

Part 2 - The nature of the present proceedings

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As I have indicated s 474C(1) requires the case in this Court to be dealt with as an appeal under the Criminal Appeal Act . Section 474L provides for this Court to deal with the case so referred, in the same way as if the person had appealed against the conviction under the Criminal Appeal Act.

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The effect of these provisions in the circumstances of a previous appeal, as occurred in the present case, was considered by this Court in the matter of Johns (1999) 110 A Crim R 149. In his Honour's reasons for judgment Greg James J referred to the article by A Castles, "Executive References to a Court of Criminal Appeal" (1960) 34 ALJ 163 as providing an authoritative discussion of the relevant principles. His Honour described those principles in terms which are relevant to the present proceedings. His Honour said:

"It has been held that on such a reference the court was re-invested with jurisdiction notwithstanding an appellant had exercised and exhausted the ordinary right of appeal: Gunn (No 1) 43 SR (NSW) 23; but that the court was not called on to re-adjudicate upon any ground of appeal which had already been heard and disposed of unless some new matter arose (for example, fresh evidence) warranting a reconsideration (Gunn (No 2)) (1942) 43 SR (NSW) 27). Mickelberg (1989) 167 CLR 259; 43 A Crim R 182, which confirmed the current test for the admissibility of fresh evidence on appeal, was itself an appeal from the Court of Criminal Appeal of Western Australia on a reference of the whole case under a similar provision. The jurisprudence developed as governing the reception of new and fresh evidence on appeal has been held to be

applicable to these matters: Mickelberg; Davies and Cody (1937) 57 CLR 170. Mickelberg established that:

"Prima facie, the reference of the whole case required the Court of Criminal Appeal to consider the case in its entirety, subject only to the limitation that it 'be heard and determined ... as in the case of an appeal by a person convicted'. That limitation necessitates that the matter be determined by 'legal principles appropriate to an appeal': Ratten (1974) 131 CLR at 514, per Barwick CJ. See also R v. Gunn [No. 1] (1942) 43 SR (NSW) 23 at 25, per Jordan CJ and Allen, Allen and Winter (1910) 5 Crim. App. R. 225 at 226.

It has been held that, where the whole case is referred, the court may consider matters not relied upon in the petition (R v. Gunn [No. 2] (1942) 43 SR (NSW) 27 at 31 and matters not specified in the reference (Reg v. Chard [1984] AC 279. On the other hand, it has been said that, as a matter of practice, the considerations may be confined to those in the petition or the reference: see Re Matthews and Ford [1973] VR 199 at 201; Reg v. Chard [1984] AC at 292-293. And in R v. Gunn [No. 2] (1942) 43 SR (NSW) at 29 Jordan CJ. stated:

'In a case in which there has already been an appeal which has been disposed of on the merits the court, in the case of a reference such as the present, is not called upon to re-adjudicate upon any ground of appeal which has been already heard and disposed of, unless some new matter has come to light which makes a reconsideration of the ground necessary or desirable.'

The words of s 21 (a) of the Code, so far as they require 'the whole case ... [to] be heard and determined', permit of only one meaning. It is the whole case which must be passed upon by the application of legal principles appropriate to criminal appeals. That being so, the power

to exclude matters from consideration is properly to be seen as an aspect of the inherent power of a court to control its own proceedings. That power will authorise the exclusion of issues which are frivolous or vexatious: see *Jackson v. Sterling Industries Limited* (1987) 162 CLR 612; *Tringali v. Stewardson Stubbs & Collett Limited* (1966) 66 SR (NSW) 335; *Metropolitan Bank v. Pooley* (1885) 10 App. Cas. 210. However, subject to an issue being properly excluded as frivolous or vexatious, it is, in our view, the duty of a court to which there has been a reference of the whole case to pronounce upon the whole case as presented."

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As his Honour observed it is the duty of this Court to consider and determine the appeal having regard to the whole of the case as presented at the trial and the evidence received by Davidson ADCJ and his Honour's findings.

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The applicability of r 4 of the Criminal Appeal Rules relating to admissions is replaced by s 474L and r 78. In so far as the appeal relates to matters of fact no leave is necessary, notwithstanding s 5 of the Criminal Appeal Act.

The approach to the findings made by Davidson ADCJ

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Substantial evidence was given in the hearing before Davidson ADCJ and his Honour made many findings of fact. Many of those findings are sought to be challenged by the Crown in this appeal in submissions which extend over hundreds of pages and include detailed references to various matters in the evidence. In many respects the submissions seek to

persuade this Court that, having regard to all of the evidence which is now available, the Crown case in relation to each count is overwhelming.

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The correct approach to be taken when a matter or issue is remitted to a court of trial for determination, was considered by this Court in *Histollo Pty Ltd v Director-General of National Parks and Wildlife Service* (1998) 45 NSWLR 661. The reasons for decision in that appeal make plain that an appeal to this Court lies with respect to any determination in relation to a matter of fact made by Davidson ADCJ. However, that appeal is confined to the right of appeal conferred by s 5 of the Criminal Appeal Act. Accordingly, the appeal is not by way of rehearing and this Court may not intervene unless satisfied that an error has occurred. This Court has expressed the relevant test in the following terms:

"Error may be demonstrated if there is no evidence to support a particular finding, or if the evidence is all one way, or if the judge has misdirected himself. But, unless error has first been established, this Court has no power to substitute its own findings for those of the trial judge." *R v Simmons* (1995) 79 A Crim R 31 at 35.

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Accordingly, in so far as the Crown submissions seek to persuade this Court to come to a different view of the facts than was reached by Davidson ADCJ, unless appellable error is revealed, the submission must be rejected.