A NEW APPROACH TO CRIMINAL APPEALS

Address by Justice Chris Maxwell, President of the Court of Appeal, to the Victorian Bar, 7 October 2009

It is almost exactly three years since I spoke here about 'A New Approach to Civil Appeals'. At that time, the Court of Appeal was introducing, for the first time, front-end management of civil appeals. Those reforms continue to improve our efficiency and reduce costs.

You will be interested to know that, in his recent report on the costs of civil litigation in the UK, Lord Justice Jackson of the English Court of Appeal drew attention to the cost-saving benefits of the Victorian procedures: a directions hearing in every new appeal; rigorous control of what goes into the appeal book; and the limitation of outlines of argument to six pages (the latter reform having been initiated by the judges, and adopted following consultation with counsel who appear in civil and criminal appeals). Associate Justice Lansdowne regularly refers appeals to mediation, with a good success rate.

The Boston Consulting Group reviewed the operations of the court at the end of 2007 and reported that the average hearing time for civil appeals had fallen from 1.6 days in the 2004-05 year to 1 day in the 2006-07 year, a drop of almost 40%. The saving in cost, both for the parties to an appeal and for the court, is enormous.

Now it is time to say something about criminal appeals. The advent of the *Criminal Procedure Act 2009*, and its commencement on 1 January next year, provide the immediate occasion for this talk. But there are a number of other things I want to mention.

Criminal Procedure Act and interlocutory appeals

The most dramatic change to criminal appeal procedure under the new Act

will be the introduction of interlocutory appeals. This potentially very significant law reform was initiated by the Court of Appeal itself, in circumstances to which I will refer later.

The object of the new procedure is to enable critical questions of law to be considered by the Court of Appeal before the trial starts or, in exceptional cases, after the trial has commenced.[1] Traditionally, of course, the Court of Appeal does not become involved until the trial is over. If error is found at that stage, then (subject to the applicability of the proviso) the conviction must be quashed and a re-trial had – unless, of course, a verdict of acquittal is directed.

Let me give two recent examples to illustrate what we have in mind. In *Thomas*, the prosecution for the terrorism offence depended almost entirely on an interview with Mr Thomas, conducted by the Australian Federal Police, while he was in custody in Pakistan. Prior to the trial commencing, the judge ruled that the admissions in the interview had been made voluntarily and that the record of interview was admissible in the trial. Thomas was subsequently convicted.

On the appeal, the Court of Appeal unanimously concluded that the confession was not voluntary and that the record of interview was inadmissible. The conviction was quashed. Had it not been for the remarkable circumstance that Mr Thomas had in the meantime given an interview to the ABC, in which he had said apparently incriminating things, there would inevitably have been a verdict of acquittal.

The moral of the story is clear. It should have been possible for the defence to come to the Court of Appeal before the trial started, to challenge the judge's ruling that the interview was admissible. Had that occurred, the

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[1] The relevant test is found in s 297(2) : "The Court of Appeal must not give leave to appeal after the trial has commenced, unless the reasons for doing so clearly outweigh any disruption to the trial".

interlocutory appeal would have been upheld and there would have been no trial. And the Court of Appeal would have been required to consider only a single point, instead of having to deal with a full set of conviction appeal grounds.

My second example is the sex slavery case of *Wei Tang.* In that case, it was not until there had been two lengthy trials that the Court of Appeal was asked for the first time to rule on fundamental threshold questions regarding the slavery provisions in the Commonwealth Criminal Code, that is, whether the provisions were constitutionally valid and, if so, how they were to be interpreted.[2] (Had the answer to the first question been no, then there should never have been a trial at all). Those same questions were, in turn, ruled on by a seven-member bench of the High Court.[3]

As Eames JA noted in his judgment, the task facing the trial judge and trial counsel was one of considerable difficulty, there being no guiding case law on the elements of the offences, or on the meaning to be attributed to the statutory language. It ought to have been possible for those issues to be ruled on, including at appellate level, before the first trial started.

On the sentence appeal which followed the reinstatement of the convictions by the High Court, Buchanan and Vincent JJA and I said:

> 'It is to be hoped that the new provisions of the Criminal Procedure Act 2009, introducing interlocutory appeals and greatly expanding the case stated procedure, will enable questions of fundamental importance to a trial to be decided – and, where necessary, considered by this court – before the trial begins'.[4]

As flagged in that passage, the case stated provisions have also been much enlarged, to facilitate – and encourage – trial judges, and trial parties,

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2 *R v Wei Tang* (2007) 16 VR 454.

3 *R v Wei Tang* (2008) 82 ALJR 1334.

4 [2009] VSCA 182 [5].

to consider stating a case for the Court of Appeal when a fundamental issue is identified. The importance of early identification of issues is self-evident. As with interlocutory appeals, a case may be stated before – or, in exceptional cases, after – the trial has commenced.

Inevitably, these new procedures will - in the short term at least - impose an additional workload on the Court of Appeal. We are already overburdened by our conventional appeal work, both civil and criminal. But the clear view of the Court - which the Government has endorsed by enacting this legislation - was that to deal with 'knock-out' points at the start rather than at the end of a trial is likely, in due course, to pay a handsome dividend, by reducing the number of conviction appeals which have to be heard.

An appeal on an interlocutory question will be by leave, following certification by the trial judge. This double gateway is intended to confine this procedure to the cases where the issue truly warrants the Court of Appeal's urgent attention. (We are drafting Rules which will ensure that these appeals are heard expeditiously). As in New South Wales, whose procedure has been the model for the Victorian initiative, we will have to develop jurisprudence on a case by case basis as to when leave will and will not be granted.

The first few years of operating under the new procedures will, of course, be exploratory – for the Court, for trial judges and for counsel. So, after two years, we will review the operation of the provisions, in consultation with trial judges and with other interested parties, including the Criminal Bar Association, to decide whether any alteration is required.

Abolition of sentencing double jeopardy

The *Criminal Procedure Act* will make one significant change to sentencing policy. Traditionally, where an offender is resentenced after a successful appeal by the Director of Public Prosecutions, the sentence imposed is

discounted to reflect the fact that the Director's appeal exposed the offender to a form of double jeopardy.

During the development of the Criminal Procedure Bill, the Attorney-General announced that the Government would include a provision abolishing the double jeopardy discount. To my knowledge, the first time this very significant change was brought to the public's attention was in yesterday's "Herald Sun". Sentencing is the area of judicial work which – understandably - attracts the most vigorous public debate and well-informed journalism of this kind is an essential ingredient for a constructive debate. It should also be said that the frequency with which the "Herald Sun" reports sentencing decisions is an important contribution to making a reality of the doctrine of general deterrence. If the community is unaware of what sentences are being imposed, general deterrence is simply a fiction.

Reform of the proviso

The provision which currently governs conviction appeals in Victoria is s 568(1) of the *Crimes Act.* Under that provision, the Court of Appeal must allow a conviction appeal if satisfied 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 (the 'unsafe and unsatisfactory' ground);

or

- the judgment of the trial court should be set aside on the ground of a wrong decision on any question of law;

or

- on any ground there was a miscarriage of justice.

The obligation to allow the appeal in those circumstances is subject to the

proviso, which is in these terms:

> 'Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.'

The *Criminal Procedure Act* replaces this two-stage analysis with a one-stage analysis, as follows. Under s 276(1), the Court of Appeal must allow an appeal against conviction if the appellant satisfies the court that –

(a) the verdict of the jury was unreasonable or cannot be supported having regard to the evidence; or

(b) as the result of an error or an irregularity in, or in relation to, the trial there has been a substantial miscarriage of justice; or

(c) for any other reason, there has been a substantial miscarriage of justice.

This change was supported by the judges of the Court of Appeal on the basis that it would simplify, and clarify, the grounds on which a conviction appeal would succeed. Instead of – as at present – having an appellant seek to establish a miscarriage of justice, then the Crown seek to establish that it was not a *substantial* miscarriage of justice, the new simplified approach requires the appellant to establish, simply, that there was a substantial miscarriage of justice (except on the 'unsafe and unsatisfactory' ground, which is unchanged).

This change will mean that Victoria's criminal appeal statute is no longer is conformity with the equivalent statutes in other States. The view was taken that there was a need for reform and that Victoria should lead the way. The Chief Justice has written to the Attorney-General, expressing the hope that the Victorian example will be used as the springboard for reform elsewhere.

Reform of sentence appeal procedures

As part of the Court's continuing program to upgrade the Court of Appeal registry, the Government last year provided funding for two Deputy Registrars, who commenced on 1 July 2008. Adam Cockayne, who is here with me today, is Deputy Registrar (Legal). Since his appointment, Adam has taken primary responsibility for the management of criminal appeals.

Great things have been achieved in a short time. For the first time, we have front-end management of criminal appeals and, in particular, of the very large number of applications for leave to appeal against sentence. Those applications are, as you know, heard by a single judge under s 582 of the *Crimes Act.*

In consultation with the OPP and Victoria Legal Aid, Adam has reshaped the timetable for the filing of submissions, and has greatly improved the level of compliance. This in turn has enabled the Court to deal with a significant number of applications on the papers, without the need for any appearance. When the applicant's submissions are filed in good time, the Crown is able to decide whether or not to concede that there is a proper basis for a grant of leave and, where a concession is made, to inform the Court and the applicant.

The *Criminal Procedure Act* will change the criteria for a grant of leave to appeal against sentence. At present, in accordance with the decision of the court in *Raad*,[5] leave will be granted where one or more of the grounds of appeal is reasonably arguable, without the judge having to assess the prospects of a different sentence being imposed upon the hearing of the appeal. Under the new Act, leave may be refused, notwithstanding that one or more grounds is reasonably arguable, if the leave judge considers that there is no reasonable prospect of a lower sentence being imposed if the appeal succeeded.[6]

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5 (2006) 15 VR 338.

6 Section 280.

The question is sometimes asked as to why the Court of Appeal does not hear more than two or three sentence appeals in a day. The short answer is that a decision affecting a person's liberty is a matter of great importance, and must necessarily be dealt with carefully. Moreover, the issues to be considered are often complex and the Court's analysis will almost always have application beyond the case at hand. The care with which criminal appeals have been dealt with, since the days of the Full Court and throughout the 14 years of the Court of Appeal's existence, is recognised as one of the great strengths of the administration of criminal justice in Victoria.

That said, we are acutely conscious of the need to reduce the delay involved in the disposal of criminal appeals. Ashley JA has just completed a detailed report for the Chief Justice and me, following his investigation of the procedures for dealing with criminal appeals in England. His Honour has advised that we have much to learn from the English experience. There, criminal appeals are disposed of in much greater numbers, more quickly, and with much briefer reasons. At the same time, as his Honour points out, that system only works because there is a very substantial infrastructure which provides expert assistance to judges in advance of the hearings.

Conviction appeal must relate to the actual trial

My next point concerns the hearing of conviction appeals. This is not so much a new approach as the reinforcement of an old approach. This is best illustrated by what Vincent and Neave JJA and I said recently in *R V Luhan*[7] as follows:

> 'The vice inherent in all three grounds of appeal is that they were premised on a different trial having been conducted from that which was actually conducted on Luhan's behalf. Those who seek to challenge the result of a trial will be treated as bound by the manner in which the trial was conducted, and

[7] [2009] VSCA 30 [37].

> confined to the matters actually put in issue by them or by their counsel (except where a matter, thought not raised, can reasonably be seen to have emerged as a real question from the evidence actually adduced at the trial).'

The point is a fundamental one, and it needs to be well understood by those who appear for the defence in criminal trials. The way the defence chooses to run the trial will define the scope – the limits – of the appeal. Of course, there will be exceptional cases, where mistakes of such a fundamental nature have been made by trial counsel that the Court of Appeal will be satisfied that a miscarriage of justice occurred. But, in the ordinary course, the failure to raise an issue at trial will preclude a complaint being raised on appeal about, for example, the failure of the trial judge to give a direction on that (non) issue.

This rigorous focus on the actual trial is simply an expression of Sir Leo Cussen's *'great guiding rule*', as approved by the High Court in *Alford v Magee.*[8] In *Alford*, the High Court said:

> 'If the case were a criminal case, and the charge were of larceny, and the only real issue were as to the *asportavit*, probably no judge would dream of instructing the jury on the general law of larceny. He would simply tell them that if the accused did a particular act, he was guilty of larceny, and that, if he did not do that particular act, he was not guilty of larceny.'

In 2005, the Court of Appeal in *AJS*[9] restated that rule in these terms:

> 55. Axiomatically, it is the responsibility of the trial Judge in every jury trial -
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> (a) to decide what are the real issues in the case;
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> (b) to direct the jury on only so much of the law as is necessary to enable the jury to resolve those issues;
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> (c) to tell the jury, in the light of the law, what those issues are;
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> (d) to explain to the jury how the law applies to the facts of the case; and

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8 (1952) 85 CLR 437, 466.

9 (2005) 12 VR 563, 577.

(e) to summarise only so much of the evidence as is relevant to the facts in issue, and to do so by reference to the issues in the case.

56. These propositions are of long-standing and of high authority. They have often been repeated in this Court.[10] If adhered to, they should serve to simplify, rather than complicate, the task of the trial Judge. Adherence to them is, of course, essential if the jury is to be adequately equipped for its task.

Reform of the law governing jury directions

On 29 July this year, the Attorney-General launched the report of the Victorian Law Reform Commission on jury directions. The Report makes challenging recommendations for reform, the most radical of which is that the law of jury directions should be distilled into a single statute. As far as I am aware, that has not been done anywhere in the common law world.

Judges and practitioners played a crucial part in articulating the concerns about the existing law which resulted in this reference being given to the Commission. The process began in the middle of 2006, when Vincent JA said to me, in his characteristically pithy way, "We have to do something about jury directions. They are just too complicated for judges and too complicated for juries."

At about the same time Eames JA returned from a period sitting in criminal trials and said, "We have two different cultures at work in criminal advocacy, one at trial and one on appeal. We have to make sure that the key points are argued and decided at trial, and not saved up for the appeal."

Those concerns led to the establishment in June 2006 of what

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[10] *Alford v Magee* (1952) 85 CLR 437, 466; *R v Wilkes & Briant* [1965] VR 475; *R v Jellard* [1970] VR 802; *Bellizia v Meares* [1971] VR 641, 644-5; *R v Anderson* [1996] 2 VR 663, 666-7; *R v Franks (No.1)* [1999] 1 VR 518, 524-5; *R v De'Zilwa* (2002) 5 VR 408, 416-7; *R v Dardovska* (2003) 6 VR 628, 633; *R v Taylor* (2004) 149 A Crim R 399, [23]; R *v Yusuf* (2005) 153 A Crim R 173, [15].

became known as the Ad Hoc Group on Criminal Trials and Appeals. There was energetic participation in the work of that Group by appeal judges, by trial judges from both the Supreme Court and the County Court (with the active support of Chief Judge Rozenes), by the then Director of Public Prosecutions, by representatives of Victoria Legal Aid, and by the Criminal Bar Association.

The Report of that Group was principally written by Justice Eames, who was relieved of his casework for three months to enable that to occur. The Report was submitted to the State Government in late 2006, and recommended (amongst other things) that urgent action be taken to tackle the over-complexity of jury directions. (Another recommendation was that interlocutory criminal appeals should be introduced). In March 2007, the Chief Justice wrote to the Government urging that there be a reference to the Law Reform Commission.

The Report now published presents us all with an opportunity to renovate, and reinvigorate, the system of criminal trials, so that the system continues to advance the high ideals embodied in the concept of a fair trial. Like the reforms in the *Criminal Procedure Act*, this is a project which requires collaborative engagement. As soon as time permits, therefore, the Ad Hoc Group will be reconvened.

Workload and timeliness

The number of criminal appeals filed in the Court of Appeal increased by 24% over the two year period between 1 July 2006 and 30 June 2008. That was a very substantial increase in workload. Even though we keep increasing the rate of disposal of criminal appeals, we cannot keep pace with the increasing inflow, and the backlog therefore grows.

The year ended 30 June 2009 illustrates the position clearly. We increased

the number of criminal appeals finalised by 10%, from 410 to 452, the highest level ever achieved. At the same time, however, the number of criminal appeals pending at year's end was up 8%, from 466 to 503.

The time taken to hear and determine conviction appeals has continued to fall. In 2004 – 2005, the average time from the filing of a notice of appeal to final orders was 14.6 months for a conviction appeal. The median period for a conviction appeal is now 10.6 months. At the same time, the median time from filing to finalisation for a sentence appeal has risen from 8.8 months to 10.7 months. This reflects both the growth in the number of sentence applications and a deliberate shifting of priority to the clearance of conviction appeals.

One initiative taken by the court, somewhat reluctantly, in September 2008 was to introduce a provision for straightforward sentence appeals to be heard by two judges instead of three. We had considered the same issue twelve months earlier and at that stage decided that, because of the importance of sentence appeals, they should be heard by a three member-bench like every other appeal.

In the face of the growing backlog, however, we came to the conclusion – precisely because of the importance of sentence appeals – that it was preferable to have the appeal heard earlier by two judges rather than later by three.

As a result of a funding allocation by the Government in the 2008 State budget, to increase the numbers of Supreme Court judges, the Court requested Government to allocate one of those new positions to the Court of Appeal rather than to the Trial Division, because of concerns over delays and backlog. That was approved and, as a result, the Court of Appeal has one additional permanent position, with effect from 1 July this year. Our numbers have increased from 10 to 11. The new position has been filled by

Bongiorno JA. One unfilled vacancy remains, following the retirement of Vincent JA.

I wish to record publicly the court's appreciation of this increase in the size of the Appeal Court. This is the first such increase in more than a decade, and it will certainly make a difference to our ability to deal with our workload. But it will only take us so far. At best, the additional position will help us to meet the increased demand. As Government appreciates, we are working to capacity and, if we are to make any major inroads into delay and backlog, we will need additional judicial resources.

The Chief Justice has continued to roster two judges from the Trial Division into the Court of Appeal, to assist with the workload. In the term just begun, this has been increased to four. We are currently looking at whether we will need to continue sitting four additional judges of appeal in first term next year.

Sentencing range, sentencing practices and the maximum penalty

In the last couple of years, the Court of Appeal has adopted a new approach to the issue of sentencing range. The argument on appeal that the sentence was 'outside the range' is now likely to be met with a question from the bench: 'What do you say the applicable range was?'

Particular attention has been focused on the role of Crown Prosecutors in making submissions on sentencing range. The Full Court in the 1980's had made it clear that prosecutors should assist sentencing judges on range.[11] In recent years, however, that seemed to have been forgotten, and requests for assistance by sentencing judges were often flatly refused by prosecutors. (*Terrick's* case, handed down last Friday, contains a classic example of this.)[12]

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11 *R v Casey and Wells* (1986) 20 A Crim R 191.

12 [2009] VSCA 220 [66]–[69].

Last September, in *MacNeil-Brown*[13] the Court ruled that a sentencing judge could reasonably expect the prosecutor to make a submission on sentencing range if the judge requested such assistance, or if the prosecutor perceived a significant risk that the court would fall into error regarding the applicable range unless such a submission was made.

As the Court said then, the function of such submissions is to promote consistency of sentencing and to reduce the risk of appealable error. These are vital objectives. They maintain the rule of law and enhance public confidence in the courts. To that end, the Court of Appeal has made clear to the Office of Public Prosecutions that when, on an appeal, the Director wishes either to contend that a sentence is manifestly inadequate, or that a sentence is within range, the Court will need to be furnished with a submission clearly setting out what the Crown says the applicable range was. That submission must be supported by reference to relevant sentencing statistics and comparable sentencing decisions, and to the relevant features of the case at hand. This has occurred in a number of cases now decided, and the court has acknowledged the assistance which such submissions provide.[14]

An important topic, which it is beyond the scope of this talk to explore in detail, concerns the twin obligations of a sentencing judge to have regard to the applicable maximum penalty and to current sentencing practices.[15] In a series of decisions this year, the Court of Appeal has drawn attention to what appears to be – in respect of particular offences – a disconformity between current sentencing practices and the applicable maximum.[16] These decisions were noted by the Sentencing Advisory Council in its

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13 [2008] VSCA 190.

14 See eg *DPP v Monteiro* [2009] VSCA 105 [3]; *DPP v Patterson* [2009] VSCA 222 [15].

15 *Sentencing Act 1991* (Vic) s 5(2)(a), (b): see *R v AB (No 2)* [2008] VSCA 39.

16 *DPP v CPD* [2009] VSCA 114*; DPP v DDJ* [2009] VSCA 115*; DPP v El Hajje* [2009] VSCA 160.

recent report on *Maximum Penalties for Sexual Penetration with a Child under 16* (see Chapter 6).

The Court has made clear, however, that no firm conclusion can be reached on whether current practices for a particular offence are inadequate unless and until a case is appropriately formulated and articulated by the Director of Public Prosecutions.

Conclusion

Two themes have, I hope, emerged from what I have said. The first is that what drives the Supreme Court's engagement with both procedural and substantive law reform is our commitment to serving the community. We are striving, as did all those who preceded us, to deliver to Victorians a first class system of justice.

Secondly, as the experience of the last three years has shown, progress can only be made if we work collaboratively. I have already mentioned the Ad Hoc Group. But the point is equally well-illustrated by the work of what was called the Specialist Appeals Advisory Group. This Group was set up by the Department of Justice in early 2008, to review those parts of the Criminal Procedure Bill bearing directly on criminal appeals. That Group comprised: the Director of Public Prosecutions and the senior solicitor from the Office of Public Prosecutions; John McLoughlin from Victoria Legal Aid; Phillip Priest and Michael Croucher on behalf of the Criminal Bar Association; and myself, representing the Court of Appeal. The Group functioned constructively and effectively. We were fortunate indeed to be dealing with highly capable officials from the Department, who were responsive both to suggestions and to criticisms and were creative in finding solutions.

Let the collaboration continue.