2000) 205 CLR 337 at 363 [81]; [2000] HCA 63.

36 *R v Hertrich* (1982) 137 DLR (3d) 400 at 430 (Ont CA); *R v Duke* (1985) 22 CCC (3d) 217 at 223 (Alta CA).

of unachievable standards. Nevertheless, it would be an unnecessarily narrow view of the judicial duty to say that appeal courts are to judge such lapses solely by reference to their effects upon the outcome of the case. In so saying, it must be accepted that the question will ordinarily fall for consideration in the application of statutory language, in this case the common form provision for criminal appeals reflected in s 6(1) of the *Criminal Appeal Act*.

73 The standards to which courts are held and to which they hold themselves have become higher in recent times. Lord Steyn, giving the opinion of the Appellate Committee of the House of Lords in *Lawal v Northern Spirit Ltd*[37], said:

> "What the public was content to accept many years ago is not necessarily acceptable in the world of today. The indispensable requirement of public confidence in the administration of justice requires higher standards today than was the case even a decade or two ago."

74 In a jury trial it is not the judge but the jury which finds the facts. It reaches a verdict by applying to the facts the law as explained to it by the judge. But the judge's function in such a trial is not exhaustively described by saying that he or she rules on questions of law including the admissibility of evidence, sums up to the jury, directs the jury on matters of law and otherwise acts as a kind of referee between prosecution and defence. These are all attributes of a more broadly expressed function of supervision and control of and participation in the trial process[38]. That is a function which has long been understood. It requires no less a standard of attentiveness to the evidence and the conduct of the trial generally than the standard applicable to a judge sitting alone. Indeed, because of the involvement of the jury it requires more.

75 In *Capital Traction Company v Hof*[39] the Supreme Court of the United States described the concept of trial by jury in language, which it approved, from the District Court of the United States[40]:

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37 [2004] 1 All ER 187 at 196 [22].

38 Trends towards and arguments for increased judicial responsibility for the outcomes of criminal trials are discussed in Doran, "The Necessarily Expanding Role of the Criminal Trial Judge", in Doran and Jackson (eds), *The Judicial Role in Criminal Proceedings*, (2000) 3.

39 174 US 1 (1899).

40 174 US 1 at 15-16 (1899) quoting from *United States v One Thousand Three Hundred and Sixty-Three Bags of Merchandise* 27 Fed Cas 340 at 341 (1863).

> "The Constitution secures a trial by jury, without defining what that trial is. We are left to the common law to learn what it is that is secured. Now the trial by jury was, when the Constitution was adopted, and for generations before that time had been, here and in England, a trial of an issue of fact by twelve men, under the direction and superintendence of the court. This direction and superintendence was an essential part of the trial."

The temporary absence of a judge from the court during a trial by jury has been held, in United States cases, to be a fatal flaw in process on the basis that the court ceases to be constituted as a court. That flaw is linked to the indispensability of the judge's presence supervising and controlling the trial[41]:

> "A defendant convicted under such circumstances has been deprived of his liberty without due process of law."

76 It is difficult to distinguish in principle between the physical absence of a judge from the courtroom and sleep episodes which effect substantial discontinuities in the judge's superintendence and control of the trial. If it be accepted that the supervision and control of the trial by the judge is indispensable to trial by jury there is no requirement for present purposes to inquire whether its absence can be characterised as a failure to maintain a duly constituted court capable of exercising federal jurisdiction. Nor is it necessary to inquire whether its absence amounts to a failure to meet the constitutional guarantee of trial by jury. It suffices for present purposes that such a failure can be characterised as a miscarriage of justice by reference to common law concepts of trial by jury and what such trials necessarily entail. There are other dimensions going beyond the want of supervision and control to the effect of the judge's conduct upon his or her authority with the jury, the respect or lack of respect which its members may have for the trial process and, beyond that again, to public confidence in the courts.

77 Against this general background it is necessary to have regard to the words "miscarriage of justice" in s 6(1) of the *Criminal Appeal Act* and to the words of the proviso which authorises the Court of Criminal Appeal to dismiss the appeal if it considers that "no substantial miscarriage of justice has actually occurred".

78 Section 6(1) of the *Criminal Appeal Act* is a common form of statutory provision for criminal appeals which traces its legislative ancestry back to s 4(1) of the *Criminal Appeal Act* 1907 (UK). The history of that provision and its

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41 *People v Silver* 269 NYS 765 at 771 (1934) citing *People v Tupper* 55 P 125 at 125 (1898). See also *Bateson v State* 80 SW 88 at 91 (1904).

antecedents and the consequences of that history for its application were considered by this Court in *Weiss v The Queen*[42]. What that history revealed was that, before the introduction of the proviso by s 4(1) of the 1907 UK Act, a miscarriage of justice under the pre-existing Exchequer rule "was *any* departure from trial according to law, regardless of the nature or importance of that departure" (emphasis in original). When miscarriage of justice is seen in that light the word "substantial" has a function[43].

79 *Weiss* is authority for the proposition that the question whether an appellant may have lost a fair chance of acquittal is one to be considered under the proviso. It is not a necessary condition of the conclusion that there has been a "miscarriage of justice" as that term is used in "the dragnet ground" in s 6(1). Observations about the necessity of such a condition have been made in earlier cases and must be seen in the light of the approach taken by the whole Court in *Weiss*[44].

80 The earlier case of *TKWJ v The Queen*[45] concerned a decision by defence counsel not to adduce evidence as to the good character of an accused nor to seek an advance ruling as to the admission of adverse evidence in response. There was no defect in the instructions to the jury nor in the procedures followed at trial. As Hayne J pointed out, the question of "miscarriage of justice" in that case directed attention to the result of the trial[46]. Counsel's decision was significant only if it affected the result of the trial. The case is not authority for the proposition that the loss of a chance of acquittal is a necessary condition of the existence of a miscarriage of justice.

81 *Weiss* involved the admission of irrelevant but prejudicial evidence. In that context the Court in *Weiss* defined the task of criminal appeal courts applying the proviso. The task so defined requires their consideration of the whole of the record to reach an independent conclusion on whether the appellant

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42 (2005) 224 CLR 300 at 306-311 [12]-[25]; [2005] HCA 81.

43 (2005) 224 CLR 300 at 308 [18].

44 *Mraz v The Queen* (1955) 93 CLR 493 at 513 per Fullagar J; [1955] HCA 59; *Driscoll v The Queen* (1977) 137 CLR 517 at 524-525 per Barwick CJ; [1977] HCA 43; *R v Storey* (1978) 140 CLR 364 at 376 per Barwick CJ; [1978] HCA 39; *Wilde v The Queen* (1988) 164 CLR 365 at 375-376 per Deane J; [1988] HCA 6; *TKWJ v The Queen* (2002) 212 CLR 124 at 133 [25]-[26] per Gaudron J; [2002] HCA 46.

45 (2002) 212 CLR 124.

46 (2002) 212 CLR 124 at 157 [103].

was guilty beyond reasonable doubt of the offence on which the impugned verdict has been reached. There may be cases, nevertheless, in which there is a process failure of such significance that, whatever the apparent weight of the evidence against the accused person, it cannot be said that there has not been a substantial miscarriage of justice. That may be because the process failure has deprived the appeal court of the capacity to assess whether the appellant may have lost a fair chance of an acquittal. That proposition is supported by dicta in *Simic v The Queen*[47].

82 In *Simic*, the Court said[48], in relation to s 568(1) of the *Crimes Act* 1958 (Vic):

> "It is true that an appellant who claims that the trial judge misstated the facts to the jury must, if his appeal is to succeed, show that there was a miscarriage of justice. But since an accused person has a fundamental right to a fair trial, conducted in accordance with law, the fact that the case has not been properly presented to the jury will in some circumstances be enough to show that a miscarriage has occurred."

In *TKWJ*, McHugh J said that this dictum suggested that in some cases a material irregularity would itself constitute a miscarriage of justice. The context of the dictum suggested that in such a class of case there was no question of applying the proviso. However, the Court in *Simic* had also held that the onus was on the appellant to show that the misdirection which had occurred amounted to a miscarriage of justice. McHugh J concluded[49]:

> "Thus, *Simic* holds that, in most cases of misdirection on facts, the appellant has the onus of establishing a misdirection, that it might have affected the verdict and that, if it had not been made, the jury might have acquitted the appellant. In some undefined categories of cases, however, the irregularity may be so material that of itself it constitutes a miscarriage of justice without the need to consider its effect on the verdict."

83 In *Nudd* the Court was concerned with a contention that incompetency of trial counsel had caused a miscarriage of justice. Gleeson CJ observed that "the concepts of justice, and miscarriage of justice, bear two aspects: outcome and

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47 (1980) 144 CLR 319; [1980] HCA 25.

48 (1980) 144 CLR 319 at 331.

49 (2002) 212 CLR 124 at 147 [73].

process"[50]. He described the emphasis upon those two aspects as fundamental and familiar and continued[51]:

> "Some irregularities 'may' involve no miscarriage of justice if the appellate court forms a certain opinion about the strength of the case against the appellant. The corollary of that proposition is that a defect in process may be of such a nature that its effect cannot be overcome by pointing to the strength of the prosecution case. It is impossible to state exhaustively, or to define categorically, the circumstances in which such a defect will occur."

One such circumstance would arise where, as a result of the failure of process, the appellate court is deprived of the capacity justly to assess the strength of the case against the appellant. Gleeson CJ said[52]:

> "There may be other circumstances in which a departure from the requirements of a fair trial according to law is such that an appellate court will identify what occurred as a miscarriage of justice, without undertaking an assessment of the strength of the prosecution case. If there has been a failure to observe the conditions which are essential to a satisfactory trial and, as a result, it appears unjust or unsafe to allow a conviction to stand, then the appeal will be allowed."

84 Gummow and Hayne JJ saw "miscarriage of justice" in the common form of criminal appeal statute as encompassing a very wide variety of departures from the proper conduct of a trial. Their Honours said[53]:

> "Alleging that trial counsel was incompetent does not reveal what is said to be the miscarriage of justice. That requires consideration of what did or did not occur at the trial, of whether there was a material irregularity in the trial, and whether there was a significant possibility that the acts or omissions of which complaint is made affected the outcome of the trial." (footnotes omitted)

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50 (2006) 80 ALJR 614 at 617 [3]; 225 ALR 161 at 162 citing *Davies and Cody v The King* (1937) 57 CLR 170 at 180; [1937] HCA 27 and *Ratten v The Queen* (1974) 131 CLR 510 at 516 per Barwick CJ; [1974] HCA 35.

51 (2006) 80 ALJR 614 at 617 [6]; 225 ALR 161 at 163.

52 (2006) 80 ALJR 614 at 618 [6]; 225 ALR 161 at 163.

53 (2006) 80 ALJR 614 at 622 [24]; 225 ALR 161 at 170.

85 Kirby J, enunciating an individual rights-based approach, stated, inter alia, that provision of such rights is not necessarily confined to cases where their deprivation results in adverse consequences that might not otherwise have occurred[54]. In this context he referred to the judgment of the Ontario Court of Appeal in *R v Joanisse*[55] where Doherty JA said:

> "A reliable verdict may still be the product of a miscarriage of justice if the process through which that verdict was reached was unfair." (citations omitted)

Callinan and Heydon JJ agreed that the appeal should be dismissed notwithstanding counsel's incompetence on the basis that the appellant was not deprived of a chance of acquittal[56].

86 The case of incompetence of counsel which was considered in *Nudd* does not fall within the same category of defect of process as a failure of the judicial function. Nevertheless the approach taken in that case can be generalised to the identification of miscarriages of justice flowing from failure of process and to the application of the proviso.

87 There is support for the proposition that a failure of the judicial process may be so fundamental as to result in a trial which is incurably flawed. In *Katsuno v The Queen*[57] Gaudron, Gummow and Callinan JJ referred to *Maher v The Queen*[58] and *Johns (Roger) v The Queen*[59] which they said "[a]t one level" concerned failures to comply with mandatory legislative provisions governing the constitution and authority of the jury. Their Honours went on, however, to say[60]:

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54 (2006) 80 ALJR 614 at 634 [94]; 225 ALR 161 at 186.

55 (1995) 102 CCC (3d) 35 at 62.

56 (2006) 80 ALJR 614 at 644-645 [159]-[163]; 225 ALR 161 at 200-201.

57 (1999) 199 CLR 40.

58 (1987) 163 CLR 221.

59 (1979) 141 CLR 409; [1979] HCA 33.

60 (1999) 199 CLR 40 at 60 [35]. See also the application of that reasoning in *Petroulias v The Queen* [2007] NSWCCA 134 at [66]-[70] per Simpson J, Hoeben J agreeing.

> "At another [level], as is clear from the judgment of the Court in *Maher*, they are concerned with 'failure to observe the requirements of the criminal process in a fundamental respect', of which the failure to observe mandatory provisions relating to the constitution and authority of the jury is but an example. A conviction simply cannot stand if the trial process is flawed in a fundamental respect." (footnotes omitted)

88 If there be a flaw in a fundamental respect such that the appearance of injustice is indelibly stamped on the process and its outcome from the point of view of a reasonable and informed observer, this may be expressed by saying that public confidence would be undermined if the conviction were allowed to stand.

89 A trial process "flawed in a fundamental respect" falls into that category. Such deficiencies in process constitute miscarriages of justice. It may be that such a deficiency raises a possibility that a chance of acquittal has been lost but is of such a nature that no inquiry under the proviso could resolve that question. In that case it cannot be said that there has been no substantial miscarriage of justice. In such a case the proviso cannot apply. It may be that the deficiency is of its nature "substantial" and warrants no further inquiry, under the proviso, into its effects upon the appellant's chances of acquittal.

Whether sleep or inattention by a trial judge can constitute a miscarriage of justice in a trial by jury

90 It is perhaps a reflection of the human condition and the demanding nature and expectations of the judicial function that the phenomenon of the sleeping or apparently sleeping judge has a long history dating back to Plato's reference to "dozing judges"[61].

91 Appellate courts in common law jurisdictions have deprecated judicial sleepiness where it has occurred. Nevertheless in reported cases in the United Kingdom, the United States and Canada there has been a tendency to focus on the practical effects of the judge's conduct on the trial process. In many of the cases this may be attributed, at least in part, to the brevity or inconsequential character of the incidents. In some cases failure by counsel to raise concerns at trial about the judge's condition has been a significant factor weighing against appellate intervention[62].

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61 See Pannick, *Judges*, (1987) at 77-78; Foss, *A Biographical Dictionary of the Judges of England*, (1870) referring at 223 to Judge Doderidge. See also William Hogarth's 1758 painting *The Bench*.

62 Examples abound. In the United Kingdom: *R v Edworthy* [1961] Crim LR 325; *R v Tancred* unreported, Court of Appeal (Criminal Division), 14 April 1997; *R v*

(Footnote continues on next page)

92 The general principle that a fair trial requires a judge to be attentive to the evidence and submissions of the parties was supported by the judgment of the Court of Appeal of England and Wales in *Stansbury v Datapulse plc*[63]. Peter Gibson LJ (Latham LJ and Sir Martin Nourse agreeing) said:

> "A member of a tribunal who does not appear to be alert to what is being said in the course of the hearing may cause that hearing to be held to be unfair, because the hearing should be by a tribunal each member of which is concentrating on the case before him or her. That is the position, as I see it, under English law, quite apart from the European Convention on Human Rights."

Peter Gibson LJ saw the proposition as reinforced by Art 6(1) of that Convention[64].

93 If, by reason of sleep episodes or serious inattention, the reality or the appearance exists that a trial judge has substantially failed to discharge his or her duty of supervision and control of the trial process in a trial by jury, then enough has been made out to establish a miscarriage of justice. The question whether there has been the reality or appearance of a substantial failure by the judge to perform his or her duty will require assessment of a number of factors including:

1. Whether the conduct of the judge can be said to have affected the outcome of the trial.

Moringiello [1997] Crim LR 902; *R v Betson* [2004] 2 Cr App R (S) 52. In the United States: *Chicago City Railway Co v Anderson* 61 NE 999 (1901); *United States v White* 589 F 2d 1283 (1979); *United States v Yanez-Baldenegro* 1994 US App LEXIS 22103 (9th Circuit); *Hummel v State* 617 NW 2d 561 (Minn 2000); *People v Degondea* 769 NYS 2d 490 (2003); *United States v Martinez* 97 Fed Appx 869 (2004); *Lampitok v State* 817 NE 2d 630 (Ind App 2004). In Canada: *R v Caley* 1991 CanLII 304 (BC SC); *R v Chan* (2007) 429 AR 101 (which cited *Cesan* (2007) 174 A Crim R 385); *Leader Media Productions Ltd v Sentinel Hill Alliance Atlantis Equicap Limited Partnership* (2008) 90 OR (3d) 561.

63 [2004] ICR 523 at 533 [28].

64 *Kraska v Switzerland* (1993) 18 EHRR 188 at 200 [30], 201 [32]. Successful appeals based on the appearance of sleep were *R v Weston-super-Mare Justices; Ex parte Taylor* [1981] Crim LR 179; *Kudrath v Ministry of Defence* unreported, Employment Appeal Tribunal, 26 April 1999; cf *R v Langham and Langham* [1972] Crim LR 457.

2. Whether the conduct of the judge has created a risk that the outcome of the trial may have been affected.

3. Whether counsel raised the question of the trial judge's conduct at the trial.

4. Whether the jury appeared to have noticed or to have been distracted or otherwise affected by the judge's conduct.

None of these factors, taken by itself, is determinative. There is an overall assessment to be made in deciding whether a failure or apparent failure by the judge for whatever reason to attend to the duty of supervising and controlling the trial process amounts to a miscarriage of justice. In so saying it should be emphasised that the duty of counsel in a case of non-trivial inattention or sleep episodes is to draw these issues to the attention of the judge in the absence of the jury. The failure of counsel to do so may support an inference that the judge's conduct did not amount to a substantial failure in the judicial process at trial. However, it will not always be determinative.

Whether the judge's conduct in this case constituted a miscarriage of justice

94 In this case the facts, as found by Basten JA, were amply supported by the evidence taken before the Court of Criminal Appeal, which was reviewed earlier in these reasons. They indicated a substantial failure of the judicial process. The trial judge was asleep on a number of occasions on the 11 days when evidence was being given. He slept at least once on most of those days and on some days on two or three occasions. Some of the sleep episodes, possibly between two and five, lasted from 10 to 15 minutes. Most lasted between two and 10 minutes. The judge's sleeping was accompanied by heavy breathing on a number of occasions and he snored when Cesan was giving his evidence. This was disruptive and caused Cesan to look around at the trial judge. The judge also slept through parts of Mas Rivadavia's evidence. The jury was distracted by the judge's sleep episodes and some of the jury members found his behaviour amusing and even emulated it.

95 The fact that counsel at the trial did not draw the matter to the judge's attention does not, on the evidence in this case, appear to be based upon any assessment that the judge's conduct did not matter. Rather, it seemed it had been based on the defeatist proposition that nothing could be done.

96 In this case there was a miscarriage of justice by failure of the judicial process. It was constituted by the judge's substantial failure to maintain the necessary supervision and control of the trial. Further, his conduct created a distraction during the trial process. In particular it distracted the jury and led at least some of the members of the jury to regard the judge with amusement.

Whether there was no substantial miscarriage of justice

97 It could not be said in this case that there was no substantial miscarriage of justice within the meaning of the proviso to s 6(1). The judge's conduct had a discernible distracting effect on the jury. The reaction of some of the jury members raised a real question about the extent to which they would have attended to the evidence and accorded to the judge's directions the respect and attention they required. The Court of Criminal Appeal was in no position to assess these imponderables. The nature of the miscarriage of justice which occurred put such inquiry beyond its reach. Further, this is a case in which the miscarriage of justice was substantial because it created the appearance of injustice which could not be cured by the Court of Criminal Appeal forming the opinion that a reasonable jury would have convicted the appellants in any event.

Conclusion

98 For the preceding reasons, I joined in the orders in this case allowing the appeals, setting aside the convictions and remitting the matters for retrial.

99 GUMMOW J. In his reasons the Chief Justice explains the constitutional and statutory (federal and State) structure upon which rested the trial on joint indictment of the appellants in the District Court of New South Wales on charges laid under federal law. The provisions of s 11 of the *District Court Act* 1973 (NSW) and s 131 of the *Criminal Procedure Act* 1986 (NSW) produced the result that, as a matter of New South Wales law, the trial was to be "by a jury". There is no suggestion that these provisions were not "picked up" by federal law and no suggestion that they conflicted with the requirements of s 80 of the Constitution.

100 Argument on the appeals to this Court was limited to what was said to be a serious systemic failure in the conduct of the jury trial by reason of a lack in the necessary superintendence of the proceedings by the trial judge. The appellants complained that the Court of Criminal Appeal of the Supreme Court of New South Wales (Grove and Howie JJ, Basten JA dissenting)[65] had erred in dismissing the appeals against conviction. The appellants contended that there had been "a miscarriage of justice" and that this had not attracted the exercise of the power to dismiss an appeal because the appellate court "considers that no substantial miscarriage of justice has actually occurred" within the meaning of s 6(1) of the *Criminal Appeal Act* 1912 (NSW) ("the Criminal Appeal Act"), again as "picked up" by federal law.

101 The appeals to this Court may be decided favourably to the appellants by reference to the State legislative structure and the common law of Australia respecting the character of trial by jury, without entering upon the question whether s 80 of the Constitution imposed requirements which both went beyond those of the common law and were not satisfied by the conduct of the trial of the appellants.

102 The relevant characteristic of the institution of jury trial inherited in Australia and elsewhere from the English common law was explained by Sir Matthew Hale in his work *The History of the Common Law*, first published posthumously in 1713[66]. The tenth of the excellencies of the jury trial was identified by Hale as follows[67]:

> "that the judge is always present, at the time of the evidence given in it. Herein he is able, in matters of law, emerging upon the evidence, to direct

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65 *Cesan v Director of Public Prosecutions (Cth)* (2007) 174 A Crim R 385.

66 Cromartie, *Sir Matthew Hale 1609-1676*, (1995) at 104.

67 Hale, *The History of the Common Law*, 5th ed (ed Runnington) (1794), vol 2 at 147.

> them; and also, in matters of fact, to give them a great light and assistance, by his weighing the evidence before them, and observing where the question and knot of the business lies; and by showing them his opinion even in matter of fact; which is a great advantage and light to lay-men. And thus, as the jury assists the judge in determining the matter of fact, so the judge assists the jury in determining points of law, and also very much in investigating and enlightening the matter of fact, whereof the jury are the judges."

103 It was with these observations in mind that, in the 19th century, United States decisions stressed as an essential part of the institution of trial by jury inherited from England, the direction and superintendence of the judge[68]. In delivering the reasons of the Supreme Court of the United States in *Capital Traction Company v Hof*[69], Gray J remarked:

> "'Trial by jury,' in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and empanelled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence."

104 With these basic principles in mind, it becomes apparent that the unusual circumstances to which the medical condition of the trial judge gave rise called for a response in the Court of Criminal Appeal which applied to the evidence before it concerning the conduct of the trial of the appellants, the statutory criterion of "miscarriage of justice", followed by a consideration of the "proviso" to s 6(1) of the Criminal Appeal Act. No modification of established principle is necessary to determine that the majority of the Court of Criminal Appeal erred in dismissing the appeals.

105 The superintendence of the trial by the trial judge required him to ensure that the jury was not distracted from paying full attention. The evidence which was accepted by the Court of Criminal Appeal showed both that the jury was

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68 The impact of Jacksonian populism upon the laws of some States curtailing the functions of the trial judge was traced and lamented by Wigmore: *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 3rd ed (1940), vol 9, §§2551-2551a.

69 174 US 1 at 13-14 (1899).

distracted from paying attention to all of the evidence and that the very source of the distraction was the sleeping judge.

106 The consequence was that in respect of each appellant there was a miscarriage of justice within the meaning of s 6(1) of the Criminal Appeal Act.

107 As to the application of the proviso to s 6(1), I agree with what is said by Hayne, Crennan and Kiefel JJ.

108 For these reasons I supported the making of the orders pronounced at the conclusion of the oral argument on these appeals.

109 HAYNE, CRENNAN AND KIEFEL JJ. The facts and circumstances giving rise to the appeals are set out in the reasons of French CJ and need not be repeated. At the conclusion of argument, the Court made orders allowing each appeal, setting aside the orders of the Court of Criminal Appeal of the Supreme Court of New South Wales dismissing each appellant's appeal against conviction and sentence, and in their place ordering that the appeal to the Court of Criminal Appeal against conviction should in each case be allowed, the appellant's conviction quashed, and a new trial had. What follows are our reasons for joining in those orders.

110 The disposition of the appeals to this Court depended, in our opinion, on the application of established principles to the particular facts and circumstances of the case. No development or amplification of those principles is necessary in order to conclude that the Court of Criminal Appeal should have allowed each appellant's appeal, quashed his conviction, and ordered a new trial.

111 Each appellant's appeal to the Court of Criminal Appeal presented two questions which must be framed by reference to the words of s 6(1) of the *Criminal Appeal Act* 1912 (NSW). Was there "on any other ground whatsoever ... a miscarriage of justice"? If there was, should the Court of Criminal Appeal conclude that "no substantial miscarriage of justice has actually occurred"?

Miscarriage?

112 There was, in these cases, "on any other ground whatsoever ... a miscarriage of justice" because the trial judge did not exercise that degree of supervision of the proceedings which would ensure, so far as reasonably practicable, that the jury paid attention to all of the evidence as it was given. The occasion for this departure from the proper conduct of the trial was the trial judge falling asleep. (The trial judge was later diagnosed as suffering from severe obstructive sleep apnoea.) But for present purposes, attention should focus upon the *consequences* of the trial judge falling asleep[70].

113 The majority in the Court of Criminal Appeal (Grove and Howie JJ) concluded[71] that no defect in the trial was identified. In particular, the majority

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70 *TKWJ v The Queen* (2002) 212 CLR 124 at 134 [31], 135 [33] per Gaudron J, 149-150 [79] per McHugh J, 157 [101] per Gummow J, 157 [104] per Hayne J; [2002] HCA 46; *Nudd v The Queen* (2006) 80 ALJR 614 at 622 [24] per Gummow and Hayne JJ; 225 ALR 161 at 170; [2006] HCA 9.

71 *Cesan v Director of Public Prosecutions (Cth)* (2007) 174 A Crim R 385 at 430 [191] per Grove J, with whose reasons Howie J agreed.

rejected[72] the conclusion reached by Basten JA[73] that the trial judge's conduct tended to undermine the routine directions given at the commencement of the trial and cast doubt on whether it could be presumed that the jury would follow the judge's instructions.

114 In his evidence to the Court of Criminal Appeal, Mr Cesan complained that he found the judge's conduct, when he was giving evidence at trial, to have been disruptive, but the majority put this complaint aside[74] as being "general in expression" and not accompanied by any attempt to identify any error in, or omission from, the evidence which Mr Cesan gave at his trial.

115 All members of the Court of Criminal Appeal accepted that, as Grove J put it[75], "the probability [was] that, from time to time, the judge was 'nodding off' and on other occasions, notably when he was heard to snore, was asleep in a real and practical sense". And all members of the Court of Criminal Appeal accepted[76] the evidence of Mr Cesan that, during his cross-examination, the trial judge was heard to snore and that, as a result, some members of the jury "were looking at the judge and not [Mr Cesan] or the prosecutor" and that some "looked surprised and others were smiling"[77].

116 The importance of the evidence given in the Court of Criminal Appeal by Mr Cesan was that it showed that during the cross-examination of one of the two accused on trial at least some members of the jury were not paying attention to the evidence being given. And the findings made by all members of the Court of Criminal Appeal showed that the distraction that occurred during Mr Cesan's cross-examination was probably no isolated incident. There were other substantial periods of time during the trial when the trial judge was asleep and it follows, as Basten JA rightly concluded[78], that it is probable that the attention of

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72 (2007) 174 A Crim R 385 at 433 [208]-[209].

73 (2007) 174 A Crim R 385 at 413 [106]-[107].

74 (2007) 174 A Crim R 385 at 428 [178].

75 (2007) 174 A Crim R 385 at 429 [188]. See also at 402-403 [62] per Basten JA.

76 (2007) 174 A Crim R 385 at 402-403 [62] per Basten JA, 428 [177]-[178] per Grove J.

77 (2007) 174 A Crim R 385 at 394-395 [32], 402-403 [62] per Basten JA, 428 [178] per Grove J.

78 (2007) 174 A Crim R 385 at 403 [65].

members of the jury was distracted from other evidence being adduced because the trial judge was asleep. And because the trial judge was asleep, no step was taken to refocus the jury's attention upon the evidence.

117 The conclusion reached by the majority in the Court of Criminal Appeal, that the jury should be taken to have paid attention to the instructions the trial judge gave during the trial, denies that there was on *this* account a miscarriage of justice. But it does not conclude the issue.

118 As noted earlier in these reasons, in considering whether there was a miscarriage of justice at the trial, attention must focus upon the respect or respects in which it is said that there was some departure from the proper conduct of the trial, rather than upon the cause of the departure. That is why, in the present cases, to focus only upon the fact that the trial judge fell asleep during some parts of the trial diverts attention from identifying whether there was some miscarriage.

119 What is important, in these cases, is that the jury was distracted from paying attention to all of the evidence. And it was upon the assessment of all of the evidence led at trial that the jury's verdict had to be founded. The repeated distraction of the jury from attending to the evidence at various stages of the trial, including when one of the accused was giving his evidence, constituted a miscarriage of justice.

120 Ensuring that the jury is not distracted from paying full attention to its task is pre-eminently a matter for the trial judge. If trial counsel is concerned that members of the jury cannot give, or are not giving, proper attention during the trial, it will be for counsel to raise that issue with the trial judge. Ordinarily, if the trial judge does not act of his or her own motion, and if trial counsel says nothing, an appellate court will not later be able to conclude that the jury did not pay attention to the evidence that was led. In particular, proffering the opinion of one or more observers about whether the jury appeared to be paying attention to proceedings would not ordinarily suffice to show that there has been a miscarriage of justice. The absence of intervention by the trial judge will usually far outweigh the value of any opinion offered by some observer after the trial is over.

121 In the present cases, however, the evidence that was accepted by the Court of Criminal Appeal went beyond the bald assertion of observers that the jury seemed not to have paid attention during the trial. The evidence that was led in the Court of Criminal Appeal showed that the jury was distracted from paying attention to all of the evidence and was distracted because the trial judge was asleep.

122 There having been "on any other ground whatsoever ... a miscarriage of justice", s 6(1) of the *Criminal Appeal Act* obliged the Court of Criminal Appeal to allow the appeals against conviction, unless persuaded that the proviso was engaged.

The proviso

123 In *Weiss v The Queen*[79], the Court said that it was neither right nor useful to attempt to lay down absolute rules or singular tests to govern the application of the proviso beyond three fundamental propositions. First, the appellate court must itself decide whether a substantial miscarriage of justice has actually occurred. Second, that task is an objective task which is not materially different from other appellate tasks. Third, the standard of proof is the criminal standard. The Court rejected[80] the use of expressions, like loss of a real chance of acquittal, as substitutes for the statutory language. Rather, the Court held[81] that no single universally applicable description of what constitutes "no substantial miscarriage of justice" can be given.

124 The Court further held[82] in *Weiss* that a necessary, but not always sufficient, step to the application of the proviso is that the appellate court is persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict of guilty. But the conclusion that guilt of the accused was proved to that standard does not, in every case, suffice to show that there was no substantial miscarriage of justice. An example of circumstances in which consideration of what was proved at trial is not a sufficient basis for applying the proviso is provided by *AK v Western Australia*[83]. In that case the relevant statute required that the trial of an accused, by judge alone, yield a reasoned decision, but there were no reasons given at the appellant's trial for the determination of the central issue tried in the case. That being so, it could not be said that there was no substantial miscarriage of justice.

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79 (2005) 224 CLR 300 at 316 [42]; [2005] HCA 81.

80 (2005) 224 CLR 300 at 313 [33].

81 (2005) 224 CLR 300 at 317 [44].

82 (2005) 224 CLR 300 at 317 [44].

83 (2008) 232 CLR 438; [2008] HCA 8.

125 In *Wilde v The Queen*[84], reference was made to the possibility that some errors occurring in the course of a criminal trial may amount to such a serious breach of the presuppositions of the trial as to deny the application of the proviso. The appellants submitted, both in the Court of Criminal Appeal and in this Court, that these cases were of this kind. That is, the appellants submitted that the inattention of the trial judge at various times during the trial meant that there was no trial by judge and jury.

126 But just as the application of the proviso is not to be determined by deduction from expressions which attempt to describe the operation of the statutory language in other words, what was said in *Wilde* is not to be taken as if it were a judicially determined exception grafted upon the otherwise general words of the relevant statute[85]. And the application of the proviso is not to be determined according only to whether the form of expression used in *Wilde*, or some other conclusive statement, appears to be an apt description of the course of the trial. Rather, it is necessary to have regard to the miscarriage of justice that has been identified.

127 In these cases the miscarriage lies in the distraction of members of the jury from their task. And because that is the miscarriage of justice that occurred in these cases, it is not possible to conclude, on the written record of the trial, that the evidence properly admitted at trial proved the appellants guilty beyond reasonable doubt. As noted earlier, forming that conclusion is a necessary condition for applying the proviso.

128 In *Weiss*, the Court pointed out[86] that, in considering the application of the proviso, an appellate court's task "must be undertaken on the *whole* of the record of the trial including the fact that the jury returned a guilty verdict" (emphasis in original). But in undertaking that task an appellate court must be conscious of the "natural limitations"[87] that exist in the case of an appellate court proceeding wholly or substantially on the record of the trial[88].

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84 (1988) 164 CLR 365 at 373; [1988] HCA 6.

85 *AK v Western Australia* (2008) 232 CLR 438 at 455-456 [54].

86 (2005) 224 CLR 300 at 317 [43].

87 *Dearman v Dearman* (1908) 7 CLR 549 at 561; [1908] HCA 84.

88 *Weiss v The Queen* (2005) 224 CLR 300 at 316 [41]; *Fox v Percy* (2003) 214 CLR 118 at 125-126 [23]; [2003] HCA 22.

129 In many cases where the proviso is to be considered, the fact that the jury returned a guilty verdict will indicate rejection of any explanation proffered by the accused in evidence. In the present cases, however, the relevant hypothesis is that the jury did not pay attention to all of the evidence led at trial. In particular, the jury was distracted when one of the two accused persons was giving his evidence. In those circumstances, it is not possible, in these cases, to place any weight upon the fact that the jury returned its verdicts of guilty.

130 Each accused proffered an explanation of what was put against him. In transcript the explanation may lack persuasion. But whether the evidence as a whole, including what each accused said in explanation, was sufficient to establish guilt beyond reasonable doubt was a question for the jury to decide having regard to more than the words that are recorded in the transcript of the proceedings. But because members of the jury were distracted, *they* did not perform this task. And more importantly, the Court of Criminal Appeal could not decide from the record alone that the explanations proffered by each accused were in each case to be rejected and the conclusion reached beyond reasonable doubt that each was guilty.

131 Finally, some weight was given[89] by the majority in the Court of Criminal Appeal to a letter written by Mr Cesan to the trial judge after the jury had returned a guilty verdict and before sentence was passed. The majority in the Court of Criminal Appeal considered[90] that, in the letter, he admitted his guilt of the offence charged. The letter was written for the evident purpose of mitigating the sentence that was then to be passed upon Mr Cesan. To do other than accept the jury's verdict would have aggravated the sentence. No weight can be attached to what was said in the letter in deciding whether there was no substantial miscarriage of justice.

132 For these reasons the proviso was not engaged. It could not be said that no substantial miscarriage of justice actually occurred.

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89 (2007) 174 A Crim R 385 at 427-428 [175]-[176].

90 (2007) 174 A Crim R 385 at 428 [176].

133 HEYDON J. I support the orders which the Court pronounced at the close of oral argument for the reasons given by Gummow J and by Hayne, Crennan and Kiefel JJ.