SUPREME COURT OF VICTORIA

COURT OF APPEAL

S EAPCR 2020 0180

ANTONIOS SAJIH MOKBEL — Appellant

v

DIRECTOR OF PUBLIC PROSECUTIONS (CTH) — Respondent

JUDGES:	MAXWELL P, BEACH and OSBORN JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	15 March 2021
DATE OF JUDGMENT:	16 April 2021
MEDIUM NEUTRAL CITATION:	[2021] VSCA 94
JUDGMENT APPEALED FROM:	[2006] VSC 119 (Gillard J)

CRIMINAL LAW – Appeal – Conviction quashed on appeal – Whether appropriate to order retrial or acquittal – Entirety of sentence having been served – Notice of discontinuance will be filed if retrial ordered – Order for due process not futile – Court should not usurp functions of properly-constituted prosecutorial authorities – Qualitatively different dispositions of discontinuance and acquittal – *Criminal Procedure Act 2009* s 326E(1).

APPEARANCES:	Counsel	Solicitors
For the Appellant	Mr B Walker SC with Ms R Shann and Ms S Seoud	Sarah Tricarico Lawyers Pty Ltd
For the Respondent	Ms R Orr QC with Ms R J Sharp	Ms A Pavleka, Solicitor for Public Prosecutions (Cth)

MAXWELL P:

Summary

1 On 15 December 2020, this Court set aside the appellant's conviction on a drug importation charge. As is explained in the joint reasons of Beach and Osborn JJA, which I have had the benefit of reading in draft, that order followed a concession by the Commonwealth Director of Public Prosecutions that the conviction could not stand.

2 The conviction having been set aside, the question now before the Court is whether there should be an order for a retrial of the appellant on the importation charge or whether, instead, a 'judgment of acquittal' should be entered. Those are the alternatives provided for by s 326E(1) of the *Criminal Procedure Act 2009*.

3 The conclusion of the joint judgment is that a retrial should be ordered. I respectfully disagree. For reasons which follow, I consider that a judgment of acquittal should be entered.

4 The most significant consideration, in my view, is that the appellant has already served the entirety of the 12 year head sentence imposed on him for the importation offence. An order for retrial is not, therefore, necessary to vindicate the objectives of the criminal law. That conclusion is reinforced by the fact that the Director has already decided — as she informed the Court last December — that there will be no retrial even if one is ordered.

5 It is important to emphasise that, unlike the acquittal which results when a jury returns a not guilty verdict, the entry of a judgment of acquittal in these circumstances says nothing about the appellant's guilt.[1] Indeed, it is common ground that there is sufficient evidence to support a conviction on the importation charge.[2] Rather, the judgment of acquittal gives formal expression to the appellate

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1 Cf *R v Darby* (1982) 148 CLR 668, 677; [1982] HCA 32 (Gibbs CJ, Aickin, Wilson and Brennan JJ).

2 The position here may be contrasted with the case where a conviction appeal succeeds on the ground that a guilty verdict was not reasonably open on the evidence. A judgment of

court's conclusion that there should be no retrial.

The applicable principles

6 The principles which guide the exercise of this discretionary power were laid down authoritatively in *Director of Public Prosecutions (Nauru) v Fowler*.[3] The governing consideration is what the interests of justice require in the circumstances of the case. The Court there said:

> The power to grant a new trial is a discretionary one and in deciding whether to exercise it the court which has quashed the conviction must decide whether the interests of justice require a new trial to be had. In so deciding, the court should first consider whether the admissible evidence given at the original trial was sufficiently cogent to justify a conviction, for if it was not it would be wrong by making an order for a new trial to give the prosecution an opportunity to supplement a defective case. In the present case, the admissible evidence given at the trial satisfies this test. Then the court must take into account any circumstances that might render it unjust to the accused to make him stand trial again, remembering however that the public interest in the proper administration of justice must be considered as well as the interests of the individual accused.[4]

7 In my opinion, the interests of justice do not 'require a new trial to be had'. On the contrary, the interests of justice overwhelmingly point to the conclusion that there should not be a new trial. Or, to use the language of the second step in *Fowler*, there are circumstances which would render it unjust to the appellant to make him stand trial again.

8 The first is that the appellant has served the entirety of his sentence.[5] The second is that the events giving rise to the importation charge occurred more than 20 years ago. As Dawson, Toohey and McHugh JJ said in *Parker v The Queen*:

> [T]he length of time that has elapsed since the events giving rise to the charges and the fact that the appellant has served the custodial part of his

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acquittal is entered because, the evidence being insufficient, it would not be appropriate for there to be a retrial: *AK v Western Australia* (2008) 232 CLR 438 [65]; [2008] HCA (Heydon J); *Wade (a pseudonym) v The Queen* [2018] VSCA 304, [98] (Kyrou, T Forrest JJA and Taylor AJA).

3 (1984) 154 CLR 627; [1984] HCA 48 ('*Fowler*').

4 Ibid 630 (Gibbs CJ, Murphy, Wilson, Deane and Dawson JJ).

5 See *R v Bartlett* [1996] 2 VR 687, 698–9; [1996] VSC 47 ('*Bartlett*').

sentence tell against a new trial.[6]

It was that combination of factors — lapse of time since the offending and service of the 'custodial part' of the sentence — which led this Court in *Greensill v The Queen* to conclude that a judgment of acquittal was appropriate.[7] The same combination of factors prompted the Victorian Director of Public Prosecutions to concede, in *Cvetanovski v The Queen*, that the Court should enter a judgment of acquittal. In that case, as here, the conviction had been set aside because of misconduct by Ms Nicola Gobbo and Victoria Police.[8]

9 In the present case, in my view, the fact that the appellant has served not just the 'custodial portion' but the entire sentence of 12 years is a very powerful factor pointing against an order for a retrial and in favour of a judgment of acquittal. As Brennan J said in *Jago v District Court (NSW)*,[9] the purpose of criminal proceedings is 'to hear and determine finally whether the accused has engaged in conduct which amounts to an offence and, on that account, is deserving of punishment'. That purpose has been served. The appellant was found to be 'deserving of punishment' for the importation offence, and he has been fully punished.

10 What the High Court in *Fowler* referred to as 'the public interest in the proper administration of justice' has therefore been fully satisfied. It is true, of course, that the entry of a judgment of acquittal would mean that there was no conviction recorded against the appellant's name for the importation offence. But, given the Director's stated position, the position would be no different if a retrial were ordered. Even if a retrial on the importation charge were a live possibility, I would doubt whether the public interest in restoring the record of a conviction could justify the public and private expense involved in the conduct of a retrial.[10]

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6 (1997) 186 CLR 494, 520; [1997] HCA 15 (Dawson, Toohey and McHugh JJ) ('*Parker*').

7 (2012) 37 VR 257, 275 [76]–[78]; [2012] VSCA 306 (Redlich, Osborn and Priest JJA).

8 [2020] VSCA 272, [12]–[13] (Maxwell P, Beach and Weinberg JJA).

9 (1989) 168 CLR 23, 47; [1989] HCA 46.

10 *Parker* (1997) 186 CLR 494, 531; [1997] HCA 15 (Kirby J); *Bartlett* [1996] 2 VR 687, 699; [1996] VSC 47 (Winneke P), citing *Rabey v The Queen* [1980] WAR 84, 95–6.

Division of function between the Court and the Director

11 In the present case, the appellant accepts that there is sufficient admissible evidence for a conviction on the importation charge to be reasonably open to a jury. That being so, the Director relies on the following statement by Gaudron and Hayne JJ in *Dyers v The Queen*:

> In these circumstances, it would ordinarily follow that a new trial should be ordered, leaving it to the prosecuting authorities to decide whether to proceed with a new trial. … To make an order that would preclude a new trial would constitute a judicial determination of the proceedings against the appellant otherwise than on trial by jury and in circumstances where it is not held that the evidence adduced at trial required the jury to acquit the appellant.[11]

12 As senior counsel for the appellant conceded, the division of function between appellate court and prosecutor is a 'cardinal feature' of the criminal justice system. So much was acknowledged by this Court in *R v Thomas [No 3]*:

> An appellate court must be careful not to usurp the functions of the properly-constituted prosecutorial authorities which are entrusted with responsibilities and discretions to act in the public interest in the initiation and conduct of criminal prosecutions, or lightly set to one side the system of trial by jury in a case in which there is evidence capable of supporting a conviction.[12]

13 The present case does not, however, raise any question of usurpation. As is noted in the joint reasons, senior counsel for the Director informed the Court in December 2020 that the Director had 'determined' that there would not be a retrial of the appellant on this charge. That determination had evidently been made in the course of the careful consideration which led to the making of the concession that the conviction should be set aside. That the Director made that determination, and announced it simultaneously with the making of the concession, demonstrates that she considered it to be in the public interest, as well as a matter of fairness to the appellant, that her position on retrial be made clear at the earliest practicable opportunity.

14 In those circumstances, in my view, for this Court to direct an acquittal is in

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11 (2002) 210 CLR 285, 297 [23]; [2002] HCA 45.

12 (2006) 14 VR 512, 517 [27]; [2006] VSCA 300 (Maxwell P, Buchanan and Vincent JJA).

no sense a usurpation of the Director's proper authority to make such decisions. The Director exercised that authority when she made — and announced — her 'determination' that there would be no retrial.

15 Senior counsel for the Director submitted that there would nevertheless be real 'utility' in making an order for retrial, as it would formally clothe the Director with the power to decide that there would be no retrial. Until a retrial has been ordered, it is said, the Director is not empowered to decide that there will not be a retrial.

16 Though the submission is technically correct, I consider that to order a retrial for the sole purpose of enabling the Director to formalise a decision she has already made would be to elevate form over substance. And it seems highly artificial to order a retrial when the Court has already been informed that there will be no retrial. Put another way, I do not think the Court should make an order purporting to allow for the exercise of an independent discretion by the Director when — to the Court's knowledge — the Director has already made the substantive determination.

17 For the reasons I have given, the present case is quite different from that dealt with by the Court in *Walker v The Queen* (where a retrial was ordered even though the sentence had been served).[13] In that case there was a live question as to whether or not there would be a retrial, and the Court concluded that the decision was one for the relevant prosecuting authority to make. Even then, the Court elected to express its own view as to how that discretion should be exercised.[14] In the present case, the Director having already made her decision, the entry of a judgment of acquittal would do no more than give effect to that decision.

The 'corruption' of the criminal process

18 Finally, I wish to say something about the circumstances which gave rise to

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13 [2014] VSCA 177.

14 Ibid [49]–[50], [54] (Osborn JA).

the quashing of the appellant's conviction. It is necessary only to repeat the factual concessions made by the Director, which founded her concession that the conviction should be quashed. They were as follows.

19 Between 16 September 2005 and 21 March 2006, Ms Gobbo was a registered police informer, while at the same time representing the appellant in relation to his trial on the drug importation charge. During that period, Ms Gobbo:

(a) suggested to Victoria Police ways in which it could investigate the appellant (in relation to other offending);

(b) provided Victoria Police with information about her suspicions and beliefs as to his ongoing offending and the identity and conduct of his criminal associates; and

(c) provided Victoria Police with her views as to his prospects in the trial.

20 The submission for the appellant was that the conduct of Victoria Police during that period required this Court's 'strongest condemnation', which should be 'signalled' by the entry of a judgment of acquittal. The submission relied on the High Court's expression of strong disapproval in *AB v CD*:

> [Ms Gobbo's] actions in purporting to act as counsel for the Convicted Persons while covertly informing against them were fundamental and appalling breaches of [her] obligations as counsel to her clients and of [her] duties to the court. Likewise, Victoria Police were guilty of reprehensible conduct in knowingly encouraging [Ms Gobbo] to do as she did and were involved in sanctioning atrocious breaches of the sworn duty of every police officer to discharge all duties imposed on them faithfully and according to law without favour or affection, malice or ill-will. As a result, the prosecution of each Convicted Person was corrupted in a manner which debased fundamental premises of the criminal justice system.[15]

21 I am not persuaded that this statutory discretion is exercisable for the purpose of expressing condemnation of that kind. Contrary to the appellant's submission, nothing in *Tuckiar v The King*[16] suggests that that would be a proper purpose.

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15 [2018] HCA 58 [10] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ) (footnote omitted).

16 (1934) 52 CLR 335; [1934] HCA 49.

Importantly, however, I regard the fact that the appellant's trial was 'corrupted in a manner which debased fundamental premises of the criminal justice system' as another powerful consideration supporting the conclusion that the interests of justice do not require an order for retrial.

BEACH JA
OSBORN JA:

22 In March 2006, following a trial, the appellant was found guilty of one charge of being knowingly concerned in the importation into Australia of a prohibited import, a traffickable quantity of cocaine, contrary to s 233B(1)(d) of the *Customs Act 1901* (Cth). On 31 March 2006, the appellant was sentenced to 12 years' imprisonment, with a non-parole period of nine years.[17]

23 On 11 February 2010, this Court refused an application for leave to appeal against conviction and sentence.[18] On 10 December 2010, the High Court refused an application for special leave to appeal from that decision.[19]

24 On 19 August 2020, after his sentence had expired, the appellant filed a notice of application for leave 'to second appeal against conviction', relying upon s 326A of the *Criminal Procedure Act 2009*. The application was based on certain activities alleged to have been engaged in by a barrister, Nicola Gobbo, who acted for the appellant in his trial.

25 The application was heard by this Court on 15 December 2020. At the conclusion of the hearing, the Court made orders granting the appellant leave to appeal against his conviction, allowing the appeal, quashing the conviction and setting aside the sentence imposed.[20] The orders were made because during a period

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17 *R v Mokbel* [2006] VSC 119.

18 *R v Mokbel* (2010) 30 VR 115; [2010] VSCA 11.

19 *Mokbel v The Queen* [2010] HCATrans 329.

20 *Mokbel v Director of Public Prosecutions (Cth)* [2020] VSCA 325.

of months leading up to and including the trial in March 2006, when Ms Gobbo was both a registered informer and representing the appellant in relation to his trial, Ms Gobbo:

- suggested to Victoria Police ways in which Victoria Police could investigate the appellant in relation to other offending;
- provided Victoria Police with information about her suspicions and beliefs as to the appellant's ongoing offending, and the identity and conduct of his criminal associates; and
- provided Victoria Police with her views as to the appellant's prospects in the trial.

26 During the course of the hearing on 15 December 2020, the Commonwealth Director of Public Prosecutions conceded that, as a result of Ms Gobbo's activities, there had been a substantial miscarriage of justice in relation to the appellant's trial. Accordingly, the Director did not oppose orders that resulted in the appellant's conviction being quashed and his sentence being set aside. There remained, however, a dispute between the parties as to whether this Court should order a new trial or an acquittal, these being the only relevant alternatives open under s 326E(1) of the *Criminal Procedure Act*.

27 The appellant seeks an acquittal of the charge of which he was previously convicted. In the course of argument on 15 December 2020, senior counsel for the Director submitted, to the contrary, that the Court should order a retrial of the charge. Counsel then submitted:

> Of course that does not mean that a retrial will occur. Of course that is a matter that is in the Director's discretion.
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> My instructions are to make clear that the Director has already determined in this matter to not conduct a retrial. That does not mean that an order for a retrial is not the appropriate disposition of the appeal, but we do wish to place on the record at the first opportunity that, given that [the appellant] has served his sentence, the Director has made that determination. So in the event that the Court orders a retrial, a notice of discontinuance will be filed following that order being made.

Parties' contentions

28 The Director submitted that, in determining whether to order a retrial or an acquittal, the Court should consider:

- whether the admissible evidence given at the original trial was sufficiently cogent to justify conviction; and
- if so, whether there are circumstances that might render it unjust to the appellant to stand trial again, while recognising the public interest in the proper administration of justice.

29 As to the first matter, the Director noted that the trial judge described the prosecution case as 'overwhelming'.[21]

30 As to the second matter, the Director relied upon what this Court said in *R v Thomas [No 3]*,[22] as follows:

> An appellate court must be careful not to usurp the functions of the properly constituted prosecutorial authorities which are entrusted with responsibilities and discretions to act in the public interest in the initiation and conduct of criminal prosecutions, or lightly set to one side the system of trial by jury in a case in which there is evidence capable of supporting a conviction.[23]

31 The Director submitted that there are no circumstances that might render it unjust to the appellant to order a retrial. To the contrary, it was submitted that the public interest in the proper administration of justice supported an order for a retrial.

32 The appellant accepted that it was relevant to ask whether there remained evidence upon which it could reasonably be open to convict him. For the purpose of the present application, the appellant accepted that such evidence existed.

33 The appellant submitted, however, that as a separate and distinct matter, the Court was required to consider factors which might (either alone or in combination)

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21 *R v Mokbel* [2006] VSC 119, [26].

22 (2006) 14 VR 512; [2006] VSCA 300 ('*Thomas*').

23 Ibid 517 [27].

render it unjust to order him to stand trial again. The appellant contended that 'it is an appropriate exercise of undoubted judicial power to determine, in an exceptional case, that the Court will not make an order which administers injustice to an appellant or otherwise acts to undermine the administration of justice'. Reliance was placed on a number of cases including the High Court's decision in *Tuckiar v The King*[24] and this Court's decision in *Thomas*.

34 In support of his contention that the present case is an exceptional one, the appellant advanced three arguments:

(1) It would be impossible for the appellant to receive a fair trial in light of the publicity surrounding what Ms Gobbo has already revealed about him.

(2) It is in the interests of justice to condemn the conduct of Victoria Police for their involvement in the 'corruption of one of the fundamental tenets of the criminal justice system'.

(3) There was relevant knowledge in the Office of the Commonwealth Director commencing in 2011, about which proper concessions were not made in a timely fashion, justifying this Court expressing its condemnation of the conduct of the Director in relation to this matter.

35 Additionally, the appellant submitted that there were two factors, which in combination, 'powerfully indicated against an order for a retrial'. The first was that the prosecution had already taken a position that there would not be a retrial; and the second was that on any retrial, there was no sensible prospect that the appellant, if convicted, would be further punished.

Relevant authorities

36 Before analysing the parties' contentions, it is necessary to examine some of the authorities referred to by the parties in argument.

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[24] (1934) 52 CLR 335, 347; [1934] HCA 49 ('*Tuckiar*').

37 In *Tuckiar*,[25] the High Court set aside a conviction for murder and then had to consider whether to order a new trial or an acquittal. The issue fell to be determined in the extraordinary context of the accused's counsel, after the accused was convicted, making a public statement in court to the effect that the accused admitted that evidence called by the Crown, of a confession made by the accused, was correct.

38 The trial judge, in his report subsequent to the conviction, referred to the accused's counsel's statement saying that it was made in public and entirely of counsel's own motion, 'which would make a new trial almost certainly a futility'.

39 The plurality (Gavan Duffy CJ, Dixon, Evatt and McTiernan JJ) said:

> In face of this opinion, the correctness of which we cannot doubt, we think the prisoner cannot justly be subjected to another trial at Darwin, and no other venue is practicable.[26]

40 The other member of the bench, Starke J, also agreed with the trial judge's opinion.[27] In the result, a judgment of acquittal was entered.

41 In *Director of Public Prosecutions (Nauru) v Fowler*,[28] the High Court identified the power to grant a new trial as being a discretionary one, requiring the Court which has quashed the conviction to decide whether the interests of justice required a new trial to be had. The High Court identified two matters which required consideration in the making of that decision:

- first, whether the admissible evidence given at the original trial was sufficiently cogent to justify a conviction; and
- secondly, whether there were any circumstances that might render it unjust to the accused to make him stand trial again.[29]

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25 Ibid.

26 Ibid 347.

27 Ibid 355.

28 (1984) 154 CLR 627; [1984] HCA 48 ('*Fowler*').

29 Ibid 630.

42 In determining whether there were any circumstances that might render it unjust to the accused to make him stand trial again, the High Court said that it was to be remembered, however, that the public interest in the proper administration of justice had to be considered, as well as the interests of the individual accused.[30]

43 In *Dyers v The Queen*,[31] the High Court again considered the circumstances in which a retrial might be ordered following the quashing of a conviction. In that case,; the Court noted that the sentence imposed upon the appellant had already expired. The Court, by majority,[32] rejected the appellant's contention that the evidence led at his trial should have left the jury with a reasonable doubt as to his guilt. Having done so, Gaudron and Hayne JJ then said:

> In these circumstances, it would ordinarily follow that a new trial should be ordered, leaving it to the prosecuting authorities to decide whether to proceed with a new trial. In this case, however, the sentence imposed on the appellant has expired. The decision whether to continue a prosecution is ordinarily a decision for the executive, not the courts. There have, however, been cases where this Court has quashed a conviction, without either ordering a new trial or directing entry of a verdict of acquittal. To make an order that would preclude a new trial would constitute a judicial determination of the proceedings against the appellant otherwise than on trial by jury and in circumstances where it is not held that the evidence adduced at trial required the jury to acquit the appellant. That being so, there should be an order for a new trial despite it being probable that the prosecution will not proceed further.[33]

44 Callinan J also held that there should be a new trial, saying that it would be 'for the Director to decide whether in all of the circumstances there should be a retrial or not'.[34]

45 In *Thomas*,[35] as we have already noted, this Court emphasised that an appellate court must be careful not to usurp the functions of the properly constituted

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30 Ibid.

31 (2002) 210 CLR 285; [2002] HCA 45 ('*Dyers*').

32 Gaudron, Kirby, Hayne and Callinan JJ, McHugh J dissenting.

33 Ibid 297 [23] (citation omitted).

34 Ibid 331 [135].

35 (2006) 14 VR 512; [2006] VSCA 300.

prosecutorial authorities, which are entrusted with responsibilities and discretions to act in the public interest in the initiation and conduct of criminal prosecutions.[36] As the Court also said, it was important not to lightly set to one side the system of trial by jury in a case in which there is evidence capable of supporting a conviction.[37]

46 The Court in *Thomas* referred to a number of matters that had been identified by the appellant as telling in favour of not ordering a retrial. Those matters included:

- the fact that the appellant had been subjected to 'an extremely lengthy stressful process' since the time of his initial interception in Pakistan some four years earlier;
- the extent of the stress to which the appellant had been subjected, as reflected in the fact that he had been diagnosed as suffering from a major depressive disorder and post-traumatic stress disorder;
- the existence of substantial media coverage, which had been at a level that was said to impinge upon whether a fair trial would be possible; and
- the existence of a delay in the prosecution of the appellant, which had 'never been adequately explained'.[38]

47 The Court held that while serious consideration needed to be given to each of those matters and their combined effect, there were, however, other matters that had to be taken into account. These included:

> [a] powerful public interest, militating in favour of directing that a trial be held and the question of guilt determined by a jury, where an arguable case

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36 Ibid 517 [27].

37 Ibid.

38 Ibid 518–9 [31].

can be seen to exist that there has been a breach of the law of this kind.[39]

48 In the result, the Court in *Thomas* directed that a retrial be held. In doing so, the Court, after referring to passages in the judgment of Brennan J in *R v Glennon*,[40] rejected the appellant's submission that the media publicity that had occurred would prevent the holding of a fair trial.[41]

49 In *Walker v The Queen*,[42] this Court set aside convictions on two charges, and then had to determine whether or not to order a new trial in respect of those charges. After referring to *Fowler*, the Court[43] concluded that there was admissible evidence led at trial which justified the appellant's convictions, and that a retrial would not be unfair.[44] The Court said that, in the ordinary course, the decision to continue a prosecution in such a case was a matter for the Executive, not the courts.[45]

50 The Court then turned to the circumstances which, taken together, supported the view that the matter should proceed no further:

- first, there had already been two trials, both of which had miscarried through no fault of the appellant;
- secondly, the trial process had been highly stressful to the witnesses involved;
- thirdly, four years had elapsed since the events forming the basis of the remaining charges against the appellant; and
- fourthly, the appellant had served the entirety of the sentence imposed upon her, and if a third trial were held it could not

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39 Ibid 519 [32].

40 (1992) 173 CLR 592; [1992] HCA 16 ('*Glennon*').

41 *Thomas* (2006) 14 VR 512, 520–1 [35]–[36]; [2006] VSCA 300.

42 [2014] VSCA 177 ('*Walker*').

43 Osborn JA, with whom Weinberg and Priest JJA agreed.

44 *Walker* [2014] VSCA 177, [48].

45 Ibid, citing *Dyers* (2002) 210 CLR 285, 297; [2002] HCA 45, [23] (Gaudron and Hayne JJ), 317 [88] (Kirby J), 331 [134] (Callinan J).

sensibly result in the practical imposition of any further or other punishment.[46]

51 After referring to the joint judgment of Gaudron and Hayne JJ in *Dyers*, and in particular the passage in their Honours' judgment containing the statement that the decision whether to continue a prosecution is ordinarily a decision for the Executive, not the courts, the Court held that there should be an order for a new trial. Specifically, the Court concluded that the conclusion reached in *Dyers* 'must flow in the present case, subject to any concession by the respondent that a verdict of acquittal [was] appropriate'.[47]

52 In *R v A2*,[48] the High Court again considered the circumstances in which an order for acquittal might be made following the quashing of a conviction. In *A2*, two of the three accused had already served the sentences imposed on them, and the third had served a period of months in custody before then being subject to strict bail conditions for a period longer than his non-parole period.[49]

53 In their joint judgment, Kiefel CJ and Keane J accepted the fact that an offender having served the entirety of the sentence imposed might be thought to point against an order for a new trial.[50] Their Honours said, however, that 'the dilemma which it might create for a court was that a verdict of acquittal does not seem appropriate either' and that in the special circumstances of the case it may be open to order a new trial and leave the question whether one be had to the discretion of the Crown.[51] Their Honours then said that a question which was necessarily antecedent to considerations of this kind was whether there was sufficient evidence

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46 Ibid [49]–[50].

47 Ibid [53].

48 (2019) 93 ALJR 1106; [2019] HCA 35 ('*A2*').

49 Ibid 1124–5 [85].

50 Ibid 1125 [86].

51 Ibid.

to warrant an order for a new trial.[52] After referring to *Doney v The Queen*,[53] their Honours then analysed the sufficiency of the evidence in *A2*, before ultimately concluding that the appeals should be allowed and each matter remitted to the New South Wales Court of Criminal Appeal for the determination of a ground of appeal that the jury verdicts in each case were unreasonable and could not be supported by the evidence.

54 On the remitter to the Court of Criminal Appeal, the appellants in that Court (who were the respondents in the High Court) abandoned the 'unreasonable or unsupported by the evidence' ground. This left the Court of Criminal Appeal in the position of, having allowed the appeals and quashed the convictions on other grounds, then having to determine whether retrials or acquittals should be ordered. Their Honours (Hoeben CJ at CL, Ward JA and Adams J) accepted that the appellants had already been exposed to a lengthy trial and that there would be stress occasioned by a retrial.[54] Their Honours said, however, that the factor that weighed most heavily in favour of a retrial was the public interest in the proper administration of justice.[55] Their Honours concluded that there was 'nothing to suggest that a retrial would be unfair to the appellants nor that they could not properly be put before a second jury'.[56]

Analysis

55 For the purposes of this application, the appellant did not dispute the fact that there is admissible evidence given at the original trial which is sufficiently cogent to justify conviction. Indeed, no reason was advanced for doubting the sentencing judge's characterisation of the Crown case as compelling and overwhelming. The

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52 Ibid 1125 [87].

53 (1990) 171 CLR 207; [1990] HCA 51 ('*Doney*').

54 *A2 v The Queen* [2020] NSWCCA 7, [19] ('*A2 – Remittal*').

55 Ibid.

56 Ibid.

issue in the present case is whether there are circumstances which would justify this Court departing from the usual course of ordering a retrial and, instead, ordering an acquittal.

56 With respect to the appellant's submission that it would be impossible for him to receive a fair trial in light of the publicity surrounding what Ms Gobbo has already revealed about him, we would adopt what was said by Brennan J in *Glennon*, as approved in *Thomas*, wherein this Court said:

> The Courts are accustomed to dealing with such cases, regularly encountering situations in which the notoriety of an event or an individual involved in a proceeding has been the subject of public debate, even on occasions of a kind amounting to punishable contempt. Brennan J recognized in his judgment in *R v Glennon* that —
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> > … some degree of risk, albeit not a substantial risk, to the integrity of the administration of criminal justice is accepted as the price which has to be paid to allow a degree of freedom of public expression when it is exercised in relation to a crime that is a topic of public interest.
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> And that —
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> > [o]f necessity, the law must place much reliance on the integrity and sense of duty of the jurors. The experience of the courts is that the reliance is not misplaced. In *Munday* … Street CJ repeated an unreported passage from one of his Honour's earlier judgments:
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> > > " … it is relevant to note that the system of jury trial is geared to enable juries to be assisted in every possible way to put out of mind statements made outside the court, whether in the media or elsewhere. There is every reason to have confidence in the capacity of juries to do this. Judges do not have a monopoly on the ability to adjudicate fairly and impartially. Every Australian worthy of citizenship can be relied upon to discharge properly and responsibly his duty as a juror. Particularly is this so in the context of being one of a number or group of others all similarly charged with this responsible duty. I have great faith in the multiple wisdom and balance reflected in the verdict of a jury."
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> > If the courts were not able to place reliance on the integrity and sense of duty of jurors, not only would notorious criminals or heinous crimes be beyond the reach of criminal justice but there would have to be a change in venue for many trials now held in circuit cities or towns where knowledge of the crime and of the alleged criminal easily acquires a wide currency outside the courtroom. Our system of protecting jurors from external influences may not be perfect, but a trial conducted with all the safeguards that the court can provide is a trial according to law and there is no miscarriage of justice in a

conviction after such a trial.[57]

57 In our view, Brennan J's remarks in *Glennon*, held to be apposite in *Thomas*, are also apposite in the present case.[58] We are far from persuaded that a fair trial could not be held. This case is not comparable to *Tuckiar* in this respect.

58 In relation to the appellant's submission that it is in the interests of justice to condemn the conduct of Victoria Police for their involvement in the 'corruption of one of the fundamental tenets of the criminal justice system', we would observe that the High Court has already condemned the conduct of Ms Gobbo and Victoria Police in the sternest terms when it said:

> [Ms Gobbo's] actions in purporting to act as counsel for the Convicted Persons [one of whom was the appellant] while covertly informing against them were fundamental and appalling breaches of [Ms Gobbo's] obligations as counsel to her clients and of [Ms Gobbo's] duties to the court. Likewise, Victoria Police were guilty of reprehensible conduct in knowingly encouraging [Ms Gobbo] to do as she did and were involved in sanctioning atrocious breaches of the sworn duty of every police officer to discharge all duties imposed upon them faithfully and according to law without favour or affection, malice or ill-will. As a result, the prosecution of each Convicted Person was corrupted in a manner which debased fundamental premises of the criminal justice system.[59]

59 While no doubt the activities of Ms Gobbo and Victoria Police which led to the appellant's conviction in this matter being quashed should be thoroughly condemned, we are not persuaded that such condemnation should take the form of an acquittal in the present case. The very quashing of the appellant's conviction itself condemns the conduct of Victoria Police in this case and constitutes a significant deterrent to the repetition of such conduct.

60 As to the alleged knowledge in the Office of the Commonwealth Director commencing in 2011, which the appellant submitted should form a basis for this Court expressing its condemnation of the conduct of the Director by ordering the

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57 *Thomas* (2006) 14 VR 512, 520–1 [36]; [2006] VSCA 300 (citations omitted).

58 See also the observations in *Wells v The Queen* [2017] VSCA 147, 53–61 (Maxwell P, Osborn and Ferguson JJA).

59 *AB v CD* (2018) 93 ALJR 59, 62 [10]; [2018] HCA 58 (citation omitted).

acquittal of the appellant, we are similarly unpersuaded. The appellant's written submissions contain a number of factual assertions that are contested and did not form the basis of the Director's concession that the appellant's conviction should be quashed. These assertions would need to be satisfactorily established by way of an evidentiary hearing before one could form any conclusion about their cogency. They are not adequately established by the documentary material upon which the appellant relies. Moreover, even if the appellant's assertions about these matters were to be accepted, we are far from persuaded that they rise to a level requiring, or even permitting, this Court to order an acquittal in the present case.

61 The fact that the appellant has served the sentence imposed upon him in 2006, and that there is no sensible prospect that, if convicted, he would be further punished, is a significant matter telling in favour of an acquittal. However, as the authorities show (in particular, *Dyers*, *Walker*, *A2* and *A2 – Remittal*) the fact that an accused has served the entirety of his or her sentence and is unlikely to receive further punishment if convicted again, does not of itself necessarily mean that an acquittal should be ordered. As was said in *Thomas*, there is a powerful public interest militating in favour of the question of guilt being determined by a jury. That public interest remains, even if there is no sensible prospect of any further punishment being imposed.

62 Absent the Director's statement that if this Court orders a retrial she has determined to file a notice of discontinuance, we would have ordered a retrial. The issue then becomes what, if any, relevance, the Director's statement has in relation to the question now before the Court.

63 The appellant submitted that the Director's determination that, in the event that a retrial is ordered she will file a notice of discontinuance, showed that, after solemn consideration, the Director had determined that it was not appropriate in all the circumstances for there to be a retrial. It was then submitted that the proper course for this Court to take was the ordering of an acquittal. The appellant

submitted that in so ordering, we would not be cutting across the exercise of any future prosecutorial discretion, 'but would rather be recognising, accepting, and acting upon the entirely proper exercise of discretion already undertaken by the [Director] having announced [her] position'.

64 Contrary to that submission, the Director submitted that she had not made any concession that an acquittal should be ordered. She contended that the appropriate disposition of the appeal was an order for a retrial, and any other order 'would usurp her executive prosecutorial function'.

65 In our view, there is force in the Director's submissions. From time to time courts, while respecting the proposition that they should not usurp the functions of the properly constituted prosecutorial authorities have, in ordering a retrial, set out reasons why those authorities might choose not to continue the prosecution of a particular accused. In those cases, the prosecutorial authorities, after considering all relevant matters, might appropriately determine that a notice of discontinuance should be filed.[60] Such a course involves the appellate court appropriately delineating between its role and the role of the prosecuting authority.

66 The Director has foreshadowed that, upon an order for a retrial, she will file a notice of discontinuance. Without usurping her function, it seems to us that such a step would lead to the proper resolution of these proceedings.

67 To the extent that the appellant submitted that an order for a retrial would be futile in circumstances where the Director has said there will be no retrial, we reject that submission. Section 326E(1) of the *Criminal Procedure Act* provides only two alternatives for this Court in the circumstances of this case: an order for a retrial, or an order for an acquittal. The fact that there will be no retrial does not make an order for due process futile. An order for retrial will remit the decision as to further prosecution of this matter to the proper decision maker in accordance with the

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[60] See s 177 of the *Criminal Procedure Act*.

principles stated in *Dyers*, *Thomas* and *Walker*. It will also result in a qualitatively different disposition of the proceeding from an acquittal. Recognition of that qualitative difference is implicit in the observations of Kiefel CJ and Keane J in *A2*. The qualitative difference is not overcome by the fact that an acquittal by this Court on appeal can in some circumstances itself be regarded as qualitatively different from acquittal by a jury.

68 In turn, if the Court orders a retrial and the Director files a notice of discontinuance as she has determined she should do, the discontinuance of the prosecution will not amount to an acquittal as s 177(6) of the *Criminal Procedure Act* makes clear.

69 Any consideration of practical futility cannot be allowed to override the considerations of principle governing the making of the appropriate order in the circumstances. In the present case, we have determined that it is not appropriate to order an acquittal. Notions of practical futility cannot be engaged so as to require this Court to make an order that it considers is not appropriate on the authorities and in all the circumstances.

Conclusion

70 We would order a retrial.

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