A matter of fact: the origins and history of the NSW Court of Criminal Appeal

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A matter of fact: the origins and history of the NSW Court of Criminal Appeal

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Introduction

This monograph explores the origins and history of the Court of Criminal Appeal (CCA) for NSW. It begins with a discussion of the events that led up to the passage of the Criminal Appeal Act 1907 (UK), which created a CCA for England and Wales and served as the model for the Criminal Appeal Act 1912 (NSW). The monograph then explains the criminal appeal structure that predated the Criminal Appeal Act, recounts the little-known legal troubles of the Attorney General who pioneered the Act, and canvasses the parliamentary and public debates on the Criminal Appeal Bill. Also discussed are the proviso; various amendments made to the Act since its inception (including provisions for Crown appeals against sentence, “time to count” and interlocutory appeals); controversies surrounding the composition of the court; and the jurisprudential evolution of the “unreasonable verdict” ground of appeal. The monograph then goes on to catalogue some of the more notorious cases to come before the CCA, before concluding with a brief discussion of guideline judgments and other, less commented upon, aspects of the court’s work.

A Court of Criminal Appeal for England and Wales

The miscarriages of justice that precipitated the establishment of a Court of Criminal Appeal (CCA) in England spurred a similar push for reform in NSW. Two cases in particular are worthy of mention.

Wilhelm Meyer, aka John Smith among other aliases, was born in Lincolnshire in 1839. He was an enterprising soul. He claimed to have studied medicine in Vienna, and even practised as a doctor in Adelaide for a time. More fancifully, he claimed to have been surgeon-general to the King of Hawaii as well as the owner of a coffee plantation in Honolulu.¹

With this level of apparent achievement in conventional society, it is perhaps surprising that Meyer came to be a significant figure in the criminal history of England and, indirectly, NSW. By the 1870s, Meyer had taken to a life of crime on the streets of London. Posing as a nobleman by the name of “Lord Willoughby”, he successfully tricked at least 17 women into parting with their jewellery. His modus operandi was simple. He would pretend to mistake a woman on the street for one “Lady Everton” or some other fictitious lady of vague significance, and then engage her in conversation. After developing a rapport with the woman, he would promise to show her the French Riviera on his yacht, or perhaps take her as his mistress. But first, she needed jewels and a wardrobe

fit for the occasion. At Meyer’s request, the woman would hand over her ring, in the belief that “Lord Willoughby” would have it examined for size by a jeweller and return with more resplendent pieces. Suffice to say, he never came back. Meyer must have had a way with words because the historical record does not paint a flattering picture of him: short, rotund, double-chinned. In his victims’ defence, Meyer’s expensive suit and top hat did give him the appearance of a nobleman.

As one might expect, Meyer eventually saw the inside of a prison cell. In 1877, he was convicted and sentenced to five years imprisonment. Specific deterrence proved totally ineffective and he left prison unreformed. He very quickly reprised his alter ego and set about defrauding more women of their jewels and other belongings.

In December 1895, a well-dressed Norwegian man named Adolf Beck was walking down Victoria Street when one of Meyer’s many victims identified him as the charlatan who had made off with her jewels. Although Beck denied the accusation, he was arrested and charged. His life took a further and more significant turn for the worse when a number of other women identified him as the culprit. He was tried at the Old Bailey. As if things were not bad enough, the trial judge had prosecuted Meyer when he was at the Bar and was convinced that the man now before him was the culprit. His Lordship refused to allow the defence to call evidence to show that Beck could not have been the guilty party because he was in Peru when a number of the crimes took place. On the sworn evidence of a number of victims, Beck was convicted of Meyer’s crimes and sentenced to seven years imprisonment. Only when it was discovered from prison records that Meyer was circumcised, whereas Beck was not, did doubts begin to surface about Beck’s guilt. Although the Home Office brought this anomaly to the trial judge’s attention, his Lordship was unmoved. Beck continued to languish in prison for crimes he did not commit, until he was released on parole in 1901.

His sorry tale did not end there. In 1904, Beck was again arrested, and after trial convicted on the evidence of another woman who mistook him for Meyer. This time, however, Beck’s accuser was not certain in her identification. The trial judge was troubled by the guilty verdict and chose to delay sentencing. In a rare stroke of luck for Beck, the case was solved a few days later when the police arrested “Lord Willoughby”, who had continued all the while to sweet-talk women into handing over their jewels. Many of the women who had previously accused Beck recanted their testimony after seeing Meyer. Beck was finally pardoned and given £5,000 for his troubles. But he was shattered and his life ruined. He lived out his final years in “poor circumstances” before succumbing to bronchitis and pneumonia in a Middlesex hospital in 1909.²

There is another person of historical significance to the origins of the CCA. His story is also one of unmitigated misery. George Edalji was a solicitor from Birmingham of Indian and Persian descent. In 1903, a number of animals were inexplicably slaughtered near his father’s residence. An anonymous letter sent to the police claimed that Edalji was seen disembowelling a horse. Edalji was convicted after trial and sentenced to seven years imprisonment. According to those who have studied the matter, Edalji’s innocence should have been obvious to anyone who cared to look at the evidence. Not only did his father, an Anglican clergyman, supply Edalji with an alibi, but the mistreatment of animals did not abate while he was in gaol awaiting trial.³

Both Beck’s case and the misfortune of Edalji attracted significant publicity. They were cited by those who urged reform of the criminal justice system because of the unreliability of some jury verdicts. In 1907, Sir Arthur Conan Doyle, of Sherlock Holmes fame, authored two articles in the

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² “Mr Adolf Beck”, The Times (London), 8 December 1909, p 11.
Daily Telegraph in which he sought to prove Edalji’s innocence. Edalji was eventually released without “comment or pardon” and restored to his position in society, but it would be fair to say, as Holmes might to “dear Watson”, that his case required only elementary powers of deduction.

There were other miscarriages of justice in England, but it was the fate of Beck and Edalji that provided the impetus for the Criminal Appeal Act 1907 (UK) and the CCA which it established. Before the Act, the English criminal justice system did not provide for appeals on questions of fact. An appeal on a question of law was confined and could only be pursued with the leave of the trial judge. It may come as no surprise that leave was rarely granted. English judges were notorious for strong-arming juries into returning the verdicts the judge wanted. It was thought, over-optimistically, that the Crown prerogative of mercy would be adequate to deal with the occasional wrongful conviction.

The pressure for reform came from the newspapers, and not just the tabloids. The perceived dysfunction of the criminal justice system is reflected in a letter to the editor published in The Times in February 1907, which read:

“No one in his senses can approve of the course of things, now becoming almost normal, in which the main features are conviction, agitation by friends, investigation by a distinguished amateur, a ‘boom’ in the popular Press, [and] a departmental committee of the Home Office.”

Though initially opposed by the English judiciary, the CCA proved a success. The Times concluded two years after its establishment that “even with … imperfections in procedure, the formation of the Court has been justified”. An editorial published the next month was also positive. It delivered the following verdict:

“There is no sign that juries are losing their sense of responsibility by reason of the knowledge that they no longer always speak the last word. There is no likelihood that almost all prisoners will appeal, as was at one time feared … The Act has not proved unworkable, as was predicted.”

As we will see, the success of the English experiment did not go unnoticed in NSW.

6 Pattenden, above n 3, p 16.
The Criminal Appeal Act 1912 (NSW) in context

The Criminal Appeal Act 1912 (NSW) (Criminal Appeal Act) expanded the opportunities for appellate review of convictions and sentences. It marked a decisive break with the brutality that passed for criminal justice in the colonial period. The criminal law that NSW inherited on settlement prescribed the death penalty for almost all felonies and a large number of petty crimes. Offences as trivial as “horse-stealing, sheep-stealing, or stealing in a dwelling house to the value of £5” were visited with public hangings. The irony, of course, was that many of the colonists had themselves been sentenced to death in England, although the authorities there, being too squeamish to carry out executions on such a vast scale, preferred to deport them to Australia instead. Our forebears were not so restrained. Between 1830 and 1834 alone, 169 people were hanged in NSW. As one writer puts it, “the pages of early colonial criminal law history are flecked with blood.”

The criminal justice system became more humane throughout the 19th century. At settlement, English criminal law was already undergoing transformation as a result of the penitentiary movement, which assumed that criminals could be induced to renounce their sins and reintegrate into mainstream society through a combination of imprisonment and religious instruction. Politicians and lawmakers were also coming to realise, albeit very late in the piece, that the death penalty was disproportionate to the criminality manifested in all but the most serious crimes against the person. However, the upheavals that attended the French Revolution of 1789, to say nothing of the generally slow pace of social change, meant that it would be some time before these reforms reached Australian shores.

It was not until 1955 that NSW formally abolished the death penalty for murder, and not until 1984 that it was abolished for all other crimes. The last execution in NSW took place in 1939, when John Trevor Kelly, a motor mechanic, was hanged at Long Bay Gaol for the axe murder of Marjorie Constance Sommerlad. He argued in the CCA that he was criminally insane. In a terse judgment, Chief Justice Sir Frederick Jordan said: “The crime was undoubtedly a foul and brutal one without any redeeming feature whatsoever, but there is nothing whatever to suggest that the appellant was insane at the time when he committed it”. An application for leave to appeal to the High Court failed. The argument was put that the murder was so shocking that Kelly must have been insane. Of this logic, Latham CJ said: “If it were accepted, the more brutal a crime the greater the chance an offender would have of going free”. Cabinet declined to commute Kelly’s sentence. Even at that time, however, public attitudes to the death penalty were changing. One thousand residents of Kelly’s hometown of Lismore signed a petition calling for his sentence to be commuted. A week after Kelly’s death, a prison reform league held a meeting to urge the abolition of the death penalty. As will become apparent later in this monograph, many of the capital cases that went on appeal to the CCA, Kelly’s among them, helped turn public opinion against the death penalty.

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11 NSW, Legislative Assembly, Debates, 5 July 1911, p 1309 (Charles Wade MLA).
14 ibid p 115.
15 Crimes (Amendment) Act 1955 (NSW), s 5.
16 Crimes (Death Penalty Abolition) Amendment Act 1985 (NSW), Sch 1.
17 R v Kelly (unrep, 26/5/39, NSWCCA) (Jordan CJ, Nicholas and Owen JJ).
18 Starke J was “astonished” by the State’s decision to fund the special leave application, which was in his view “hopeless”. Evatt J hoped the application “was not an attempt to throw the onus of the exercise of the prerogative, which was a matter for the political authorities, on to a judicial tribunal”: “Tenterfield murder: leave to appeal refused: High Court decision”, The Sydney Morning Herald (Sydney), 4 August 1939, p 6.
19 “John Trevor Kelly to hang: murdered woman at Tenterfield”, The Singleton Argus (Singleton, NSW), 11 August 1939, p 2.
20 “Petition for reprieve of murderer”, Barrier Miner (Broken Hill, NSW), 12 August 1939, p 6.
21 “Murderer to be hanged: John Trevor Kelly”, The Sydney Morning Herald (Sydney), 10 August 1939, p 9.
A Court of Criminal Appeal for NSW

The NSW Act followed the English Act. It provided, for the first time, a mechanism for convicted persons to appeal against their convictions on a question of fact. This was a concession to the fallibility of the jury system, which the Beck and Edalji cases, among others, had exposed. Offenders were also given a right to seek leave to appeal against the severity of their sentences.

Until the Act was passed, an appeal against conviction could only be brought on a question of law. The right was severely limited before 1849, when only the trial judge could refer a question of law to the Full Bench of the Supreme Court. There was no appeal as of right, save for the theoretical possibility that a convicted person could lodge a writ to have the conviction quashed for an error of law on the face of the record. The “writ of error” rarely succeeded. When it did, the need for finality sometimes clashed with the interests of justice. In the course of parliamentary debate on the Bill, the Attorney General recalled one such case. A man was erroneously sentenced to two years imprisonment instead of three. Although “undoubtedly guilty”, his conviction was quashed and he went free.

The appeals procedure was somewhat improved in 1849, when the State adopted the English procedure of “stating a case” on a question of law. Although a perception remained that the appeal process was excessively legalistic, the overriding concern for the proponents of reform was that there were still no means by which convicted persons could challenge their convictions on the ground that the jury had reasoned to the wrong factual conclusion. The only remedy for prisoners who complained that the jury was in error was to petition the Governor. Nor was it possible for offenders to appeal against the severity of their sentences. Only the executive could reduce excessive sentences in the exercise of the prerogative of mercy.

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22 Woods, above n 13, p 253.

23 NSW, Legislative Assembly, Debates, 5 July 1911, pp 1292–1293 (William Arthur Holman MLA, Attorney General). As to the writ of error provisions, see Criminal Law Amendment Act 1883 (NSW) (Criminal Law Amendment Act), s 427 (rep); Crimes Act 1900 (NSW) (Crimes Act), s 471 (rep). Sometimes the effect of quashing a conviction for legal error could be ameliorated by the award of a venire de novo, which would allow the Crown to bring fresh proceedings on the same charge, but only where the original trial was attended by fundamental error: Wrisor v The Queen (1866) LR 1 QB 289.

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25 According to one member of Parliament: “There is no doubt that the administration of the law in our own state, and in other parts of Australia in recent years, has led to the fair comment that the same old technical rules of procedure and practice being still maintained, accused persons now have great privileges, that the law is interpreted very often unduly in favour of the guilty man, and bring about in one sense a miscarriage of justice”. NSW, Legislative Assembly, Debates, 5 July 1911, p 1311 (Charles Wade MLA).

26 Section 23 of the Criminal Appeal Act 1912 (NSW) (Criminal Appeal Act) abolished the writ of error.

27 Criminal Law Amendment Act, s 383 (rep); Crimes Act, s 475 (rep).

28 Woods, above n 13, explains at pp 285–86 that prior to the Act, “in New South Wales there had never been any appeal to a higher court against the severity of criminal sentences — or indeed, except on error of law, against criminal convictions. Instead, there was a regular flow of petitions to the Governor and parliamentary representatives against convictions and sentences seeking the exercise of the prerogative of mercy”.

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The State’s justice system was not immune from the occasional miscarriage of justice, though none quite attained the notoriety of the Beck and Edalji cases. Moss Morris Friedman was a banker who was convicted in 1902 of receiving stolen goods. Friedman had no complaint about the efficiency of the justice system. He was tried on a Wednesday, convicted and sentenced on the Thursday, and released on the Friday of the same week. His conviction rested solely on the evidence of a boy who claimed that Friedman had purchased stolen goods, worth £200, at a price of £80, the inference being that Friedman knew them to be stolen. The evidence suggested that Friedman was a person of good character and, more importantly, that the true market value of the goods was in fact £80. Before passing sentence, the trial judge remarked that he himself would not have found Friedman guilty. Within 24 hours of conviction, counsel for Friedman presented a petition for clemency to the Minister for Justice, Bernhard Wise, who sought a report from the trial judge. The trial judge reported back immediately and Wise recommended that Friedman be released shortly thereafter. In a move that raised eyebrows, Friedman was actually released a day before the Premier, Sir John See, approved Wise’s recommendation for clemency. A rumour was aired in Parliament that the wheels of justice had been greased by the Minister’s unpaid debt to Friedman, although this was never substantiated.

There were different views about the Friedman case. Some thought it unseemly for the government to intervene so directly in the judicial process. Others accepted that a wrongful conviction could not be allowed to stand. *The Sydney Morning Herald* summed up the dilemma thus:

> “On the one hand we have the very strong conviction of impartial men that it is undesirable to bring the administration of justice under review by a political body. There is an equally strong opinion that whilst juries make mistakes, there is a way by which those mistakes, or what are thought to be such, can and should be dealt with, before summarily cancelling a trial conducted according to law … As against these considerations, there is … the injury to justice in the detention of an innocent man. The latter is an argument that instantly appeals to the fairness of the community … But who is to decide when a man, said to be guilty, is guilty or innocent?”

According to one report, a juror who was interviewed in connection with Friedman’s release said that the jury was not only unanimous, but was prepared to convict Friedman without hearing counsel’s closing address.

Friedman’s case was not the only one that contributed to the push for a CCA. William Arthur Holman is a figure well known to students of the Labor Party, although perhaps not with great affection. He had an acutely personal interest in the workings of the criminal justice system. Before his election to Parliament, Holman was the proprietor of the *Daily Post*, a unionist newspaper established in 1895 to give “temperate expression to the industrial and political aspirations of the workers”. The paper was set up as a company of individual shareholders. The directors decided against calling for payment on the shares until the paper had proved its viability. But by then it was too late, and the paper was forced into liquidation. Holman and his colleagues were charged with, and ultimately convicted of,

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29 NSW, Legislative Assembly, Debates, 1 October 1902, p 3054 (Joseph Carruthers MLA), p 3063 (John See MLA, Premier). See also J.C.L Fitzpatrick, “Correspondence: the Friedman case”, *Windsor and Richmond Gazette* (NSW), 6 December 1902, p 16.

30 “The release of Friedman”, *The Sydney Morning Herald* (Sydney), 1 October 1902, p 8.

31 “One of the jurymen: his statement of the case”, *The Sydney Morning Herald* (Sydney), 29 September 1902, p 7; “The Friedman case: a last word for the jury: to the editor of the Herald”, *The Sydney Morning Herald* (Sydney), 4 October 1902, p 12.

32 On Holman’s role in the labour movement, see HV Evatt, *Australian Labour leader: the story of WA Holman and the Labour movement*, 3rd edn, Angus and Robertson, Sydney, 1934. Holman remains a controversial figure in Labor circles. He broke ranks with the Labor Party in 1916 over conscription, which he supported, and formed the conservative Nationalist Party of Australia with one-time political rival Sir Charles Gregory Wade.
having conspired to defraud one of the shareholders of his investment in the newspaper. Apparently the directors had promised the shareholder that his £200 investment would be secured by the share capital, which totalled £3,500. On liquidation, however, the investor received only £77, which prompted him to lay a criminal information against the directors. Holman denied that he or any other director had acted dishonestly. At the conclusion of the trial, Holman’s counsel sought permission for him and the co-accused to address the jury from the dock. The trial judge refused the request on the ground that Holman had already given evidence, although the point was reserved for the Full Court’s consideration.

Holman was sentenced to two years imprisonment. He spent two months in prison before the Full Court decided that he ought to have been allowed to address the jury and quashed his conviction.\(^{33}\) Holman’s brief stay in prison was devastating. Dr Herbert Evatt’s biography of Holman recounts it thus:

“... Holman underwent the unspeakable indignity and mortification of suffering imprisonment for a crime of which he was entirely innocent, certainly morally, and in my firm view, legally also. Despite his occasional lapses into violence of expression, Holman was an extremely sensitive and compassionate, even shy, young man and the modern psychologist would probably explain his occasionally flamboyant language by reference to his sensitiveness and shyness. During this imprisonment, he tried to keep his mind serene by much reading and the numerous friends who flocked to see him brought him matches and small pieces of candle so that the long nights could be spent thus. But the wound cut very deep. Afterwards, throughout his life, he never enjoyed complete freedom from a nervous insomnia which is undoubtedly traceable to this early experience.”\(^{34}\)

Fortunately Holman’s ordeal was not in vain. He did as many others suffering a similar fate have done. He decided to study law. He passed the Bar exams at the age of 29 — unusual for the time — and was admitted to practise despite the Bar Council’s opposition.\(^{35}\) He pioneered the Criminal Appeal Act as Attorney General in James McGowen’s Labor government, and later served as Premier himself. According to Evatt, Holman “derived great satisfaction from the passing of his Criminal Appeal Bill”.\(^{36}\)

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33. \(R v\) Smith (1896) 17 LR (NSW) 104. The Bench considered the appeal point to be a technical one. Darley CJ, with whom Stephen and Cohen JJ agreed, said at 107: “I am strongly of the opinion that the Legislature should ... repeal s 470 of the Criminal Law Amendment Act so far as it allows prisoners to make statements. Now that a prisoner may give evidence on oath, the necessity for allowing him to make a mere statement no longer exists, and the power is, in my experience, one which is often grossly abused.”


35. ibid pp 156–162.

36. ibid p 297.
Parliamentary and public debate on the Criminal Appeal Bill

Although NSW had experienced for itself the inadequacies of a justice system that did not readily provide for appellate review, the English experience continued to resonate. The Beck case was extensively discussed when the Criminal Appeal Bill 1912 (NSW) came up for debate in the NSW Legislative Assembly in July 1911. The Attorney General was troubled by the fact that the miscarriage of justice had come to light only because the actual perpetrator continued to offend while the wrongfully convicted man was behind bars. Mr Holman endorsed the remarks of the former English Attorney General, Sir Henry James, who in 1883 identified “the obvious probability that juries, however desirous of doing their duty justly … sometimes … made grievous mistakes in their verdicts”. It was a source of disquiet for Sir Henry that in the space of just three years, the Home Department had pardoned 12 prisoners convicted of serious crimes. He observed that “[i]n every one of these cases, facts long concealed had come almost miraculously to light; death-bed confessions of the real criminals, or the statements of perjured witnesses had proved the error of the original convictions”. Analogies were also drawn with the position in civil cases, where the parties could appeal on fresh evidence grounds as early as the mid-17th century. The Attorney General quoted Lord Loreburn, the then Chancellor, who in 1907 posed the question: “If men are liable to go wrong in their judgments in civil cases, why are they not under similar liability in criminal cases?”

Questions were raised as to how the Criminal Appeal Act would operate in practice. Some politicians feared that the court would be inundated with unmeritorious appeals. One member of the Opposition wondered whether every drunkard in the State who was convicted of misbehaviour — of whom, according to Hansard, there were about 20,000 every year — would appeal against their convictions. The Attorney General sought to allay such fears by referring to the English experience. He noted that in 1909, only six per cent of the 10,000 or so convictions recorded that year went on appeal to the English CCA. This led one member of the House to interject that the Attorney General would find criminals to be “more enterprising in New South Wales!”

The government originally envisaged that both District and Supreme Court judges would sit on the CCA. The rationale was that District Court judges would bring their worldliness, trial experience and fact-finding skills to the task of deciding criminal appeals, which would now raise questions of fact as well as law. It was also suggested that District Court judges were best acquainted with the sentencing range that was considered appropriate for particular offences. In the modern parlance of sentencing law, their skills of “instinctive synthesis” were seen as an asset to the court.

37 NSW, Legislative Assembly, Debates, 5 July 1911, pp 1298, 1301 (William Arthur Holman MLA, Attorney General).
38 Quoted in NSW, Legislative Assembly, Debates, 5 July 1911, p 1297 (William Arthur Holman MLA, Attorney General).
39 ibid.
40 Pattenden, above n 3, p 6.
41 NSW, Legislative Assembly, Debates, 5 July 1911, p 1297 (William Arthur Holman MLA, Attorney General).
42 ibid p 1316 (Charles Wade MLA).
43 ibid p 1304 (William Arthur Holman MLA, Attorney General).
44 ibid p 1304 (Daniel Lavy MLA).
45 Criminal Appeal Bill 1912 (NSW), cl 3.
46 NSW, Legislative Assembly, Debates, 19 July 1911, p 1766 (William Arthur Holman MLA, Attorney General).
The Attorney General rhetorically asked: “Would not a District Court judge, who is trying such cases all his life, be a better help to the court on questions of sentence than a Supreme Court judge?”

There was unease about the prospect of District Court judges overruling their Supreme Court counterparts. One member of the Legislative Council described the possibility of decisions rendered by a majority of District Court judges as introducing “an element of ‘topsy-turveydom’ into the administration of justice which would not make for harmony of working”. Sir Charles Gregory Wade, the member for Gordon, predicted judicial revolution. He warned that the judges of the District Court would end up “laying down the law for the whole state and governing the Supreme Court”. Histrionics aside, there was a legitimate concern that the CCA would be divested of its constitutional status as a Supreme Court if District Court judges were to sit alongside Supreme Court judges. Ultimately the clause providing for the appointment of District Court judges was abandoned in the Legislative Council — though only by a margin of two votes.

Another ill-fated clause in the Bill proposed to limit appeals from the CCA to the High Court. Under the clause, an offender could take his case to the ultimate appeal court only if the Attorney General or Solicitor General certified that the case involved a question of law of exceptional public importance. The clause was modelled on an analogous provision in the Criminal Appeal Act 1907 (UK), which required that the Attorney General certify criminal appeals to the House of Lords. It reflected concerns about the finality of the process. Wise heads prevailed in the Legislative Council, where it was recognised that any attempt to restrict High Court appeals would be “absolutely nugatory” in view of s 73(ii) of the Commonwealth Constitution. If it were not otherwise obvious, the High Court’s recent decision in Kirk v Industrial Relations Commission of NSW proved the wisdom of that proposition.

49 NSW, Legislative Council, Debates, 7 December 1911, p 2430 (Joseph Carruthers MLC).
50 NSW, Legislative Assembly, Debates, 19 July 1911, p 1767 (Charles Wade MLA).
51 Following amendments introduced in 2008, the Chief Justice may direct the Chief Judges of the District Court and the Land and Environment Court to sit on the CCA, provided the Chief Judge concerned consents to sitting on the Court: Criminal Appeal Act, s 3(1A).
52 Criminal Appeal Bill, cl 24.
53 Criminal Appeal Act 1907 (UK), s 1(6) (rep).
54 The government member who spoke in support of the Bill in the Legislative Council explained that a limitation on High Court appeals was required in the interests of finality: “In the interests of everyone concerned, there should be some finality. The object of the bill was to make the Court of Criminal Appeal, except under certain exceptional circumstances, the final court of appeal … Having created a court of appeal, in ninety-nine cases out of every hundred, probably it would be in a position to satisfactorily deal with whatever appeals came before it. There should be some guarantee against even frivolous appeals to the High Court”: NSW, Legislative Council, Debates, 8 December 1911, p 2522 (Frederick Flowers MLC).
55 NSW, Legislative Council, Debates, 7 December 1911, p 2434 (John Garland MLC).
The NSW Act confers a power on the court to order a new trial whenever an appeal against conviction is successful. Alluding to the English Act, which did not provide for a new trial, the Attorney General considered the power necessary “in order to avoid the remediety of one wrong by committing another”. The English Act left judges in the invidious position of having to let the guilty go free whenever their convictions were tainted by legal error. It was not always possible to dismiss the appeal by applying the proviso (see below). Time and again in their judgments, English judges hinted at the need for greater flexibility in the Criminal Appeal Act 1907. In a 1910 case, an appellant was convicted of stealing a ring and other items that his mistress gave him, the mistress having stolen the items from her husband. In summing up, the trial judge failed to instruct the jury that the appellant could be convicted if, and only if, he knew that the items did not belong to his mistress. The CCA had no choice but to quash the conviction. Lord Chief Justice Richard Webster, who previously served as Attorney General, said in a moment of exasperation: “In this case we have a strong illustration of what we have had to observe many times, viz: — the importance that this court should have power to order a new trial. It is impossible for the court properly to perform its duties without that power.”

The problem in England came into sharp relief in 1911, when an appellant who was convicted of murder and sentenced to death had his conviction quashed for legal error. The Crown had a strong circumstantial case. However, the prosecution failed to disclose the police statements of the Crown’s star witness to the defence. That did not stop the trial judge, who was obviously convinced of the appellant’s guilt. In summing up, he decided to leave no room for doubt. The judge told the jury that the witness had mentioned several matters in his statement taken on the day of the murder, including that the appellant had confessed and that the witness had seen the appellant dispose of the murder weapon. The judge also told the jury that, according to the witness’s statement, the appellant said things about the manner of the victim’s death that only the murderer could have known. It was later discovered that the witness had not mentioned any of these incriminating matters in his statement. The defence, not having seen the statement, did not have the opportunity to challenge discrepancies in the witness’s evidence. Darling J delivered the judgment of the court, which included a scathing criticism of the absence of any statutory power

57 Criminal Appeal Act, s 8.
58 Pattenden, above n 3, pp 190–193. Pattenden notes that the CCA inherited from the Court for Crown Cases Reserved a residual power to grant a venire de novo, a writ vacating the verdict and ordering fresh proceedings. However, the writ was available only when the original trial was vitiated by fundamental error (as when, in R v Hancock (1932) 23 Cr App R 16, an accused confessed his guilt at trial but the jury were not asked to formally enter a verdict).
59 NSW, Legislative Assembly, Debates, 5 July 1911, p 1307 (William Arthur Holman MLA, Attorney General).
60 See, for example, R v Stone (1911) 6 Cr App R 89 at 95; R v Winkworth (1911) 6 Cr App R 179 at 181; R v Rufino (1912) 7 Cr App R 47 at 49.
61 R v Bloom (1910) 4 Cr App R 30.
62 ibid at 35.
63 R v Ellsom (1912) 7 Cr App R 4.
to order a new trial.\textsuperscript{64} It was not until 1964 that the English court's plea for the power to order a retrial would be answered.\textsuperscript{65}

In NSW, the press gave the \textit{Criminal Appeal Act} a lukewarm reception. Reflecting the nationalistic sympathies of the day, \textit{The Sydney Morning Herald} criticised the Attorney General for his “unquestioning obedience to [the English] model”.\textsuperscript{66} The paper noted that unlike in England, “the way of appeal [was] not closed or tortuous” in NSW, where offenders had long enjoyed a right of appeal on questions of law.\textsuperscript{67} But what really incensed the press was Holman's proposal to have Supreme Court judges make recommendations as to whether the Crown should exercise its prerogative of mercy in capital cases. The \textit{Herald} wrote: “The Government must still perform its duties, whether it contains overworked politicians or not, and there should be no back doors provided for shifty folk in office.”\textsuperscript{68} The Labor government of the day was concerned to remove itself from a review process that gave rise to much controversy and the occasional charge that party politics had influenced the outcome. Such fears were not fanciful, as the capital cases discussed later in this monograph reveal.

### The proviso

Section 6(1) of the \textit{Criminal Appeal Act} is identical in terms to s 4(1) of the 1907 English Act. The latter portion of the section, known as “the proviso”, relevantly reads:

“... the court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred”.

Whether a miscarriage of justice is “substantial” has traditionally been determined by asking whether the error deprived the appellant of a “fair chance” of acquittal.\textsuperscript{69} The terminology derives from Fullagar J's classic statement in \textit{Mraz v The Queen}:\textsuperscript{70}

“It is very well established that the proviso to s 6(1) does not mean that a convicted person, on an appeal under the Act, must show that he ought not to have been convicted of anything. It ought to be read, and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law. It is for the Crown to make it clear that there is no real possibility that justice has miscarried.”\textsuperscript{71} [Emphasis added.]

\textsuperscript{64} ibid at 8.

\textsuperscript{65} It was not until the re-enactment of the English \textit{Criminal Appeal Act} in 1964 that the CCA was given the power to order a retrial where an appeal had succeeded on the grounds of fresh evidence. The Criminal Division of the Court of Appeal for England and Wales, which superseded the English CCA in 1966, was given from its inception a general power to order a new trial.

\textsuperscript{66} “Law Reform”, \textit{The Sydney Morning Herald} (Sydney), 13 July 1911, p 8.

\textsuperscript{67} “Ministerial Responsibility”, \textit{The Sydney Morning Herald} (Sydney), 28 November 1911, p 8.

\textsuperscript{68} ibid.

\textsuperscript{69} \textit{TKWJ v The Queen} (2002) 212 CLR 124 at [26] (Gaudron J). See also \textit{The Queen v Storey} (1978) 170 CLR 364, where Barwick CJ speaks at p 376 of the loss of a “real chance of acquittal”.

\textsuperscript{70} (1955) 93 CLR 493.

\textsuperscript{71} ibid at 514 (Fullagar J).
As the High Court explained in the 2005 decision of *Weiss v The Queen*, the purpose of s 4(1) of the English Act (and, by extension, its counterparts in the common-form criminal appeal statutes of the States) was to abolish the “Exchequer rule”. Under the rule, “any departure from trial according to law, regardless of the nature or importance of that departure”, amounted to a miscarriage of justice. As applied to criminal cases, the rule mandated that convictions be quashed upon demonstration of error of any type, no matter how small, and irrespective of whether the error had any bearing on the outcome. In contrast, the proviso expressly invites the CCA to turn its mind to the implications of the error for the accused’s trial. The intention appears to have been to prevent the criminal justice system from being “plunged into outworn technicality”.

In *Weiss*, the High Court emphasised that the task committed to courts by the common-form criminal appeal statutes “is not to be undertaken by attempting to predict what a jury (whether the jury at trial or some hypothetical future jury) would or might do”. Rather, before the proviso may be applied, the court itself must be “persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict of guilty”. This approach is in keeping with the modern approach to “unreasonable verdict” appeals, which obliges the court to make an independent assessment of the evidence.

On an interesting sidenote, to which Dr Evatt referred in his biography of Holman, the inclusion of the proviso appears to have been at odds with Holman’s intention to make convictions yield more easily to demonstrated error. “Since the Act”, Evatt wrote, “the power of the Appeal Court to disallow an appeal upon the ground of there being no substantial miscarriage of justice has undoubtedly resulted in dismissals of appeals where, under the old practice of reserving points of law, convictions must have been set aside”.

Crown appeals against sentence

In 1924, the Act was amended to incorporate s 5D to give the Attorney General the power to appeal against sentence. It was part of a package of legislation designed to address public concern about an apparent upswing in crime in NSW, which prompted the Nationalist Party government to expand police powers and dramatically enlarge the summary jurisdiction of the lower courts. Not everyone approved of these measures. Sir Edward McTiernan, who served for a time as member for the Western Suburbs before his appointment to the High Court, considered the amendments retrograde. In parliamentary debate, he said, with just a touch of irony: “After considering the speech made by the Minister on the second reading of the bill, and the provisions of the measure itself, one comes to the conclusion that it is not a social reformer’s bill.”

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72 (2005) 224 CLR 300.
73 ibid at [18] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ). [Emphasis in original.]
74 *Driscoll v The Queen* (1977) 137 CLR 517 at 527 (Barwick CJ).
76 ibid at [44] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ).
77 ibid at [41]. See also below nn 305–313 and accompanying text. See also Judicial Commission of NSW, *Conviction Appeals in NSW*, Research Monograph 35, Sydney, 2011, at pp 23–43 for a legal discussion of the proviso.
78 Evatt, above n 32, p 297.
In its early years, the CCA attempted to remain faithful to the words of the section. It assumed that it had an “unfettered discretion” to vary an offender’s sentence if the court considered it to be inadequate. The High Court was of the same view. In *Whittaker v The King*, a jury convicted a man of the manslaughter of his wife. The verdict was accompanied by a recommendation that he be sentenced leniently, on the basis of which the trial judge imposed a sentence of 12 months penal servitude with hard labour. The Attorney General appealed against the sentence as inadequate. The appeal was presided over by Sir Philip Street, the first of the three Streets to serve as Chief Justice. The court allowed the appeal and resentedenced the offender to five years imprisonment. The High Court refused the offender’s application for leave to appeal.

It was only in the 1970s that the High Court retreated from this position. Barwick CJ cautioned that Crown appeals against sentence should be “a rarity, brought only to establish some matter of principle”. The court was probably concerned to bring the principles regulating Crown appeals against sentence into line with its 1936 decision in *House v The King*, in which the plurality emphasised that a reviewing court should interfere with a trial judge’s discretion only in cases where the judge “acts upon a wrong principle, … allows extraneous or irrelevant matters to guide or affect him … mistakes the facts … [or] does not take into account some material consideration”. Even so, Sir Laurence Street continued the family tradition and voiced strong opposition to the High Court’s discouragement of Crown appeals, remarking in 1983: “It would … be wrong for courts to adopt a posture of discouraging the bringing of Crown appeals whether by direct statements to this effect or by reluctance to entertain them fairly and properly.”

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80 See, for example, *R v Gosper* (1928) 45 WN (NSW) 165 at 166; *R v Geddes* (1936) 36 SR (NSW) 554 at 555.
81 (1928) 41 CLR 230.
82 *R v Whittaker* (1928) 28 SR (NSW) 411.
83 *Whittaker v The King* (1928) 41 CLR 230 at 235 (Knox CJ and Powers J). See also *R v Geddes* (1936) 36 SR (NSW) 554, where the CCA resentenced an offender who was given a 12-month sentence for manslaughter to a sentence of three years imprisonment. Chief Justice Sir Frederick Jordan, who delivered judgment on behalf of the court, acknowledged that sentencing is not an entirely objective enterprise, but one in which the “only golden rule is that there is no golden rule”: at 555. Again, the High Court refused special leave to appeal: *R v Geddes* (1936) 36 SR (NSW) 680 (note).
84 *R v Herring* (1956) 73 WN (NSW) 203 at 203 (Street CJ).
85 *Griffiths v The Queen* (1977) 137 CLR 293 at 310 (Barwick CJ).
86 (1936) 55 CLR 499.
87 ibid at 505 (Dixon, Evatt and McT iernan JJ).
88 *R v Holder and Johnston* [1983] 3 NSWLR 245 at 255 (Street CJ).
“Time to count”

The Criminal Appeal Act originally provided that the time an appellant spent in custody pending an appeal decision would not count as part of the term of the appellant’s imprisonment, unless the court ordered otherwise. Prisoners who appealed to the court were taking a gamble on their success. The CCA was ambivalent about this state of affairs. On the one hand it recognised that the measure would reduce the number of hopeless appeals. This attitude perhaps explains the following exchange between Jordan CJ and an appellant in 1937:

“JORDAN CJ: The Court is of opinion that this appeal must be dismissed and that there is no possible ground for interfering with the [habitual offender] declaration. Unfortunately your record shows that you are a habitual criminal, and in those circumstances the Court can do nothing except dismiss your appeal.

PRISONER: Would Your Honour date the sentence from the time I was arrested and the time I was waiting on appeal?

JORDAN CJ: No, the Court has considered that, and having regard to the fact that there was no possible justification for the appeal the Court can take no other course than simply to dismiss the appeal with the usual consequences.”

Counsel did not fare much better:

“JORDAN CJ: We cannot interfere in any way either with the sentence or with the declaration made by His Honour. We simply dismiss the appeal.

MR QUINN: Would Your Honours consider dating the sentence back?

JORDAN CJ: Oh, no. When an appeal has absolutely no substance or merit whatsoever, we cannot make any such order. The appeal is simply dismissed.”

Despite this robustness of approach, it was soon recognised that if the court did not readily accede to applications for time to count, there could be a chilling effect on offenders whose appeal points did have merit. It soon became the norm for the court to allow the sentence to run from the date of conviction. The appropriateness of the court’s generous approach to applications for time to count was questioned from time to time, notably by Sir Laurence Street in 1986. However, in 1995 the Act was amended to reverse the presumption that time spent in custody pending an appeal would not count as part of the appellant’s sentence.

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89 R v Jones (unrep, 7/5/37, NSWCCA) (Jordan CJ, Halse Rogers and Bavin JJ). The order for time to count was not readily granted under the chief justiceship of Jordan CJ. See, for example, R v McLean (unrep, 28/10/34, NSWCCA) (Jordan CJ, Davidson and Stephen JJ); R v Rosedale (unrep, 26/7/35, NSWCCA) (Jordan CJ, Halse Rogers and Street JJ); R v Navin (unrep, 27/5/38, NSWCCA) (Jordan CJ, Davidson and Halse Rogers JJ).

90 R v Benn (unrep, 22/9/44, NSWCCA) (Jordan CJ, Davidson and Halse Rogers JJ).

91 The court’s ambivalence is evident in R v Brennan [1974] 1 NSWLR 618, where McClemens CJ at CL, Begg and Isaacs JJ said at 621: “[i]n modern days, these provisions … do not amount to a great deal, and in many ways it would be harsh in the ordinary type of case to refrain from directing that time spent pending the hearing of the appeal should count as part of the sentence. But, nonetheless, there are from time to time vexatious and frivolous appeals and it is only just that prisoners indulging in such activities, which often necessitate them being transferred to Sydney from distant prisons … should not have the time spent counted as part of their sentence”.

92 R v Shutt (1986) 5 NSWLR 232, where Street CJ said at 232: “The number of such hopeless appeals is increasing thereby tending to clog up the Court’s list and encumbering the Court’s capacity to give prompt hearings to appeals that do justify appellate consideration … [w]here an appeal is without merit it must be foreseen by the appellant that the Court may not continue its present practice of allowing the whole of the time served to count. It would be unfair to change the Court’s practice without giving some notice in that regard and these observations may be taken to be such notice.”

93 Criminal Appeal Act, s 18(3), as amended by Sch 1 to the Courts Legislation Further Amendment Act 1995 (NSW) and Sch 4 to the Crimes Legislation Amendment (Sentencing) Act 1999 (NSW). The explanatory note to the former states: “The proposed amendments reverse the present position, so that time in custody under special treatment [that is, pending an appeal] will count as part of the sentence unless the Court of Criminal Appeal is satisfied that it should not count. In addition, the rule will not apply to substituted sentences, which generally specify the date on which the substituted sentence is to commence.”
The composition of the court

It is now common for the justices of appeal to sit together with common law judges on the CCA. It was not always so. The history of the matter is recounted in two 1986 memoranda that Sir Laurence Street sent to all Supreme Court judges, in which the Chief Justice set out a revised policy to guide the constitution of the CCA.94 The memoranda reveal that, according to a policy implemented in 1974, justices of appeal were not permitted to sit on the CCA. The document does not disclose the logic of that policy, but it probably rested on an assumption that the justices of appeal, unlike the common law judges, lacked criminal trial experience. The policy was reversed in 1979 for reasons of “expediency in connection with difficulties in Common Law Judge availability”.95 Sir Laurence recalled that from 1979 onwards, an “invidious” distinction was drawn between justices of appeal who were eligible to sit on the CCA by virtue of their previous criminal trial experience, and those who were ineligible because they lacked such experience.96

In or about June 1986, Sir Laurence proposed a new policy to guide the court’s composition, the terms of which were formalised in a policy statement he issued in November of that year.97 Under the revised policy, which gave weight to the “great value of current trial experience”, two trial judges were usually to be included on the Bench.98 The presiding judge would normally be the Chief Justice. The President of the Court of Appeal would be “invited ex officio to participate from time to time in constituting the Bench”.99 The justices of appeal would also be “invited to participate from time to time”, provided they spent “a few weeks each year trying criminal cases at first instance”.100 This represented a victory of sorts for the Common Law Division, which had pressed the view that the court should always be constituted by the Chief Justice and two trial judges. The justices of appeal had proposed that the court regularly include one judge from among their ranks.101

94 Memorandum from Sir Laurence Street to all Supreme Court Judges, “Court of Criminal Appeal”, 11 June 1986 (on file with authors); Memorandum from Sir Laurence Street to all Supreme Court Judges, “Constitution of the Court of Criminal Appeal”, 27 October 1986 (on file with authors).
95 Memorandum from Sir Laurence Street to all Supreme Court Judges, “Court of Criminal Appeal”, 11 June 1986, p 1 (on file with authors).
96 ibid.
98 ibid at p 3.
99 ibid at p 4.
100 ibid.
In justifying this policy, Sir Laurence cited parliamentary debates on the legislation that established the Court of Appeal in 1965, in which "it was made plain … that there was an expectation that criminal appellate work would continue to be the province of Trial Judges familiar with the day to day administration of the criminal law." Sir Laurence conceded that the justices of appeal had "special expertise and experience in appellate work." But, he said, their "disengagement and detachment from the dust of trial involvement" argued against their frequent participation on the criminal appeal court. Sir Laurence added that his own 12 years on the CCA had persuaded him that majority participation by trial judges was desirable. He also defended his presiding role on the court. It was, he said, "part of the duties of the Chief Justice to involve himself closely with the Court of Criminal Appeal in particular and the administration of the criminal law in general both within practical and academic circles." "Quite simply", he concluded, "this responsibility goes with the office".

Sir Laurence’s proposed policy must have caused some consternation among the justices of appeal, because his memorandum dated June 1986 prompted a follow-up memorandum in October of that year in which the Chief Justice gave a more forceful justification of his position. Sir Laurence had done his research. He noted that even when the CCA for England was rolled into the Criminal Division of the Court of Appeal in 1966, trial judges from the Queen’s Bench Division continued to be eligible to sit on that court. Moreover, the Lords Justice of Appeal who wished to sit in the Criminal Division had to spend a few weeks each year trying criminal cases themselves. Sir Laurence considered that these measures evinced "the importance of the contribution of trial judges in the work of the Court of Criminal Appeal".

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102 ibid p 2. As to the parliamentary speeches cited by Sir Laurence, see NSW, Legislative Assembly, Debates, 30 September 1965, p 1023 (Kenneth McCaw MLA, Attorney General) ("I think members will appreciate that in the criminal jurisdiction where appeals so often relate to the quantum of sentence, it is better for the administration of justice that those judges who are familiar with the day-to-day administration of the jurisdiction should determine appeals in that field"); NSW, Legislative Assembly, Debates, 30 September 1965, p 1024 (Norman Mannix MLA) ("I was pleased to learn that criminal appeals will not go to this new division"); NSW, Legislative Assembly, Debates, 12 October 1965, p 1268 (William Sheahan MLA) ("I am not making any objection to the principle, as explained by the Attorney-General, that the full court will still deal with criminal appeals"); NSW, Legislative Council, Debates, 14 October 1965, p 1343 (Arthur Bridges MLC) ("Anything touching upon the liberty of the subject and the quantum of sentence must surely be left to the Supreme Court sitting in banco … This, I would suggest, is again a matter of common sense in ensuring that those most suited to the discharge of appellate duties of a particular nature should be entrusted with them"); NSW, Legislative Council, Debates, 14 October 1965, pp 1346–1347 (Robert Downing MLC) ("It has been felt by practitioners that the experience in New Zealand indicates that the atmosphere of the appellate court [the Court of Appeal] is a long way removed from the atmosphere of a criminal court and that talking to a court of appeal is a different matter altogether from an advocate talking to a jury in the criminal jurisdiction. I am pleased to know that in this measure the Government has not included those appeals that now come before the CCA"); NSW, Legislative Council, Debates, 26 October 1965, p 1383 (Arthur Bridges MLC) ("… under the new Act the Chief Justice will doubtless continue to preside over the CCA and will also continue to nominate the judges to sit with him. These may occasionally include judges of appeal, but other judges would normally sit with the Chief Justice").

103 “Court of Criminal Appeal”, above n 94, p 8.

104 ibid p 8.

105 ibid p 5.

106 ibid pp 4–5.

107 ibid pp 4–5. Sir Laurence did acknowledge that the President’s role as “stand-in Chief Justice” necessitated that he too become familiar with the work of the court.

108 “Constitution of the Court of Criminal Appeal”, above n 94.

109 ibid p 11. In England, the merger of the CCA with the Court of Appeal was necessitated by the criminal appeal court’s rapidly expanding caseload. It was often the case that three or four CCAs would sit at the same time. This gave rise to a significant risk of inconsistent decisions. The Lord Chief Justice could preside over only one Bench, with the remainder constituted by a rotating roster of trial judges from the Queen’s Bench Division, often drafted in at short notice. The Donovan Committee’s rationale for recommending that the CCA’s work be transferred to the Court of Appeal was that a Lord Justice of Appeal would then be able to serve a two or three-month stint presiding over criminal appeals, and in so doing ensure consistency between decisions: Pattenden, above n 3, pp 37–39.
Interlocutory appeals

The insertion of s 5F into the *Criminal Appeal Act* in 1987 allowed the Crown and, with the court’s leave or on the certificate of the trial judge, the accused, to appeal to the CCA against interlocutory orders made at trial in criminal proceedings. According to Yeldham J, the object of the provision “was principally to deal with the refusal or granting of stays pursuant to applications which, in recent times, have become fashionable”.110 Under s 5C as it stood before the 1987 amendment, the Crown could appeal as of right against the quashing or staying of any information or indictment. The position with respect to interlocutory appeals by an accused was more complex. Pursuant to the 1987 Court of Appeal decision in *Watson v A G (NSW)*,111 an accused could appeal against an interlocutory order by the District Court to the Court of Appeal, but was precluded by s 17(1) of the *Supreme Court Act* 1970 (NSW) from appealing to the Court of Appeal against an interlocutory order by the Supreme Court. The Attorney General’s Second Reading Speech explained the muddled position as follows:

“The anomaly arose when the Court of Appeal, in a number of recent cases, confirmed that its supervisory jurisdiction over the District Court, conferred by section 48 of the *Supreme Court Act*, extended to hearing applications for relief from an interlocutory order or judgment of a District Court judge in criminal proceedings. Most notably, this jurisdiction has been resorted to by defendants seeking a permanent stay of proceedings. In the recent case of *Watson v. The Attorney General* [citation omitted] the Court of Appeal granted a permanent stay after the trial judge in the District Court had refused a similar application. Three or four applications for a stay of proceedings are being made in the District Court each week. The majority of them are unsuccessful but the decision in Watson’s case has encouraged applications to be made to the Court of Appeal against the refusal by the trial judge to grant a stay.”112

In effect, s 5F removed any role for the Court of Appeal in hearing appeals from interlocutory orders of the District Court in criminal proceedings, vesting the CCA with jurisdiction to hear appeals from interlocutory orders in all criminal matters (including those made by the Supreme Court and, later, the Land and Environment Court). This remains the position. The Attorney General envisaged that the amendments would “ensure that decisions adding to the body of criminal law in this State are made by the specialist Court of Criminal Appeal and that the court retains its established function of review of criminal matters”.113

Notable decisions: 1913–2012

Many of the cases that come before the CCA are accompanied by considerable controversy. In this section, we discuss a number of notable decisions with a view to giving readers an insight into the breadth, complexity, and public and appellate scrutiny of the court’s work. Given the thousands of judgments delivered over the past century, it has not been possible to include all noteworthy decisions. Omitting mention of any particular case does not imply anything about its significance.

111 (1987) 8 NSWLR 685.
An early case that attracted significant press coverage was that of Thomas Edwin Brown, an orchardist who thrice stood trial for the murder of Senior Sergeant Edwin Hickey in 1913. Sergeant Hickey had gone to Brown’s house in St Ives to arrest him on warrants of commitment for the non-payment of money. Brown demanded that he be given an opportunity to settle his debts. A scuffle ensued, in the course of which Hickey was fatally shot. The Crown case was that the accused shot Hickey; Brown claimed that Hickey had accidentally shot himself with Brown’s revolver. The first trial resulted in a hung jury. At the second trial, Brown made his case forcefully in a statement from the dock. He also gave evidence on oath, during which he was subjected to cross-examination on his dock statement. While deliberations were underway, the jury asked whether it was entitled to return an alternative verdict. The trial judge answered no; the choice was between murder and nothing. The jury then returned a verdict of guilty with a strong recommendation for mercy. Their recommendation was based on the “assumed persecutions under which accused was labouring for a number of years”, which the jury took to be evidence that Brown’s “mind had become unbalanced”. Brown was nevertheless sentenced to death.

Brown appealed against his conviction to the CCA. He argued that the trial judge had erred in failing to instruct the jury that they could return a verdict of manslaughter, and by permitting the Crown to cross-examine Brown on his dock statement. Cullen CJ, with whom Pring and Gordon JJ concurred, rejected both grounds of appeal. As to the first ground, the Chief Justice held that the trial judge was not obliged to inform the jury that they could return a verdict of manslaughter, as the evidence did not raise the possibility that Brown had shot Hickey accidentally. The second ground of appeal failed because Brown had exposed himself to cross-examination on his dock statement by giving evidence on oath after having made it.

In one of the first “flesh wounds” that the CCA would suffer at the hands of the ultimate appeal court, the High Court granted Brown special leave to appeal and upheld the appeal. It did so primarily on the basis that the trial judge erred in instructing the jury, contrary to s 23 of the Crimes Act 1900 (NSW), that it was not entitled at law to bring in a verdict of manslaughter. In effect, the trial judge had misled the jury as to the extent of its powers, which extended even to the return of a perverse verdict in the accused’s favour. At any rate, at least Isaacs and Powers JJ were satisfied that the facts admitted of the possibility that if Brown discharged the weapon, he did so without the mens rea for murder. The proviso was inapplicable, as the error deprived Brown of a fair chance of acquittal on the capital charge. Three members of the court were also critical of the trial judge’s attempt to explain the concept of reasonable doubt, as well as his Honour’s decision to admit certain evidence prejudicial to the accused. Their Honours agreed with the court below that Brown could lawfully be cross-examined on his dock statement.

116 ibid.
117 R v Brown (1913) 13 SR (NSW) 433.
118 ibid at 438–439 (Cullen CJ).
119 ibid at 439–440 (Cullen CJ).
120 Brown v The King (1913) 17 CLR 570 at 578–579 (Barton ACJ); at 591–592 (Isaacs and Powers JJ); at 600 (Gavan Duffy and Rich JJ).
121 ibid at 592 (Isaacs and Powers JJ).
122 ibid at 590 (Isaacs and Powers JJ).
123 ibid at 579 (Barton ACJ); at 593 (Isaacs and Powers JJ).
124 ibid at 583–586 (Barton ACJ); at 594–596, 599 (Isaacs and Powers JJ).
125 ibid at 576–577 (Barton ACJ); at 589 (Isaacs and Powers JJ).
Brown’s trials and tribulations continued. He was tried for a third time and, though acquitted, he was no sooner out the courtroom door than the police arrested him on a charge of lunacy. Questions were raised in Parliament as to why, if Brown really was insane, he was sentenced to death at the second trial’s end. Brown lodged a writ of habeas corpus after an interim order to commit him to an asylum had expired, which prompted a judicial inquiry into his soundness of mind. The press expressed disenchantment with the original proceedings:

“The extraordinary divergence of medical opinion as to the sanity or insanity of Thomas Edwin Brown … cannot be passed over without comment. The evidence of no less than 13 doctors was taken in the case; and the conclusion of six of them was completely opposed to the conclusion of the other seven. We offer no judgment on the result — the magistrate appears to have been convinced that those who said that Brown was suffering from a dangerous delusion were right, and the man goes back into detention. But what we do say is that it is high time that the medical men of this country were given such a training in the diagnosis of madness that such a conflict of evidence should in future be put almost beyond the bounds of possibility.”

The judge chairing the subsequent inquiry concluded that while Brown gave every outward appearance of being sane, letters written by him over the years showed that he believed himself to be “the victim of a far-reaching conspiracy amongst the powers that be to ruin him, but the evidence of such conspiracy was too shadowy to justify such a belief in any rational human being”. In February 1916, the Crown, perhaps taking pity on Brown, ordered his release on the condition that he leave Australia “under proper care and control”. He decamped to America with relatives, and was not heard from again.

As Brown’s case demonstrates, it was once common for jury verdicts to be accompanied by recommendations to the trial judge. The CCA dealt with the fallout from one such case in August 1913. The appellant, Daniel O’Connell, was convicted of burglary at Quarter Sessions. In bringing in its verdict, the jury recommended that O’Connell be treated as a first offender on account of his previous good character. The jury added that O’Connell was drunk at the time of the offence, did not know what he was doing, and was pressured into committing the crime by his accomplices. In the CCA, Cullen CJ, with whom Pring J agreed, held that the jury’s rider was equivalent to a verdict of not guilty.

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126 “Central Criminal Court: St Ives tragedy: accused acquitted”, The Sydney Morning Herald (Sydney), 26 March 1914, p 5.
127 “St Ives tragedy”, The Sydney Morning Herald (Sydney), 26 March 1914, p 10. Brown was arrested under the Lunacy Act 1878 (NSW).
130 “The prevention of madness”, The Sydney Morning Herald (Sydney), 30 April 1914, p 10.
132 “St Ives tragedy: Brown released: now on his way to America”, The Singleton Argus (Singleton, NSW), 26 February 1916, p 6.
133 R v O’Connell (1913) 13 SR (NSW) 374.
134 ibid at 378.
In October 1914, Frederick Mountford, an irrigation engineer and share farmer, was convicted of murdering his wife, Minnie Alkins Mountford, at Leeton in August 1913. He was sentenced to death. Mountford, who took umbrage at being tried by a Cootamundra jury, sought leave to appeal in the CCA. Representing himself, he requested a retrial in Sydney on the basis that “country juries are likely to be prejudiced against immigrants, because of the latter taking up work which local residents would follow”.135 Mountford also wished to adduce evidence of his insanity and “the effect upon him of alleged domestic differences”136 between him and his late wife. The court was unmoved. Cullen CJ, delivering judgment for the court, concluded that “the evidence showed a clear case of an intentional shooting by prisoner of his wife”.137

In 1924, William George Simpson, a 33-year-old motor mechanic, was tried for the murder of one Guy Chalmers Clift at Appin. The so-called “Appin murder” occurred as Clift was driving Simpson, apparently a friend of his, from the Cordeaux Dam (where Clift and Simpson worked) to Campbelltown. Also in the car was Constable Flynn, who was escorting Simpson to the police station in connection with some unrelated offence. On the way there, Clift and Flynn were both fatally wounded by shots fired from a revolver that Simpson had stolen from the paymaster’s office. Simpson maintained that he was trying to kill himself with the revolver, only for Flynn and Clift to intervene and suffer accidental gunshot wounds in the struggle that ensued. The evidence indicated that Simpson had been drinking heavily the night before.

The first trial resulted in a conviction and capital sentence. Simpson successfully appealed against his conviction to the CCA on the ground that a “dying deposition” made by Clift was wrongly admitted into evidence.138 At the second trial, the judge said in summing up that, in a trial for murder, it was always permissible for the jury to find a verdict of manslaughter, but they were entitled to do so only if the facts proved the lesser offence to their satisfaction. The judge went on to say that if the shooting was accidental, Simpson was entitled to an acquittal; but if deliberate, Simpson was guilty either of murder or, if he was so drunk as to preclude him forming the intention to murder, of manslaughter.139 Having been so instructed, the jury found Simpson guilty of murder. Simpson did little to help his cause by claiming that he and Flynn “were at the war together” — Flynn’s mother later gave evidence that her son had never gone to the war.140 Simpson was once again sentenced to hang; once again, he appealed.

Richard Windeyer KC, arguing the appeal on Simpson’s behalf, submitted that the trial judge had misled the jury as to the extent of its powers, much as the judge in Brown’s case had done. Simpson’s appeal presented the court with an opportunity to revisit the question, first raised in Brown’s case, whether a judge in a trial for murder is always required to inform the jury of the possibility of returning a verdict of manslaughter. Acting Chief Justice Sir Philip Street, with whom Ferguson and James JJ concurred, emphasised the crucial distinction between a trial judge abstaining from advising a jury of its power to return a verdict of manslaughter, and the trial judge forbidding the jury from returning a verdict of manslaughter.141 Barton ACJ had pointed out in Brown v The King142 that the former was permissible, but the latter course, being a misdescription of the jury’s

135 “Court of Criminal Appeal: The Leeton shooting case”, The Sydney Morning Herald (Sydney), 7 November 1914, p 9.
136 ibid.
137 ibid.
139 R v Simpson (1924) 24 SR (NSW) 511 at 516 (Street ACJ).
140 ibid at 512.
141 ibid at 516.
142 (1913) 17 CLR 570.
powers, was not. In the event, the Chief Justice held that the judge did not err in telling the jury that a manslaughter verdict was warranted only if they came to the view that the shooting was accidental. The remaining ground of appeal, that the evidence given by Flynn’s mother was wrongly admitted, was also rejected. Simpson’s application for leave to appeal to the High Court was refused.

Towards year-end, Cabinet decided that Simpson’s execution should go ahead. As was typical of a system in which the fate of the condemned lay in the Executive’s hands, members of government were in the habit of passing comment on capital cases. Their defence of the ultimate sanction affirmed their faith in its deterrent value and potential to sate the community’s hunger for just deserts. The Premier, Sir George Fuller, said of Simpson’s case: “Much as I regret the necessity for the punishment, if crimes of this character are going to be committed we must have some punishment to act as a deterrent in the interests of the community generally”.

A last-minute appeal by the Howard Prison Reform League was of no avail. Simpson was hanged at Long Bay on 10 December 1924.

Eight years after Simpson’s execution, William “Mad Dog” Cyril Moxley, a 34-year-old carpenter, was tried, convicted and sentenced to death for the murder of Frank Barnby Wilkinson, 25, and his 21-year-old girlfriend, Dorothy Ruth Denzel. Moxley abducted the couple in Strathfield before driving them to Moorebank, where he raped Denzel, shot and bashed both of the deceased so as to prevent their identification, and disposed of the bodies in shallow bushland graves. The so-called “Moorebank murders” attracted nationwide attention, not least because the circumstances of the case were both grisly and unusual. Moxley, an army deserner, small-time thief and police informer, was so careless as to leave a trail of evidence that led directly to him.

Moxley turned down offers by leading counsel to conduct his appeal, preferring to represent himself. His hearing in the Banco Court was adjourned for three weeks to enable him to obtain fresh evidence regarding his mental state at the time of the killings. In his plainspoken style, Moxley told Street CJ and James and Stephen JJ: “Three X-rays were taken of my head, and if those photographs had been produced by the Crown it would have wiped out the necessity for this appeal.” Betraying a somewhat naïve view of appellate procedure, Moxley continued: “It is only a matter of the X-ray photos and the stethoscope report being produced and for a doctor to get in that box and say, ‘This man is so and so, and that is the end of the case’.”

143 ibid at 578.
144 R v Simpson (1924) 24 SR (NSW) 511 at 517–518 (Street ACJ).
145 ibid at 518–520 (Street ACJ).
147 “Appin murder: death sentence to be carried out”, The Sydney Morning Herald (Sydney), 19 November 1924, p 13.
148 NSW, Legislative Assembly, Debates, 2 December 1924, p 4082 (George Fuller MLA, Premier). See also “The Appin murder: Premier says punishment should fit the crime”, Barrier Miner (Broken Hill, NSW), 3 December 1924, p 1.
152 ibid pp 62–68, 72.
153 “Moxley appeal: services of counsel offered”, The Canberra Times (Canberra), 5 July 1932, p 2.
Moxley was preternaturally upbeat in the lead-up to his next appearance before the court. According to one report, he “walked agilely up the steps of the Court to conduct his adjourned appeal. He was cheerful and alert on the way from the jail, and chatted with the warders. He had been busy while in jail preparing his case, and appeared optimistic.” Moxley’s grounds of appeal left no stone unturned: he argued that the trial judge had misdirected the jury; that the verdict was against the weight of the evidence; and, for good measure, that he was insane at the time of the killings.

To make good the last of these submissions, Moxley tendered an affidavit from his sister claiming “that injuries to [Moxley’s] head when a child had dulled his intellect”. Chief Justice Sir Philip Street was unimpressed, warning Moxley that his “wandering discussion could not serve any useful purpose”. The court dismissed the appeal after a hearing that lasted all of 20 minutes. In the Chief Justice’s view, such “small discrepancies” in the evidence as Moxley had identified should have been raised at trial. His Honour doubted whether the sister’s affidavit “would have to the slightest degree influenced the result”. As he was being removed from the court, an understandably distraught Moxley yelled at a detective, “You’ll get your cut for telling lies!”

Having lost his appeal, Moxley seemed resigned to his fate. Before Cabinet had made a final decision on his case, Moxley wrote to the Minister for Justice asking that his sentence be carried into effect as soon as possible. After Cabinet had decided that the law should run its course, a deputation organised by the Howard Prison Reform League appealed to the government for a reprieve. Among the representations made by the deputation was the novel claim that Moxley “was suffering from a form of insanity which medical men had not yet discovered”. The president of the NSW Labor Party threw his weight behind the appeal, adding that “[h]e knew of nothing more stupid or less scientific than hanging”.

Premier Bertram Stevens, of the United Australia Party, was unconvinced. While he “sympathised with the views of the deputation”, he gave more credence to the expert opinion that Moxley was sound of mind and therefore accountable for the “ghastly case”.

Moxley was hanged on 17 August 1932. He spent his final days in prayer with a Salvation Army chaplain, to whom he entrusted his diary. The final entry read as follows:

“Colonel Pennell and I have spent a happy night together. We looked for my star. It appeared at 5.25 a.m. We gazed at it together. It is my guiding light. I feel quite calm. I shall leave here 7.45 a.m. to go to B cell. It does not worry me, as death is sweet to me. I have said goodbye to my friends and relatives on this earth. I know I shall be with my mother by 9 o’clock to-day. I shall know the great secret. My mind is at rest and I have put my trust in God. He has led me for twelve days. This morning I shall have no breakfast but Holy Communion. If I cannot get help from that, then nothing will help me. This little book I leave to Colonel Pennell. He has the right to make known anything in it to the world, and it is with the hope that it will do some good that I have recorded the happenings as they came to me. Goodbye, Colonel,”

158 ibid.
160 ibid.
162 “William Moxley: sentence to be carried out: Cabinet’s decision”, The Sydney Morning Herald (Sydney), 4 August 1932, p 9.
164 ibid.
165 ibid.
166 ibid.
may you be spared to carry on for some time yet to help poor unfortunates that are in this place. Signed William Cyril Moxley. 17/8/32. Long Bay, Sydney."168

When the hour of execution arrived, Moxley thanked the warders, “stepped firmly from his cell opposite the gallows, took half a dozen steps to the middle of the trapdoor and stood as erect as a soldier. Within ten seconds of leaving his cell he was dead”.169 Moxley quite literally believed that he would be vindicated from the grave. In a bizarre twist, he had requested that his body be donated to Sydney University “for the furtherance of science; [and] also that it might be proved by examination that he had suffered from delusions.”170 The University refused to accept his remains.171

The next capital case to reach the CCA was the so-called “mountain train murder”. Edwin John Hickey, a 17-year-old dairy hand, was found guilty of murdering Conciliation Commissioner Montague Henwood on 4 November 1935. The two men had occupied the same first-class compartment of a train travelling from Bathurst to Sydney. In a statement from the dock, Hickey said that Henwood seemed friendly at first, but later attacked him for no apparent reason. Hickey then fatally struck Henwood with a water bottle (in self-defence, he claimed), before removing items with which to identify the deceased from Henwood’s pocket and throwing him off the train. The jury evidently rejected Hickey’s account. After the verdict of guilty was read, the trial judge asked Hickey whether he could proffer any reason why the death sentence should not be imposed. Hickey “replied in a firm voice, ‘No’”.172

In February 1936, the CCA heard Hickey’s appeal against conviction. Hickey, who represented himself after dismissing his Crown-appointed counsel, initially proposed to produce fresh evidence that three of the prosecution witnesses in his trial had given false testimony. He abandoned that ground of appeal when it became apparent that the affidavits required to sustain it were not forthcoming. Instead, he pressed ahead with his appeal on the ground that the verdict was against the weight of the evidence. The CCA saw no merit in Hickey’s submissions, which “questioned the inferences to be drawn from certain of the medical evidence”.173 Jordan CJ dismissed the appeal, adding that “having regard to the evidence, it is impossible to see how any other verdict could have been given than that which was given”.174

That a person so young had been condemned to death was the cause of much discomfiture in the community. The Minister for Justice rejected any suggestion that the government would introduce legislation to abolish capital punishment, though he did indicate that Cabinet would give Hickey’s case the fullest attention.175 The Sydney Morning Herald monitored the case closely. Two weeks before his scheduled date of execution, Hickey sent a stoical letter to a friend which read: “Dear Cecil. Just a few lines to let you know the worst has happened. I am to be hanged on May 14. Well, Cecil, old friend, how are the lottery tickets selling? Have you won the £5,000 yet?”176 According to the Herald, “the writer then went on to inquire after the health of certain persons and asked that his handwriting be excused ‘as my nerves are not too steady’”.177 On 30 April, abolitionists gathered

169 “Supreme penalty: Moxley executed Wednesday”, The Longreach Leader (Longreach, Qld), 20 August 1932, p 12.
170 “Moxley’s body: not accepted by university”, The Northern Standard (Darwin), 23 August 1932, p 5.
171 ibid.
174 R v Hickey (unrep, 21/2/36, NSWCCA) (Jordan CJ, Street and Bavin JJ).
177 ibid.
at Emerson Hall to protest against the imminent hanging of Hickey and one John Carpenter Jones, also under sentence of death for attempted murder. Albert Piddington KC — the same Albert Piddington who served as a High Court justice for less than a month before resigning amid attacks on his independence — told the gathering that the statute book was in need of “drastic alteration” because it “provided for capital punishment in certain crimes for which it had been eliminated in England for nearly 100 years”.176 Piddington’s motion condemning the death penalty was carried unanimously.177 The equally controversial Jack Lang, then the leader of the Opposition, took up the abolitionist cause in Parliament.180

Passions were further inflamed on 8 May, when Cabinet decided after three hours’ deliberation not to grant Hickey’s request for clemency.181 As the date of execution drew near, abolitionists demonstrated outside Parliament House and held another protest at Emerson Hall. The member for Cobar, independent Mark Davidson, called for the immediate abolition of capital punishment. With reference to the economic situation, he described Hickey as “the victim of a system that denied him work” and warned that “until that system was altered there could be little hope for highly-strung men, who were often driven to deeds of desperation”.182 Davidson, a bushworker, miner and barber who left school at age 12, had recently come to public attention for defying Legislative Assembly procedure in an attempt to prolong debate on the Hickey and Jones cases. “If you have a spark of humanity in you”, he cautioned his parliamentary colleagues, “you will not rest in your beds for some considerable time to come if this boy is executed on Thursday”.183 (Davidson would later speak movingly in support of legislation abolishing the death penalty for minors — an amendment inspired at least in part by the Hickey case.)184 The ALP Member for Hartley, Hamilton Knight, joined the chorus of parliamentary voices urging restraint. He said: “This afternoon the father of the boy again came to me and asked me if there was any hope for his son. He came to me with tears running down his cheeks. What news is he to take back to the mother of the boy to-night?”185 Knight went on to recount that one of the jurors in the Hickey case, who was “unable to sleep”, had contacted Hickey’s father through a parish priest at Five Dock. According to the juror, the jury had considered recommending that Hickey be shown leniency on account of his youth, but ultimately decided not to do so because, they believed, the government would not deign to send a minor to the gallows.186

For all the advocacy excited and heartstrings tugged by Hickey’s plight, he was hanged at Long Bay gaol on the morning of 14 May 1936. According to the Herald, “Hickey walked from his cell to the gallows with a firm tread. Death was instantaneous”.187 Premier Stevens was unrepentant. In response to the Howard Prison Reform League’s plea for an 11th-hour reprieve, he said that Cabinet had considered the matter exhaustively and saw “no reason to interfere in the ordinary course of the law”.188

176 “Public protest”, The Sydney Morning Herald (Sydney), 1 May 1936, p.12.
177 ibid.
178 “Two to hang; man aged 20 and youth aged 17; Cabinet decides: criticism in House”, The Sydney Morning Herald (Sydney), 24 April 1936, p.11; NSW, Legislative Assembly, Debates, 23 April 1936, pp 3284–3285 (Jack Lang MLA).
179 “Death sentence to stand: Cabinet decision”, The Sydney Morning Herald (Sydney), 9 May 1936, p.17.
180 “Effort to save Hickey; demonstrations arranged”, The Sydney Morning Herald (Sydney), 11 May 1936, p.9.
181 NSW, Legislative Assembly, Debates, 12 May 1936, p 3643 (Mark Davidson MLA).
182 NSW, Legislative Assembly, Debates, 10 May 1939, p 4552 (Mark Davidson MLA), p 4554 (Robert Heffron MLA); Child Welfare Act 1939 (NSW), s 127 (rep). See also R v Murray (1940) 47 WN (NSW) 138, where the CCA, applying s 127, substituted a sentence of life imprisonment for death in the case of a 17-year-old convicted of rape.
183 NSW, Legislative Assembly, Debates, 12 May 1936, p 3646 (Hamilton Knight MLA).
184 ibid.
186 ibid.
Soon after the Hickey saga had come to an end, James Leighton Massey and Aubrey Potter, two motor mechanics in their early twenties, were sentenced to death for the murder of Norman Samuel Stead, the proprietor of a garage in Darlinghurst.\(^{189}\) The two men had planned to raid the garage till, but the robbery went awry when Stead put up resistance and Massey shot him in response. Potter, whose role was limited to keeping watch outside, argued in the CCA that he was not party to a common design to overcome, at all hazards, whatever resistance Stead might have put up. The court dismissed the appeal. Jordan CJ laid particular emphasis on the fact that Massey had shown Potter the pistol just before entering the garage.\(^{190}\) Cabinet, at least, accepted that Potter’s culpability paled in comparison with Massey’s, and in recognition thereof commuted Potter’s sentence to 15 years imprisonment with hard labour.\(^{191}\) It is difficult to resist the conclusion that the public outcry sparked by Hickey’s case had chastened the government. Massey, on the other hand, was not spared the gallows. He spent his last days “in almost constant meditation and prayer”.\(^{192}\) “I can only pray”, he said in a statement issued just before his execution, “that my desperate position and my poor reparation may prove a warning to the youths of my age not to neglect those things that count for Christian life and conduct”.\(^{193}\)

The cases that came before the court in the early part of the 20th century were a product of their less enlightened times. In November 1936, a judge of Quarter Sessions sentenced one James Hetley, who had no prior convictions, to five years imprisonment for indecent assault on a man. The sentencing judge recommended that Hetley be placed under medical observation. In his report to the CCA, the judge explained that “in order to protect the young members of the community against this class of offender, he felt that he could only put [Hetley] away for the maximum period”.\(^{194}\) Even the Crown thought the sentence excessive, and appealed to have it reduced. The CCA substituted a sentence of three years imprisonment.\(^{195}\)

In June 1940, the court heard a Crown appeal against sentence that arose from heart-wrenching circumstances. The prisoner, John Kenny, had pleaded guilty to the rape of his 12-year-old daughter. He was sentenced to two-and-a-half years imprisonment, the offence carrying a maximum sentence of 14 years imprisonment. In the CCA, the Solicitor General noted that a man was sentenced to a lengthier term for misappropriation on the same day Kenny was sentenced — an occurrence that had “aroused a lot of comment in the district”.\(^{196}\) The sentencing judge’s task was complicated by the consequences of the crime. The offender had impregnated his daughter. He failed to mention the girl’s pregnancy to her treating physician, who mistakenly diagnosed her with, and treated her for, a tumour. As a result of the unnecessary operation, the prognosis was that the girl would die on giving birth. The judge at first instance gave particular weight to the offender’s good character and the need to sentence him only for the crime to which he had pleaded guilty, and not for the consequences that might follow. The CCA substituted a sentence of five years penal servitude. Jordan CJ, with whom Davidson and Halse Rogers JJ agreed, said:

“In coming to that conclusion we put aside altogether any consideration of the unfortunate results that may follow from the erroneous diagnosis made by the doctor of the condition

\(^{189}\) “Garage tragedy: two youths remanded”, *The Sydney Morning Herald* (Sydney), 22 February 1936, p 14.

\(^{190}\) *R v Potter* (unrep, 15/5/36, NSWCCA) (Jordan CJ, Davidson and Stephen JJ).

\(^{191}\) “Decisions: six murder cases: one sentence to take effect: five others commuted”, *The Sydney Morning Herald* (Sydney), 2 June 1936, p 11.

\(^{192}\) “James Leighton Massey hanged: condemned man makes lengthy statement”, *The Singleton Argus* (Singleton, NSW), 15 June 1936, p 2.

\(^{193}\) ibid.

\(^{194}\) “Court of Criminal Appeal: Rex v Hetley”, *The Sydney Morning Herald* (Sydney), 14 November 1936, p 10.

\(^{195}\) *R v Hetley* (unrep 13/11/36, NSWCCA) (Jordan CJ, Stephen and Maughan AJ).

\(^{196}\) “Supreme Court: Court of Criminal Appeal: offence against daughter”, *The Sydney Morning Herald* (Sydney), 15 June 1940, p 8.
of the unfortunate child, and we put aside also all consideration of any interest or comment which the case may have excited in the district in which the offence was committed. We direct our attention exclusively to the fact that the offence was committed, and to the age of the child upon whom it was committed. The learned trial Judge paid special attention to the admittedly excellent character borne by the prisoner. That is a factor which his Honour was undoubtedly entitled to take into consideration, but in this type of case it is a factor of less importance than in other crimes.”

In October 1946, the police arrested Frederick McDermott, a shearer, in connection with the murder of farmer William Henry Lavers on 5 September 1936. After a painstaking 10-year investigation that failed to turn up Lavers’ body, the arresting detectives were convinced they had their man. Suspicion attached to McDermott because of his drunken boasts to his girlfriend and workmates that he had killed Lavers for two gallons of petrol, cut up his body, and dumped the remains in a Grenfell paddock. In their enthusiasm, the arresting officers omitted to bring McDermott before an officiating magistrate. They took him instead to the police station for an illegal, hour-long grilling. Unorthodox procedure aside, the police did administer the “usual caution”. McDermott was unusually forthright. Part of the exchange between one of the detectives and the detainee went like so:

“DETECTIVE: During a quarrel between you and Florrie [McDermott’s girlfriend] did Florrie say ‘You killed Lavers, cut his body up and buried it in the sheep yards’?  
McDERMOTT: Yes, she is always saying that to me.  
DETECTIVE: Did you then say ‘I killed Lavers, I hit him on the head with the bowser handle, we had no money to pay for the petrol, we took him away in the car and buried him in the sheep yards out of Grenfell’?  
McDERMOTT: Yes, if I had not said that I would not be here now.  
DETECTIVE: Is it true that you said to Holland that you had killed Lavers and disposed of his body?  
McDERMOTT: Yes, but if Florrie had kept her mouth shut I would not be here now.”

Only after the police had elicited from McDermott as many damaging admissions as they thought he would make did they observe proper legal process. At McDermott’s trial for murder, Herron J allowed the illegally obtained statements into evidence. A conviction was all but inevitable. The trial judge sentenced McDermott to death.

McDermott appealed to the CCA on the ground that the police interview ought not to have been admitted into evidence. The recent case of *R v Jeffries* had established that illegally obtained evidence may be admissible so long as the authorities had refrained from violence, threats, promises, inducements and lies during questioning. Davidson and Street JJ, following *Jeffries*, could see no grounds for interfering with the trial judge’s discretion. Jordan CJ dissented. The Chief Justice took exception to the interview because, he said, it had assumed the form of an

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197 *R v Kenny* (unrep, 14/6/40, NSWCCA) (Jordan CJ, Davidson and Halse Rogers JJ).
198 *R v McDermott (No 2)* (1947) 47 SR (NSW) 407.
199 “10-years-old murder; man for trial”, *The Sydney Morning Herald* (Sydney), 9 November 1946, p 4.
200 *R v McDermott (No 2)* (1947) 47 SR (NSW) 407 at 410.
201 *R v McDermott* (unrep, 26/2/47, NSWSC) (Herron J).
202 A separate appeal on the basis of fresh evidence had already failed: *R v McDermott (No 1)* (1947) 64 WN (NSW) 91.
203 (1946) 64 WN (NSW) 71.
204 *R v McDermott (No 2)* (1947) 47 SR (NSW) 407 at 414–415 (Davidson J), 415–416 (Street J).
overbearing cross-examination. Displaying unmistakable concern for the rights of the accused, his Honour remarked:

“The ‘usual caution’ becomes an empty formality when administered by police officers who proceed immediately to subject their prisoner to a rigorous cross-examination, sometimes lasting for hours, and do not scruple to hold him in illegal confinement whilst he is being cross-examined. To describe as ‘voluntary’, admissions obtained in this way is to play with words. To allow police methods to be assimilated in this way to those of the Gestapo may be described as ‘realistic’, but it is not a type of realism to be tolerated in a free country. I think that, for this reason, the bulk of the evidence objected to should have been rejected in the present case.”205

A further appeal to the High Court failed.206 In refusing special leave to appeal, Dixon J said:

“The character of the questions, the absence of any insistence or pressure in putting them, the fact that no questions were put directed to breaking down or destroying the prisoner’s answers or statements and the fact that there was no attempt to entrap, mislead or persuade him into answering the questions, still less into answering them in any particular way, these are all matters which negative such a degree of impropriety as to require the exclusion of the testimony as to the prisoner’s admissions.”207

Doubts about McDermott’s guilt persisted. Cabinet commuted his sentence to life imprisonment,208 and in 1952 he was released from prison on the recommendation of a Royal Commission which found the evidence of guilt to be inconclusive.209 But suspicion dogged McDermott for the rest of his unhappy years, making it impossible for him to find work or otherwise lead a productive life. McDermott died in 1977, his conviction never having been expunged. Many years later, in 2004, Lavers’s remains were discovered in a cave far removed from the sheep yards where McDermott claimed to have dumped the body. Contrary to McDermott’s boasts, the remains showed no signs of having been dismembered. The discovery gave the lie to McDermott’s confession. In 2012, McDermott’s descendants successfully applied to the CCA to have his conviction set aside.210 McDermott was the first, and as of writing remains the only, Australian to have his conviction posthumously quashed.

In February 1953, the court heard a curious case involving similar fact evidence and thallium, a chemical element high in toxicity and sold in the form of a liquid rat poison before it became notorious for its homicidal applications.211 Gladys Yvonne Fletcher, 30, appealed against her conviction for the murder of her husband, Desmond Butler. Butler died on 29 July 1948, apparently of natural causes. Four years after his death, however, his remains were exhumed for further examination, upon which thallium was discovered in his body and in the lining of the coffin. The events leading up to Butler’s death had cast suspicion on the appellant. In November 1947, Butler accused the appellant of having an affair. Days later, he suffered paralysis of the lower body, but was refused admission to hospital on the ground that his complaints were psychosomatic.
According to friends of the couple, the appellant resented having to care for her husband during his convalescence. When the hospital refused to admit Butler despite his worsening condition, he took up a suggestion by his wife that he tell the doctors he had ingested rat poison. At being told this, the hospital contacted the police and Butler was committed to an asylum. He remained there for five months and, oddly enough, his physical and mental condition improved to the point where he was deemed fit to return to hospital. Butler’s recovery continued there and he was discharged a month later.

The appellant was not altogether happy about her husband’s remission. She told his treating physician, Dr Kirkwood, “that her husband had treated her badly and that she did not see why she, a woman of twenty-four years of age, should be tied to him for life”.212 Shortly before Butler’s discharge from hospital, the appellant confided in her neighbour, “I am not going to have him. I am not going to look after him”.213 Friends reported that on the occasions when they visited Butler, the appellant was nowhere to be seen. So distraught was she by his return that she appealed to Dr Kirkwood to have Butler sent back to the asylum. When Dr Kirkwood explained that this was not possible, the appellant lamented the situation and said she would “have to do something about it”.214 A week later, Butler was dead.

A doctor who saw Butler in his final days described him as a “protoplasmic mass”.215 Butler’s symptoms were consistent with thallium poisoning. At all relevant times, a thallium-based rat poison by the name of “Thalrat” was sold in Sydney shops, although there was no evidence that the appellant had purchased any. However, it did not go unnoticed that Butler’s health had dramatically improved during his stay in the asylum, and later the hospital, only to deteriorate again in the final week under his wife’s care.216

Between the exhumation of Butler’s body and the appellant’s trial for his murder, the appellant had remarried to a man named Bertram Fletcher. In 1952, he too died of thallium poisoning. Fletcher had mistreated the appellant, who consulted a solicitor about having her husband removed from the matrimonial home. The solicitor advised that he could not take any steps until proceedings that the appellant had brought against her husband in Police Court were brought to a close. At this, the appellant mentioned that Fletcher had threatened to take poison to “make himself sick and get her into trouble”217 if she pursued the matter in Police Court. Events took a familiar turn from that point onwards. The next day, Fletcher developed a feeling of numbness in his legs. Numbness developed into paralysis, and Fletcher soon suffered other thallium-related ailments such as hair loss, vomiting and weakness. He died within a month of the symptoms emerging. A post mortem revealed in his body approximately the same quantity of thallium as was in Butler’s. About a fortnight before his symptoms developed, Fletcher had brought home a bottle of “Thalrat” from work.218

The main issue on appeal to the CCA was whether the trial judge had erred in admitting evidence of Fletcher’s death by thallium poisoning. Owen J, with whom Street CJ and Herron J agreed, held that the deaths of the two men occurred in such strikingly similar circumstances that the evidence relating to Fletcher was properly admitted.219 Owen J added that the appellant’s conviction for
Butler’s murder would have been justified on the evidence relating to Butler's death alone, such
were the power of the inferences to which it gave rise.220 The second ground of appeal was that
the trial judge ought to have excluded as prejudicial the appellant’s interrogation by police. During
the interview, the appellant speculated that Fletcher had learned of Butler’s suicide by rat poison
and decided to shuffle off the mortal coil in like fashion, though it was brought to her attention that
Fletcher’s death predated the discovery of thallium in Butler’s body.221 The third and final ground of
appeal, also rejected, was that a bottle of “Thalrat” should not have been admitted into evidence.222

Another case before the court to garner widespread media attention was Stephen Leslie Bradley’s
appeal against conviction for the murder of eight-year-old Graeme Thorne in July 1960. Bradley
had read in the papers that Graeme’s father had won £100,000 in a lottery run by the government to
fund the construction of the Sydney Opera House. In what transpired to be an imprudent decision,
the papers reporting on the lottery win published the Thorne family’s address. Bradley abducted
Graeme while he waited one morning for a relative to escort him to school. The kidnapper’s plan
was to extract a sizeable ransom from the boy’s father. But he was an amateur criminal at best,
and gave insufficient instructions as to how the exchange was to take place. Months went by with no
word from the kidnapper. The situation began to look grim. Graeme’s body was discovered
in August by children playing cowboys and Indians. Even Sydney’s most notorious underworld
figures were shocked by the crime. Kate Leigh, sly-grog operator and self-styled “Queen of the
Underworld”, reportedly said: “I’ve got one of the biggest butcher’s knives in Sydney and it would
give me the greatest pleasure to use it on the mongrels”. 223

In March 1961, Bradley was extradited from Sri Lanka to stand trial in Sydney’s Central Criminal
Court. He made an apparently unsolicited confession on the flight back to Australia. Although he
later argued that the confession was coerced, it was ruled admissible. The confession, together
with identification evidence placing Bradley at the scene of the kidnapping, proved his undoing
at the trial, and he was sentenced to life imprisonment for Graeme’s murder. Evatt CJ and Herron
and Collins JJ heard Bradley’s conviction appeal in May 1961. Bradley argued that the verdict
was unreasonable or could not be supported having regard to the evidence. The court rejected
the appeal and confirmed the conviction. Evatt CJ said of the kidnapping: “People were disposed
to think that such villainous criminals would never rear their ugly head in this country. In this case
they did.”224

Another controversial case to come before the court arose from the “Milperra massacre” of
2 September 1984. During a shootout at a Revesby hotel between members of two rival motorcycle
clubs, the Comancheros and Bandidos, six club members and one girl who was not associated with
either group were killed. In April 1986, each of the 31 participants was indicted on seven counts
of murder and one of affray. All were tried together. At the conclusion of an 11-month long trial in which
249 witnesses were called, nine of the accused were found guilty on all charges, 21 were found
guilty on seven counts of manslaughter and one count of affray, and the remaining accused was
convicted only of affray. The nine who were convicted of murder and affray appealed against their
convictions in the CCA.225 It was argued that the sprawling nature of the trial and the sheer number of
costudied involved had made it impossible for the jury to do justice. The court rejected that

220 ibid at 75.
221 ibid at 79.
222 ibid at 80.
argument, ruling that it was proper to try the accused together because the charges arose from a single incident. They also found that the trial judge, Roden J, had taken extraordinary measures to ensure that the jury gave specific consideration to the case of each individual co-accused. However, the CCA did find that Roden J had erred in failing to instruct the jury that each of the accused was liable for murder only if he foresaw that his participation in the fight would probably and not just possibly cause death, consistent with the mens rea standard of “reckless indifference to human life” under the Crimes Act. Their Honours substituted verdicts of manslaughter for the verdicts of murder. The Crown sought but was refused special leave to appeal to the High Court. The court ruled that only in exceptional cases would it grant special leave to the Crown, and as the respondents had already been released from prison, this was not one of them.

Another tragic crime that came before the court was the rape and murder of Anita Cobby, a 26-year-old nurse, in 1986. The offenders were John Travers, Michael Murdoch and the three brothers Murphy. They dragged Ms Cobby through a barbed wire fence, assaulted and raped her repeatedly, and slit her throat while she was conscious. The men stood trial amid intense media coverage and calls for the reintroduction of the death penalty. At the first of two trials, the jury was discharged when The Sun published a photograph of Travers alongside the headline “ANITA MURDER MAN GUILTY”. The tabloid had previously published the criminal record of one of the Murphy brothers. Travers later pleaded guilty and received a sentence of life imprisonment, and the remaining accused were convicted at the second trial. The sentencing judge, Maxwell J, said of the crime:

“Wild animals are given to pack assaults and killings. However, they do so for the purpose of survival, and not as a result of a degrading animal passion. Not so these prisoners, they assaulted in a pack for the purpose of satisfying their lust and killed for the prevention of identification.”

His Honour continued:

“This is one [of], if not the most, horrifying physical and sexual assaults I have encountered in my forty odd years associated with the law. The crime is exacerbated by the fact that the victim almost certainly was made aware, in the end, of her pending death”.

Maxwell J ordered that the offenders’ files be marked “never to be released”. He added that the offenders deserved “the same degree of mercy they bestowed on Anita Lorraine Cobby”. The offenders appealed to the CCA. Chief Justice Sir Laurence Street delivered the judgment of the court, which traversed a large number of appeal grounds. The Chief Justice concluded: “Not only do I not find it unsafe or unsatisfactory to allow the convictions to stand, but I would myself have been surprised if any other verdict than guilty had been brought in by the jury”. Murdoch and two of the Murphy brothers appealed to the High Court. The High Court quashed Leslie Murphy’s conviction and ordered a retrial on the basis that the trial judge had erred by excluding certain psychological evidence. The evidence suggested that Leslie Murphy’s confession was...
unreliable due to his limited intellectual capacity. He was again convicted in a further trial, and again sentenced to life in prison. Murdoch’s appeal point succeeded and the matter was remitted to the CCA for further consideration, whereupon his conviction was confirmed. Anita Cobby’s murderers remain in prison, never to be released.

The brutal rape and drowning of Janine Balding by a number of homeless youths occurred in 1988. The crime had chilling parallels with the Anita Cobby case. The sentencing judge, Newman J, sentenced the three principal offenders to life along with a recommendation that they never be released, notwithstanding their youth. The case predated “life means life” legislation, which meant that Newman J’s recommendation was without legal effect at the time. Under the sentencing legislation that then prevailed, the three offenders were eligible for release after eight years. A 1992 appeal to the CCA against the severity of the sentences was unsuccessful. However, Gleeson CJ distanced himself from Newman J’s recommendation that the appellants never be released, saying:

“… where the offender is a young person, and there are so many different possibilities as to what might happen in the future, it is normally not appropriate for a sentencing judge to seek to anticipate decisions that might fall to be made … over the ensuing decades”.

The matter rested there until the State Government passed legislation in 1997 and 2001 which all but ensured that offenders in respect of whom non-release recommendations had been made would never be released. This prompted two of the offenders to seek leave to reopen their appeal against sentence and to appeal against Newman J’s non-release recommendation. Those applications failed, primarily on discretionary grounds. Spigelman CJ and Howie J held that the legislature was free to amend sentencing laws and parole arrangements in a manner adverse to the applicants, who simply had to wear the consequences of any change. Even were that not so, Newman J’s non-release recommendation had no legal effect when it was made, and was therefore insusceptible to appeal under the Criminal Appeal Act. A further appeal to the High Court failed.

One of the more bizarre cases to come before the court was Tim Anderson’s 1991 appeal against conviction in what became known as the “Hilton bombing case”. Anderson was convicted of being an accessory to the murder of two garbage men and a police officer, who were killed when a bomb exploded outside the Hilton Hotel in Sydney in February 1978. The intended target was allegedly the Prime Minister of India, who was staying at the Hotel. The Crown case was that one Evan Pederick placed the bomb in a garbage bin at Anderson’s behest. Anderson and Pederick were members of Ananda Marga, a religious movement based in India and under surveillance at the time by the Australian Security Intelligence Organisation (ASIO). The group was campaigning for the release of its divine leader from an Indian prison. According to the Crown case, Anderson and Pederick hoped that by assassinating the Indian Prime Minister, momentum would build for their leader’s release.

In his judgment, Gleeson CJ, with typical understatement, remarked:

“A consideration of some of the features of the assassination proposal might be thought to lead to a conclusion that this was not a very realistic expectation, but the Crown argued that the persons involved in the plot were not very realistic people.”

235 Murphy v The Queen (1989) 167 CLR 94 at 107 (Mason CJ and Toohey J).
236 R v Murdoch (unrep, 10/11/89, NSWCCA) (Hope AJA, Grove and McInerney JJ).
238 ibid at 80 (Gleeson CJ).
240 ibid at 18 (Spigelman CJ), 44 (Howie J).
241 ibid at 20 (Spigelman CJ), 32 (Kirby J), 43 (Howie J).
The Chief Justice described Pederick as:

“a witness who said that on a particular occasion he stood in George Street in Sydney and tried to blow up the Prime Minister of India, the Prime Minister of Australia, and a number of other people besides, and, when his attempt was unsuccessful, attributed its failure to the supernatural intervention of his guru”.244

The Chief Justice added: “He seems to have been a person whose reasoning processes were somewhat unorthodox.”245

The court rejected the submission that Anderson's verdict was unreasonable, but did find that there was a miscarriage of justice on other grounds, one being that the Crown had changed its theory of the case part-way through the trial. That change was necessitated by the implausibility of Pederick’s evidence. The court refused to order a retrial. To do so would have given the Crown an unfair opportunity to “patch up” its case against Anderson.246

In 1998, the CCA heard an appeal from the State's most notorious serial killer, Ivan Milat. Milat was convicted of seven backpacker murders between 1989 and 1992. One of Milat’s would-be victims escaped and testified against him at the murder trial. The witness memorably described Milat as having a moustache like the cricketer Merv Hughes.247 Many of the items belonging to the deceased backpackers were found in Milat’s house and premises occupied by his relatives. Weapons in Milat’s possession bore traces of the victims’ DNA. It was by all accounts a formidable Crown case. The trial judge, Hunt CJ at CL, concluded that the evidence against Milat was so overwhelming as to make his conviction inevitable, although the Crown could not exclude the possibility that Milat had committed his crimes jointly with another.248

Among the submissions put on Milat’s behalf in the CCA was that the trial judge had wrongly admitted the Crown witness’s identification evidence and that the publicity which attended the trial rendered Milat’s conviction unsafe. Gleeson CJ, with whom Meagher JA and Newman J agreed, dismissed Milat’s appeal in its entirety.249 In 2004, the High Court refused Milat’s application for special leave to appeal.250 Milat is currently serving seven life sentences in a supermax prison. He made headlines in 2009 when he gnawed off his little finger, wrapped it in newspaper, and sent it to McClellan CJ at CL.251 Milat explained in a letter to The Sydney Morning Herald that he had given the Chief Judge the finger, so to speak, because his Honour had failed to acknowledge Milat’s previous correspondence. Milat’s missives to Spigelman CJ have apparently gone unanswered as well, although to our knowledge the former Chief Justice has yet to receive any of Milat’s appendages.252

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244 ibid at 452.
245 ibid.
246 ibid at 453.
247 R v Milat (unrep, 27/7/96, NSWSC) (Hunt CJ at CL).
248 R v Milat (unrep, 26/2/98, NSWCCA).
249 Milat v The Queen [2004] HCATrans 179 (Gummow J).
250 It was erroneously reported that the package was sent to the Chief Justice of the High Court: M Clayfield, “Ivan Milat tries to give High Court the finger”, The Australian (Sydney), 27 January 2009, at <www.theaustralian.com.au/news/milat-tries-to-give-high-court-finger/story-e6frg6o6-1111118673888>, accessed 4 April 2013.
In 2005, the CCA heard Kathleen Folbigg’s appeal against conviction and sentence for the murder of three of her children and manslaughter of another.\textsuperscript{252} The Crown case was that Folbigg had smothered each of her children in fits of rage and frustration. The cumulative force of the evidence was overwhelming. Each of the deaths occurred in remarkably similar circumstances. Expert witnesses gave evidence that it was unprecedented for four children within the one family to die of natural causes. Entries in Folbigg’s diary revealed animosity towards her children and were strongly suggestive of her responsibility for their deaths. After canvassing this evidence, the CCA rejected Folbigg’s argument that her convictions were unreasonable. Sully J described the possibility that each of the children died of natural causes as a “debating point possibility” rather than a reasonable possibility.\textsuperscript{253}

The centenary of the CCA brought to an end two high-profile homicide cases that had baffled Sydney since the 1990s. Gordon Wood, chauffeur to the late stockbroker Rene Rivkin, applied for leave to appeal against his conviction for the murder of his girlfriend, 24-year-old model Caroline Byrne. Ms Byrne’s body was found at the base of The Gap at Watsons Bay in Sydney on 7 June 1995. It was assumed at the time that, like many others before her, she had committed suicide by jumping from the cliff top. Ms Byrne had previously attempted suicide and her mother had taken her own life some years before, this being indicative, according to the psychiatric evidence at trial, of an increased risk of suicide in the family. In the week leading up to her death, Ms Byrne had been assessed by her general practitioner as “very, very depressed”. She was in fact scheduled to visit a psychiatrist on the day she died. Against this background, the police concluded that her death was a suicide. A coronial inquest into Ms Byrne’s death returned an open finding in February 1998. There the matter rested for some time.

The applicant’s conduct on the night of Ms Byrne’s death and in the years afterwards aroused suspicion. He was the first to raise the alarm about her wellbeing. In a television interview aired in 1998, he claimed, when asked how he intuited that Ms Byrne had gone to The Gap, that her “spirit” had guided him to her.\textsuperscript{254} Other evidence suggested that Wood or someone fitting his description was at The Gap when, or shortly before, Ms Byrne died. Days after Ms Byrne’s death, Lance Melbourne and Craig Martin, the two owners of a local café, were shown a photo of Ms Byrne by her employer, June Dally-Watkins. Dally-Watkins was making independent enquiries into Ms Byrne’s death. The café owners claimed to have seen Ms Byrne or a woman fitting her description, as well as two men accompanying her, at a park near The Gap on the day she died. Dally-Watkins later showed Melbourne and Martin a photo of the applicant, who, they agreed, bore a strong resemblance to one of the men they saw with the woman. Three years after Ms Byrne’s death, a Watsons Bay resident named John Doherty reported that on the night of her death he saw two men and a woman, apparently intoxicated, below his window overlooking Military Road. One of the men was arguing with the woman, who was sitting in the gutter, “combative” and “slurring her words”.\textsuperscript{255} The argument came to an abrupt end at about 11.30 pm, when Doherty and two fishermen in the area heard a short scream.\textsuperscript{256} The scream was believed to be that of Ms Byrne falling to her death. In 2006, on the basis of this and other evidence, the applicant was charged with, and subsequently convicted of, Ms Byrne’s murder.

\textsuperscript{252} R v Folbigg (2005) 152 A Crim R 35.
\textsuperscript{253} ibid at [143] (Sully J, Dunford and Hidden JJ agreeing). The court did uphold Folbigg’s appeal against sentence in part, reducing her head sentence from 40 years to 30 and her non-parole period from 30 years to 25.
\textsuperscript{254} Wood v R [2012] NSWCCA 21 at [198] (McClellan CJ at CL).
\textsuperscript{255} ibid at [435].
\textsuperscript{256} ibid at [159], [171].
The Crown argued at trial that the applicant had killed Ms Byrne either because she had expressed a wish to end the relationship, this being unacceptable to Wood, or because she could somehow prove that Rivkin had deliberately lit a fire at a business in which he had an interest in order to claim the insurance money. According to the latter theory, Wood feared losing favour with Rivkin if Ms Byrne divulged the incriminating information, and so he killed her rather than risk the loss of his job. The prosecution made much of the fact — dubbed the “killer point” — that the applicant had apparently pinpointed the precise location of Ms Byrne’s body from the cliff top, despite the night being so dark that the rocks below could only be seen with the aid of a high-powered police flashlight. The Crown case relied heavily on the expert evidence of Associate Professor Rod Cross, an engineer and physicist. His various experiments were said to prove that a man of Wood’s size and strength could have “spear thrown” Ms Byrne from the cliff top to the spot from which her body was retrieved — this, despite the inability of the police to confirm where Ms Byrne had landed. Associate Professor Cross went on to write a book detailing his involvement in Wood’s prosecution.

Wood’s appeal was upheld on various grounds, but most significantly on the ground that the verdict was unreasonable and not supported by the evidence. The court gave short shrift to the “killer point” by pointing out the obvious, namely, that if the night were so dark that the rocks at the base of The Gap were not visible to the naked eye, then whoever threw Ms Byrne from the cliff top (assuming she was thrown) would not have been able to see where she landed. As the trial judge elegantly put it in his summing-up: “Committing a crime doesn’t improve your eyesight, or the weather”.

The appeal court drew attention to the many problems associated with the identification evidence used to convict the applicant. The photo of the applicant shown to Melbourne and Martin was not part of a photo array. Moreover, the prosecution could not exclude the possibility that the café owners’ in-court identification of the applicant as one of the men accompanying the woman at The Gap was based on their memory of the photo of Wood which Dally-Watkins had shown them years before (a phenomenon known as the “displacement effect”). In a further sign of the unreliability of Melbourne and Martin’s evidence, they erroneously identified Ms Byrne’s modelling agent as one of the two men with her at the park on the day in question.

Doherty’s evidence was also tainted by the displacement effect, as he had seen the applicant’s television interview of 1998. More generally, the court observed that the erratic behaviour of the woman Doherty saw on the night of 7 June 1995 did not comport with Ms Byrne’s demeanour as observed by her family and friends.

The court’s judgment was highly critical of Associate Professor Cross, whose “spear throw” experiments did not replicate the conditions prevailing at The Gap on the night of Ms Byrne’s death, and who had become so closely identified with the police and prosecution’s cause that his evidence lacked the impartiality which the law requires of expert witnesses. Cross’s book was admitted as fresh evidence on the appeal. It detailed the extent to which he had become involved in the police investigation and the firmness of his belief in the applicant’s guilt.

258 Wood v R [2012] NSWCCA 21 at [611].
259 ibid at [288].
260 ibid at [147], [401]–[402].
261 ibid at [460].
262 ibid at [162], [459].
263 ibid at [275]–[276].
264 ibid at [717].
265 ibid at [731]–[732].
The Crown’s case theory was also fraught with problems. The court criticised the “entirely speculative and internally inconsistent”266 motive put forward by the Crown, to the effect that Wood was so enamoured of Byrne that he would kill her if he could not be with her.267 Of the motive involving Rivkin’s business interests, the court said: “the suggested evidence of a motive involving Rivkin is so thin that it should never have been left with the jury”.268 Their Honours also noted that the suggestion of a homosexual relationship between the applicant and Rivkin may have coloured the evidence to the applicant’s disadvantage.269 After essaying these and other flaws in the Crown case, McClellan CJ at CL, with whom Latham and Rothman JJ agreed, granted the application for leave to appeal, upheld the appeal and quashed the applicant’s conviction.270

Also in 2012, the CCA upheld Jeffrey Gilham’s appeal against his convictions for the murder of his parents, Helen and Stephen Gilham.271 The history of the matter and the central issues involved require some elaboration.

In 1995, the applicant pleaded guilty to the manslaughter of his older brother, Christopher. The killing occurred in the early hours of 28 August 1993. The applicant and Christopher were aged 25 and 23 respectively. They lived with their parents, Helen and Stephen Gilham, in the family home at Woronora, although by the applicant’s own admission they were not especially close. Both excelled in their studies and the community held them in high regard. The applicant was gregarious and popular. He had achieved some success as a yachtsman, and was apparently his father’s favoured son. Christopher was quieter and more introspective. He was a talented fencer and pianist, and enjoyed the company of a close circle of friends.272

According to the applicant, he was provoked into killing Christopher when he came upon his brother setting alight the bodies of Helen and Stephen Gilham, whom he (Christopher) had stabbed to death only moments before. For years, the police appeared to accept this version of events. In June 1995, a coronial inquest confirmed the applicant’s alibi. However, in 1999, at the urging of the applicant’s uncle, the police reopened their investigation into the deaths of Stephen and Helen Gilham. A second coronial inquest was held at the conclusion of the police investigation. The Deputy State Coroner found in April 2000 that there was evidence on which a jury could conclude that the applicant had murdered his parents. Despite the coronial finding, the Director of Public Prosecutions (DPP) declined to prosecute owing to the lack of any reasonable prospect of conviction. That assessment had evidently changed by 21 February 2006, when the Crown filed an ex officio indictment charging the applicant with his parents’ murder. The applicant’s first trial resulted in a hung jury, the second in his conviction and sentence to life imprisonment on both counts of murder.273

266 ibid at [19].
267 ibid.
268 ibid at [239].
269 ibid at [694].
270 ibid at [378]–[388] (McClellan CJ at CL); at [810] (Latham J); at [820] (Rothman J).
272 ibid at [3]–[4], [11].
The Crown case was entirely circumstantial. Three weeks before the killings, the applicant mentioned to his girlfriend and a friend that Christopher was behaving aggressively, and at times violently, towards his parents. While there was evidence that Christopher was having relationship problems and difficulty finding work as an engineer and teacher, there was no independent evidence to corroborate the applicant’s claims. To the contrary, Christopher had a reputation for being quiet, calm and gentle. The Crown argued that the applicant had made these comments in an attempt to frame Christopher for the killings. Other evidence suggested that Christopher was unlikely to be the killer. He was found without his glasses, and was so short-sighted that without them he would have found it very difficult to navigate his way in the dark to his parents’ bedroom and stab them repeatedly. Moreover, Christopher’s unusual state of dress — naked, save for a shave coat — was not common among premeditative killers.

The Crown made much of other aspects of the evidence. It argued that the clustering and number of stab wounds to each of the deceased were so extraordinarily similar that a single attacker must have inflicted them. There was also evidence that someone had attempted to siphon petrol from a car into a jerry can, presumably for the purposes of setting the house alight. A fireman at the scene reported smelling petrol on the applicant’s breath. The applicant claimed that he and his father had siphoned the petrol the night before the killings in an attempt to make two-stroke fuel for one of the family’s motorboats, which they were planning to use on a boating trip the next day. However, the evidence did not suggest that either he or the applicant’s father had plans to go boating. Most significantly of all, Crown experts gave evidence that the levels of carbon monoxide in the blood of Stephen, Helen and Christopher indicated that each of them had died before the fire was lit. This evidence contradicted the applicant’s alibi, pointing instead to the conclusion that it was he who lit the fire after murdering his parents and brother.

The applicant’s appeal raised complex questions of law as well as of fact. One of the legal issues at the heart of the appeal was whether, contrary to the rule against double jeopardy, the prosecution of the applicant for the murder of his parents was in conflict with his conviction for Christopher’s manslaughter. The contradiction was said to arise because the latter conviction was founded on the assumption that Christopher, not Jeffrey, had killed Helen and Stephen Gilham.

The CCA, sitting as a five-member panel, had previously ruled upon this issue in an interlocutory appeal heard in 2008. McClellan CJ at CL, with whom Latham and Hidden JJ agreed, accepted that the applicant’s conviction for manslaughter entailed an acquittal for Christopher’s murder. His Honour also accepted that “[t]he factual basis for both the applicant’s acquittal for the murder of his brother and his conviction for his manslaughter are in conflict with his prosecution for the murder of his parents.” His Honour concluded, however, that the public interest in the due prosecution of murder suspects meant that the applicant’s prosecution for his parents’ murder would not be “an abuse of process” requiring the court’s intervention.

273 ibid at [11]–[16].
274 ibid at [472]–[479].
275 ibid at [480]–[481].
276 ibid at [482].
277 ibid at [248]–[250].
278 ibid at [64], [80]–[81].
279 ibid at [508].
280 ibid at [507].
281 ibid at [597].
283 ibid at [165]–[166].
284 ibid at [209].
285 ibid at [222].
The double jeopardy argument was revived on the second appeal. The court adopted reasoning similar to that of the majority in the first appeal. Their Honours accepted that the murder convictions and the manslaughter conviction gave rise to an apparent inconsistency. But, their Honours stressed, “the rule against double jeopardy does not operate where the way the prosecution seeks to prove its case incidentally has the effect of calling into question or proving the error of a previous acquittal”. As the evidence relating to the killing of Christopher was used at trial in this incidental way only, there being no positive suggestion that the applicant had murdered Christopher, the trial did not run foul of the rule against double jeopardy. Their Honours added that the applicant’s acquittal of Christopher’s murder was not equivalent to a “declaration of innocence”, but merely an acknowledgement that the Crown could not prove the crime.

The CCA did, however, accept that the trial judge had denied the applicant the “full benefit” of his acquittal for Christopher’s murder. The jury was informed of the applicant’s 1995 plea to manslaughter, as they needed to be if they were to understand the context of the murder trial. But they were not informed of what that plea necessarily entailed, namely that the Crown could not, as at 1995, exclude the possibility that the applicant’s version of events was true.

The applicant was granted leave to adduce both new and fresh evidence on the appeal. Among the newly admitted evidence was the evidence of one Professor Penney that the levels of carbon monoxide in the blood of Stephen, Helen and Christopher were consistent with their having inhaled smoke emanating from the fire for two to four minutes before their deaths. This evidence was, the court noted, in conformity with the applicant’s alibi. On Professor Penney’s evidence alone, their Honours were satisfied that the applicant had lost a fair chance of acquittal.

The applicant also argued, unsuccessfully, that the jury verdict was unreasonable or could not be supported having regard to the evidence. For the purposes of this ground of appeal, the court was limited to the evidence before the jury, and could not have regard to the new or fresh evidence admitted on the appeal. Their Honours concluded that the jury’s advantage in seeing and hearing the applicant give evidence was capable of resolving whatever doubts the court harboured about his guilt.

Other aspects of the Crown case came in for criticism. In particular, their Honours criticised the prosecution for arguing that the similarity of the stab wounds suffered by each of the deceased was indicative of a single attacker. This submission, the court noted, was premised on coincidence reasoning, and was therefore inadmissible unless the trial court was of the view that the evidence had “significant probative value”. The issue was overlooked at trial. Arguably, the probative value of the similarities was insignificant, as they could be attributed to explanations other than the involvement of a single attacker. Specifically, the same knife was used to stab each of the deceased, and the evidence established that most stabbings were to the chest area.

286 Gilham v R [2012] NSWCCA 131 at [141].
287 ibid at [146].
288 ibid at [156].
289 ibid at [147]–[149].
290 ibid at [150]–[155].
291 ibid at [599]–[607].
292 ibid at [643]–[646].
293 ibid at [467].
294 ibid at [543].
295 ibid at [325].
297 Gilham v R [2012] NSWCCA 131 at [327].
298 ibid at [328].
As the applicant had succeeded in establishing that his trial miscarried, the court had to decide whether to acquit or retry him. Although their Honours’ judgment was otherwise unanimous, they divided on this contentious question. McClellan CJ at CL was in favour of a retrial. His Honour said: “The seriousness of the charges, the life sentences imposed, and the proportionally short period of time served by the applicant point to this being an appropriate case for the exercise of prosecutorial discretion.” Fullerton and Garling JJ, however, ordered the entry of a verdict of acquittal. Their Honours emphasised that a further trial would be the applicant’s third; that the DPP had previously indicated to the applicant that he would not stand trial for his parents’ murder; and that the Crown case at a subsequent trial would be substantially weaker than the cases presented at the previous trials. In the result, the applicant was acquitted of his parents’ murder.

Guideline judgments

A history of the court would not be complete without mention of guideline judgments for sentencing. At a time when mandatory sentencing was seriously in prospect, Spigelman CJ visited England to look at the practice of superior courts giving guidance to first-instance judges on matters of sentencing principle and the appropriate range of sentences for particular crimes. In the first guideline judgment issued by the CCA, the Chief Justice stressed that inconsistency in sentencing tends to erode public confidence in the administration of justice. His Honour’s intention was not to deny judicial discretion, but to make its exercise more likely to lead to outcomes that align with community standards. The High Court was not as enthusiastic as the CCA, and in 2001 questioned, among other matters, whether the court had the power to issue guideline judgments on its own motion. In response, the State Parliament supported the Chief Justice’s vision, amending the Criminal Appeal Act to give the court this power. Guideline judgments now play a significant role in the sentencing of many offenders.

Unreasonable verdict appeals: an evolution of approach

As noted above, the primary reason why Parliament created a CCA was to allow an appellate court to review a jury’s factual findings and, where appropriate, to overturn a jury’s verdict. The court was slow to embrace this role. The language of s 6 was imported directly from the English Act. It provides in part that the CCA “shall allow the appeal if it is of opinion that the verdict of the jury

299 ibid at [660].
300 ibid at [665]–[669], [672] (Fullerton J); at [692], [698], [700] (Garling J).
303 Wong v The Queen (2001) 207 CLR 584 at [84] (Gaudron, Gummow and Hayne JJ).
304 Criminal Legislation Amendment Act 2001 (NSW), Sch 5.
305 For an assessment of the situation as at 1945, see Evatt, above n 32, p 297: “From Holman’s point of view the chief advantage of the Act derived from the newly created jurisdiction of the Appeal Court to set aside a jury’s finding of guilty. But in New South Wales even this jurisdiction has been sparingly, very sparingly, exercised. It was intended that the jury’s finding should be subjected to an independent review, but that intention seems to have been defeated.”
should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence". Two approaches have competed for acceptance. The first requires the court to consider only whether there is sufficient evidence to support the conviction under review, without regard to the court’s preferred view of the facts or the reliability of the evidence. Chief Justices Sir William Cullen, Sir Philip Street and Sir Frederick Jordan thought this approach to be correct.\(^{306}\)

In a 1928 appeal, Sir Philip said:

“There was evidence on which the jury could find the applicant guilty if they chose to accept it; and we cannot substitute for their verdict the opinion of the judge who presided or anyone else’s opinion. The law has made the jury the judges of the facts, and if, in any case, there was evidence on which they might properly arrive at a conclusion of guilt, and if they were properly directed in the matter, I do not see on what principle this court can set their verdict aside.”\(^{307}\)

The High Court was initially of the same view. Knox CJ and Gavan Duffy and Starke JJ said in respect of a 1928 appeal that raised an unreasonable verdict ground: “It is of the highest importance that the grave responsibility which rests on jurors … should be thoroughly understood and always maintained.”\(^{308}\)

The High Court has decisively moved from this approach towards a position that is less deferential to the jury as the tribunal of fact. The appeal court is now required to “make an independent assessment of the evidence, both as to its sufficiency and its quality”.\(^{309}\) It is assumed that “[i]n most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced”.\(^{310}\)

The High Court has attempted to reconcile this approach with the previous authorities by explaining that where a reasonable doubt experienced by a criminal appeal court can be resolved by the jury’s verdict of guilty may be allowed to stand advantage in seeing and hearing the evidence, both as to its sufficiency and its quality”.

It is accepted that by granting the jury this measure of deference, it remains “the body entrusted with the primary responsibility of determining guilt or innocence”.\(^{312}\) Practically speaking, however, the CCA must ask itself whether it is persuaded of the appellant’s guilt to the criminal standard of proof.\(^{313}\)

\(^{306}\) *R v Dent* (1912) 12 SR (NSW) 544 at 550 (Cullen CJ); *R v Mansfield* (1916) 16 SR (NSW) 187 at 193–194 (Cullen CJ), 198 (Ferguson J); *R v McCall* (1920) 20 SR (NSW) 467 at 470 (Cullen CJ, Gordon and Wade JJ agreeing) (special leave refused in *McCall v The King* (1920) 28 CLR 608 (note)); *R v Thomas* (1928) 28 SR (NSW) 490 at 491 (Street CJ); *R v Cable* (1947) 47 SR (NSW) 183 at 184–185 (Jordan CJ); *R v Crooks* (1944) 44 SR (NSW) 390 at 393 (Jordan CJ, Davidson and Halse Rogers JJ agreeing). See also *R v Sharah* (1932) 32 SR (NSW) 444 at 446–447 (James J, Davidson and Halse Rogers JJ agreeing) quoting *R v Perfect* (1917) 12 Cr App R 273: “Unless we, sitting in this Court, are prepared to say that, when a judge differs from a jury on a finding of fact, we ought to conclude that the verdict is unreasonable, or that there has been a miscarriage of justice, we cannot quash this conviction … In these circumstances it seems to us that we must accept the decision of the jury on the facts, and that we are not in a position to quash this conviction, unless we substitute ourselves as a tribunal of fact …”

\(^{307}\) *R v Thomas* (1928) 28 SR (NSW) 490 at 491 (Street CJ).

\(^{308}\) *Ross v The King* (1922) 30 CLR 246 at 256. Their Honours were applying s 594 of the Crimes Act 1915 (Vic), since repealed, which was materially identical in relevant respects to s 6 of the Criminal Appeal Act.


\(^{310}\) *M v The Queen* (1994) 181 CLR 487 at 494 (Mason CJ, Deane, Dawson and Toohey JJ).

\(^{311}\) Ibid.

\(^{312}\) Ibid at 493.

\(^{313}\) *Bain v The Queen* (2012) 87 ALJR 180 at [48] (Gageler J). See also *Chamberlain v The Queen* (No 2) (1984) 153 CLR 521, where Gibbs CJ and Mason J said at 534: “To say that the Court of Criminal Appeal thinks that it was unsafe or dangerous to convict, is another way of saying that the Court of Criminal Appeal thinks that a reasonable jury should have entertained such a doubt.” This approach is reflected in the painstaking analysis of the sufficiency and quality of the evidence in the recent appeals brought by Gordon Wood and Jeffrey Gilham: *Wood v R* [2012] NSWCCA 21 at [49]–[388] (McClellan CJ at CL, Latham and Rothman JJ agreeing); *Gilham v R* [2012] NSWCCA 131 at [465]–[543] (McClellan CJ at CL, Fullerton and Garling JJ).
Other aspects of the court’s work

Today, the typical judgment delivered by the CCA will review the factual background to the case, trace the appeal’s progress through the courts, and address the parties’ submissions in detail. The authors will usually make extensive citations to relevant authority. Few, if any, judgments are delivered ex tempore. While courts, practitioners and the media have become inured to such judgments, they are of relatively recent origin. The modern judgment is a product of various influences:

- the ever-expanding volume of legislation relevant to criminal appeals and sentencing and the emergence over time of a body of judicially developed sentencing principles
- contemporary administrative law, which has disciplined the judicial mind in its emphasis on rationality, intelligibility and transparency of reasoning process
- the inherent complexity of modern criminal offences, particularly those of the “white collar” variety
- an awareness among judges that, to a degree not previously seen, their reasons will be carefully examined by appellate courts and counsel, a sceptical press, and curious laypersons.

Longer judgments are also attributable to specific developments in the area of principle: for instance, the approach to unreasonable verdict appeals now in ascendancy requires the court to assay the whole of the evidence presented at trial. 314

Gone are the days when the presiding judge could be as concise as Sir Frederick Jordan, who extemporaneously delivered the following judgment in 1935: “The Court is of the opinion that it is quite impossible to interfere with the sentence, which seems to have been richly deserved.” 315 Sir Frederick, whose real interests lay in equity, took a robust and at times wry approach to criminal appeals. Appearing before his Honour could be a daunting experience. According to one writer, the Chief Justice “adopted a manner in his robes that was not merely cold, but chilling. He had a high-pitched voice of frosty intonation, and his thin-rimmed spectacles added to the severity of his demeanour.” 316 True to form, Sir Frederick did not hesitate to make known what he thought of certain appellants. The following extracts from his Honour’s judgments are indicative: “The facts show that the prisoners were two ruffians — young ruffians, it is true, but still ruffians — who were under arms, robbing unfortunate and defenceless taxi drivers and shopkeepers.” 317 “The facts … show that the three appellants are three young jackals who, having been drinking with a man old enough to be their father, apparently at his expense, lured him to a somewhat secluded spot on a river bank, and there … assaulted him with intent to rob him.” 318 And, in 1944: “At the present time when menfolk of the family are away at the war or engaged in war work it is very terrifying to the unfortunate wife and children to find that their home has been broken into by some blackguard for the purpose of stealing.” 319

The judges are, in a sense, historians and chroniclers of social and cultural minutiae. Their judgments abound with details of the State’s shadowy underworld, including its protagonists and bit players. Consider the following passage in a judgment of Sir Frederick delivered in 1944:

“The case sought to be made by the Crown was that they [the appellants] had adopted, for the purposes of the theft, a technique which is said to be not uncommon, and involves

314 See above nn 305–313 and accompanying text.
316 JM Bennett, Portraits of the Chief Justices of New South Wales, 1824–1977, John Ferguson, Sydney, 1977, p 44.
317 R v Brignull (unrep, 14/8/36, NSWCCA) (Jordan CJ, Davidson and Street JJ).
318 R v Cowan (unrep, 30/6/44, NSWCCA) (Jordan CJ, Davidson and Street JJ).
the participation of at least two persons, one of whom must be a woman. The modus operandi is as follows. The woman induces the prospective victim to accompany her to a room, ostensibly for the purpose of prostitution. After he has undressed, and whilst his attention is being engaged by the woman, an accomplice surreptitiously searches his clothes and steals any valuables found in the pockets. This is technically described, by practitioners in the art, as ‘doing a ginger’. In the case of R v Surridge [(1942) 42 SR (NSW) 278] the victim, having detected the thieves in the act, was imprudent enough to object, and was murdered by male accomplices introduced to overcome his resistance. In the present case, the thieves decamped before the theft was discovered, and the victim suffered nothing worse than the loss of his money.320

The cases that come before the court can also reflect the worst of human nature. In 2002, the late Justice of Appeal Roderick Meagher AO, whose acerbic style was redolent of Sir Frederick’s, presided over an appeal brought by Mark Valera, who had been sentenced to life imprisonment for two counts of murder.321 The facts were truly gruesome. Meagher JA said in his judgment: “Using language as restrained as possible, I find the circumstances of each murder disgusting.”322 His Honour dismantled the appellant’s arguments in short order and concluded by remarking that “one might be tempted to suggest that the circumstances of the present case call for a punishment a good deal more severe than mere life imprisonment”.323 Wood CJ at CL and Bell J agreed with Meagher JA’s reasons, but added that they “would resist the temptation to consider whether the case might have called for any more severe punishment than that imposed”.324

In spite of the distasteful subject matter with which it sometimes deals, the court can occasionally be the source of humour. Of particular note is one occasion, verified by the former Chief Justice, when Gleeson CJ and Meagher JA sat together. Early in the proceedings, Meagher JA whispered in the Chief Justice’s ear: “You only have to look at him to know he’s guilty”. The Chief Justice is said to have responded: “They haven’t brought the prisoner up yet. That’s the sheriff’s officer you’re looking at.”

The CCA has been a pioneer of equal opportunity in the judicial system. It is now common knowledge that the court sat the first all-female Bench in the common law world in 1999, when Beazley JA and Simpson and Bell JJ sat together to hear three appeals. Less well known is the story behind that historic moment, which Simpson J has authorised us to tell. Handley JA was originally rostered to preside over the court. However, Spigelman CJ sensed the opportunity to make history and authorised a last-minute change to the roster. The three women justices sat together amid considerable publicity. On the night before this historic sitting, Sydney suffered a major hailstorm

320 R v Crooks (1944) 44 SR (NSW) 390 at 392 (Jordan CJ).
322 ibid at [2].
323 ibid at [9].
324 ibid at [11] (Wood CJ at CL); [16] (Bell J agreeing).
which resulted in widespread property damage along the State’s east coast. On the day of the sitting, Simpson J sent the Chief Justice an email in which she jokingly inquired, with reference to Genesis 6:5 and 7:11 of the Old Testament: “Did we receive last night an expression of opinion from above at the enormity of the unnatural and wicked event you have ordained to take place today?” Little did her Honour know that the “expression of opinion from above” was indeed received by the Chief Justice, whose residence in Darling Point was badly damaged the night before.

Conclusion

If William Holman were alive today, he would no doubt look upon his creation with pride. A cynic might say that his enthusiasm for the court derived from his own unhappy experience with the criminal justice system. If that is true, the Daily Post affair was a blessing in disguise. The future Attorney General’s experience was nothing if not educational. It brought home to Holman that wrongful convictions, inappropriate sentences and inadequate opportunities for appellate review can cause serious injustice to individuals and have a corrosive effect on public confidence in the justice system. The Parliament of NSW established the CCA to address these issues. The court has been entrusted with the responsibility of articulating the common law and construing the statutes which define the criminal law in NSW. Within the parameters set by Parliament, the court provides guidance to lower courts with respect to the sentences which are appropriate for particular offences and offenders. Most significantly of all, the court has accepted the onerous task of reviewing convictions and sentences for factual as well as legal error. As the High Court observed in Weiss, in reference to s 6(1) of the Criminal Appeal Act:

“Once it is acknowledged that an appellate court may set aside a jury’s verdict ‘on the ground that it is unreasonable or cannot be supported having regard to the evidence’, it follows inevitably that the so-called ‘right’ to the verdict of a jury rather than an appellate court is qualified by the possibility of appellate intervention.”

Notwithstanding the occasional flesh wound that the CCA has received from on high, none except a disgruntled appellant would doubt that it has made a profound and enduring contribution to the criminal justice system in this State. That it has done so is a testament to the skills, experience and dedication of successive Chief Justices and the judges who have served with them on the court.

325 Email from Simpson J to Spigelman CJ, 15 April 1999 (on file with McClellan JA).
326 (2005) 224 CLR 300 at [30].
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