II APPROACH TO THE DETERMINATION OF FACTUAL ISSUES

(a) CURRENT GROUNDS OF APPEAL

9. Subject to the Attorney-General's referral of the matter to the Court of Criminal Appeal, the following grounds of appeal were filed:

"1. The convictions of the appellant on eight counts of the indictment presented against her are the result of miscarriage of justice which has two separate but related components:

(a) The former detective in charge of the case, Peter Thomas was at all relevant times a corrupt policeman, who was prepared to and did manufacture and invent the evidence upon which the convictions were based. The propensity of Peter Thomas towards corruption and the perversion of justice has been repeatedly demonstrated in other matters occurring both before and after the trial of the appellant;

(b) The whole course of the committal and trial process leading up to the convictions of the appellant was contaminated by the fact of the multiplicity of the charges being presented against the appellant at the same time with resulting unfair prejudice to her.
2. In relation to each of the charges on which the appellant was convicted the conviction is, having

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regard to the evidence at the trial and the evidence now available, unreasonable and should not be permitted to stand".

(b) GENERAL APPROACH

10. I have adopted the view that s12(2) requires me as the judge of the court of trial to act in aid of the Court of Criminal Appeal in its ultimate disposition of the Appeal being a convenient way of

determining factual issues for the assistance of that Court. It is not designed to alter substantive rights (Histolo P/L v Director General of National Parks and Wildlife Services (1998) 45 NSWLR 661)

11. It will be seen from the current grounds of appeal that reliance is placed upon a consideration of the evidence given at trial and also evidence "now available". To the extent that new or fresh evidence is relied upon, it is to be considered in the context of evidence given at the trial. The referral of the "whole case" by the Attorney General to the Court of Criminal Appeal and the unrestricted terms of the referral by the Court of Criminal Appeal to a court of trial also suggest this approach.

12. R v Johns (2001) 110 A Crim R 149 is authority for the following propositions:

i) Prima facie the reference of the whole case requires that the Court of Criminal Appeal consider the case in its entirety subject only to the limitation that it be heard and determined as in the case of an appeal of a person convicted, that is to say by application of legal principles appropriate to an appeal;

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ii) That Court may consider matters not relied upon in the petition under Part 13A and matters not specified in the reference to the Court, although as a matter of practice consideration may be confined to matters raised in the petition;

Where there has already been an appeal disposed of on its merits, the Court of Criminal Appeal is not called upon to re-adjudicate upon any ground of appeal which has already been heard and disposed of unless some new matter has come to light which makes a reconsideration of the ground necessary or desirable;

iv) The Court of Criminal Appeal may exclude from consideration matters which it regards as frivolous or vexatious;

v) Rule 4 is displaced by the provisions of s474L of the Crimes Act 1900 and rule 78 (which dispenses with any requirement which would otherwise apply for the

appellant to seek leave).

(c) S474C(1)(b) CRIMES ACT 1900

13. I accept the submission of learned counsel for the Crown, and not challenged by counsel for the appellant, that the choice by the Attorney-General of s474C(1)(b) rather than s474C(I)(a) of the Crimes Act 1900, has important repercussions for my approach to the making of determinations under s12 of the Criminal Appeal Act 1912.

14. In determining factual issues arising on an appeal under the Criminal Appeal Act 1912, I must act in accordance with the

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legal principles applicable to an appeal subject to the exclusion of the operation of rule 4.

15. Whereas s474C(1)(b) has this effect, s474C(1)(a) refers to an "inquiry to be conducted by a prescribed person into the conviction or sentence". This in turn invokes the provisions of s474G(2) of the Crimes Act 1900 conferring on the prescribed person conducting such an inquiry "the powers, authorities, protections and immunities conferred on a commissioner by Division 1 of Pt 2 of the Royal Commission Act 1923". I have no such powers, authorities, etc.

16. Accordingly, I have left the parties to develop their case before me although from time to time I have suggested to counsel matters which might be of assistance to me in the making of determinations.

(d) FRESH EVIDENCE

17. To the extent to which the appellant relies upon evidence not adduced at trial, the underlying question for the Court of Criminal Appeal is whether the absence of the evidence from the trial resulted in a miscarriage of justice: Gallagher v The Queen (1986) 160 CLR 392 at p395, 402 and 410; affirmed Mickelberg v The Queen (1989) 167 CLR 259. See also TKWJ v The Queen 76 ALJR 1579.

18. There will be no miscarriage of justice unless the evidence is fresh in the sense of being either unavailable at the trial or which, with reasonable diligence, could not have been made

available although "there may be somewhat greater latitude in the case of criminal trials". The requirement that the evidence be fresh is "not a universal and inflexible requirement: the strength of the fresh evidence may in some cases be such as to

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justify interference with the verdict, even though that evidence might have been discovered before the trial". Gallagher (op cit) at 395.

19. "In essence the fresh evidence must be such that, when viewed in combination with the evidence given at trial, it can be said that the jury would have been likely to entertain a reasonable doubt about the guilt of the accused if all the evidence had been before it" (citing Brennan J in Gallagher (op cit) at 410), or "if there be a practical difference that there is a significant possibility that the jury, acting responsibly, would have acquitted the accused" (citing Gallagher (op cit) per Gibbs CJ at 399 and per Mason and Deane JJ at 402); Mickelberg (op cit) at 301).

20. In Mickelberg, Toohey and Gaudron JJ saw no practical difference between the "significant possibility" and "likely"' test. Their Honours held that the fresh evidence must be credible in the sense that a reasonable person could accept it as true but it is not necessary that the court should conclude that it is likely that a reasonable jury would believe it (Mickelberg (op cit at 302);

21. Where the fresh evidence goes only to impugn the credit of a Crown witness or witnesses, the test is whether the material is properly capable of acceptance and "if so accepted would so affect such credit that, having regard to the part played in the trial by the evidence of that witness, it is likely that a jury would have arrived at a different verdict" (R v Saleam (1989) 16 NSWLR 14 at 21);

22. Failure to adduce evidence as a result of an informed and deliberate decision of counsel to avoid a forensic risk will not involve a miscarriage of justice. It may only do so where there

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does not appear to be any reasonable explanation for not adducing the evidence. Where it is claimed that there was a miscarriage of justice because of a course taken at the trial, it is

for the appellant to establish that the course taken was not the result of an informed and deliberate decision (TKWJ v The Queen 76 ALJR 1579 per Gaudron J (31)(33); Gummow J (101); Haynes J (106)(108)).

(e) ALLEGED MISCONDUCT BY POLICE

23. Mere adverse reference to a police witness, as, for example, in the Royal Commission into Police Misconduct, does not per se justify a conclusion that a conviction involved a miscarriage of justice.

24. Nor, however, does the existence of an adverse reference to a police witness, but outside the specific subject matter of the trial, necessarily involve the conclusion that there was no miscarriage of justice.

25. What should be considered is whether there is material which is capable of disclosing conduct "or possibly a reputation therefore, pointing to a preparedness in the officer to act corruptly, at least by dishonesty, in the performance of his duties in criminal investigations. The closer the suggested adverse conduct is in the Royal Commission material to that which is relevant to the particular trial, the more persuasive will be the position of an appellant in an appeal of this nature" (R v Vastag unreported NSWCCA 12 May 1997 per Levine J, Studdert J agreeing).

26. In Vastag, Meagher JA dissenting said that evidence of this kind falls into three categories:

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i) Where there are admissions by police officers concerning the facts of the case under appeal: In such a case the appeal should be upheld and a new trial ordered "at least if those admissions are of any substance";

ii) Where the police evidence in the Royal Commission involves no admissions concerning the facts of the case on appeal but does involve admissions of misconduct in other matters: If the admissions are of sufficient gravity, the appeal should also be upheld and a new trial ordered;

Where there is no question of any police officer making any admission about anything but all that happens is that the police officer has been made the subject of adverse cross-examination or adverse reference in the Royal Commission: There is no basis for allowing the appeal.

27. In R v Johns (op cit at p169), the decision of the Court of Criminal Appeal in R v Hastings (unreported NSWCCA 29 September 1997) was regarded as having been reached by application of the principles enunciated by both Meagher JA and Levine J.

28. By way of analogy, I have adopted this approach.

(f) PROCEDURAL MATTERS

29. The operation of s474C of the Crimes Act 1900 continues to depend on an appearance of doubt or question "as to the convicted person's guilt, as to any mitigating circumstances in the case or as to any part of the evidence in the case". This

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preserves the formulation contained in s475, now repealed, under which a question arose as to whether this requirement included an error in the trial process or procedure as opposed to a substantive question of the convicted person's guilt.

30. Section 474C(2), however, is now framed so as to pose this threshold question for the Governor or Minister when action is sought under s474C(1) so that once the "whole case" is referred to the Court of Criminal Appeal under s474(C)(1)(b) then the case is at large before that Court.

31. I have proceeded on the basis that the referral of the "whole case" to the Court of Criminal Appeal throws open factual issues relating to both substantive questions of guilt and also whether there may have been a miscarriage of justice due to a failure of the trial process or procedure (see Greg James J "Report pursuant to Part 13A of the Crimes Act 1900 into the Conviction of Ronald James Suey" 6 September 2003, paras. 5.19 5.2A; Eastman v DPP (ACT) 77 ALJR 1122).

32. Although the document referring the whole case to the Court of

Criminal Appeal refers to a petition "for review of the said sentences" as well as the convictions, the section 12 hearing was confined to convictions only. Mr Martin, then of counsel for the appellant, informed me during the hearing that no appeal against sentence is to be pursued.

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