

THE PREROGATIVE OF MERCY IN NSW

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Abstract

The prerogative of mercy, as it applies in New South Wales, is considered in its historical context. It emerges that in 1987 the prerogative was supplemented and, to an extent, displaced by the establishment of what might be better termed ‘an extraordinary avenue of appeal’ now to be found in Part 7 Crimes (Appeal and Review) Act 2001 (NSW). It is argued that there are occasions when the prerogative power should be exercised to the full. Some proposals are made for reform of Part 7 of the Act.

Introduction

In 1983, Smith noted that the prerogative power to pardon is invoked rather more frequently than one might imagine from the infrequent discussion of it.² Since that time, the situation in New South Wales remains unchanged: cases concerning the prerogative, and the supplementary provisions of Part 7 of the *Crimes (Appeal and Review) Act 2001* (NSW) (the ‘Act’) and its predecessor, Part 13A *Crimes Act 1900* (NSW) are not infrequently reported, but attract very little comment.³ It has been suggested in both the High Court and the Federal Court that the pardon may have become less popular with the creation of appeals courts.⁴ There is no sustained analysis of the NSW legislation.

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² ATH Smith, ‘The Prerogative of Mercy, the Power of Pardon and Criminal Justice’ (1983) *Public Law* 398, 398.

³ The most recent case disclosed by my research is *Application of Paul Nardelli Under Section 474D Crimes Act 1900* [2006] NSWSC 967.

⁴ *Mallard v R* [2005] HCA 68, (2005) 224 CLR 125 per Gummow, Hayne, Callinan and Heydon JJ, [4]. Their honours do not cite any authority for this proposition. *Director of Public Prosecutions (ACT) v Eastman* [2002] FCAFC 209, per Madgwick J, [11], not citing any authority or source.

In his academic treatment of the English law, Smith contended that the power should be more frequently examined, in order that it might be limited, arguing: ‘If its continuance is to be tolerated at all, the greatest care is necessary to ensure that no abuse is possible.’⁵ My contention is that the prerogative should be more widely known in order that it not only continue, but that it be more widely invoked. It may be significant that Smith’s study was strictly a black letter law account. One has the impression that the concept of mercy perhaps offended his sense of rationality. The black letter law is critical, and indeed it is my starting point. But the black letter is not always sufficient for intellectual enquiry. It is often necessary to consider the law in its social context and to evaluate it against ethical and social principles. The prerogative has forceful modern opponents, who base their opposition upon an appeal to political principles. For example, in a speech to the Legislative Assembly on 5 September 2001, speaking to the *Crimes Amendment (Aggravated Sexual Assault in Company) Bill*, Mr Hartcher, the member for Gosford, stated:

The Government has given itself, or the courts, the power to impose a sentence of life imprisonment but retains the power to release that person at any time under the prerogative of mercy. The prerogative of mercy is one of the common law prerogatives that vests in the Crown; in this case the Crown is represented by the Governor. The Governor may exercise at any time the prerogative of mercy to commute a sentence, to grant an amnesty, or to issue a pardon. On the Premier’s advice the Governor may, under the prerogative of mercy, even when the person has been sentenced to life imprisonment, release that person the very next day.

So much for the Premier’s promise about getting tough on crime and tough on the causes of crime. So much for the Premier’s promise that gang-rapists would face a maximum sentence of life imprisonment. The bill does not reflect that, because to be eligible for a life sentence the offender has to satisfy a higher stage, and, additionally, the Government retains the power to release an offender the very next day under the prerogative of mercy,

⁵ Smith above n 2 at 400.

which it expressly retains for itself in the bill. This is a classic Bob Carr confidence trick and is exposed as such.⁶

Clearly, the prerogative to pardon is potentially of significance, if only for its propensity to be used in political jousting.⁷ It may be timely to review and evaluate the provisions which obtain in New South Wales.⁸

In the colony of New South Wales, the power of pardon was ‘completely and solely exercisable by the Dominion Executives’.⁹ The prerogative was bound to be topical,¹⁰ as New South Wales was specifically a penal colony, and most convicts were freed at some point, many being freed pursuant to pardons. Many citizens were themselves thus in possession of pardons. State Records of NSW advises that:

Convicts with life sentences generally received pardons. In the early years of the colony there was no limitation on the Governor’s discretion to grant pardons.¹¹

When it appeared that there may have been an error in the issuing of their pardons, an uproar ensued.¹² As we shall see below, some of the controversy which attended the exercise of the prerogative led to limits being placed on the manner in which the Governor might exercise the power. Even so, the prerogative was still quite broad. Thus, by virtue of the Letters Patent Constituting the Office of Governor of New South Wales of 29 October 1900, issued together with Letters for the new Federation, the Governor could:

⁶ New South Wales, *Parliamentary Debates*, Legislative Assembly, 5 September 2001, 16372.

⁷ Brian M Hoffstadt, ‘Normalizing the Federal Clemency Power’ (2001) 79 *Texas Law Review* 561, refers at 590 to incidents such as President Ford’s pardon of Nixon, President Reagan’s pardon of George Steinbrenner, and President Bush’s Iran-Contra pardons, commenting that: ‘This particular use of the clemency power is often controversial.’

⁸ I did contact the Governor’s office to obtain statistics, and was told that these were ‘probably not available’. The NSW Bureau of Crime Statistics and Research advised me that ‘the Bureau of Crime Statistics and Research archives statistics only related to criminal offences themselves, not all court processes and procedures.’

⁹ Herbert Vere Evatt, *The Royal Prerogative* (1987) 119.

¹⁰ Anne Twomey, *The Constitution of New South Wales* (2004) 662.

¹¹ State Records Authority of New South Wales, <http://www.records.nsw.gov.au/archives/convict_records_1061.asp> at 24 January 2007.

¹² Smith above n 2 at 426-7.

... grant to any offender convicted in any Court of the State, or before any judge or other magistrate of the State, within the State, a pardon, either free or subject to lawful conditions, or any remission of the sentence passed on such offender, or any respite of the execution of such sentence for such periods as the Governor thinks fit, and further may remit any fines, penalties, or forfeitures due or accrued to the Crown.¹³

A similar position obtained for the Commonwealth by virtue of Clause VIII of the Governor-General's Instructions of 1900.¹⁴ However, as I shall show, both of these Letters Patent have been revoked.

Prior to modern policing procedures, pardons were widely used in order to facilitate the coming forward of accomplices.¹⁵ However, at least from 1900, the Governor-General and the Governor of New South Wales do not seem to have possessed any prerogative power to pardon prior to conviction, as the Crown has in the United Kingdom,¹⁶ or as is the case in the United States of America, where the President is seized with an 'unbridled pardon authority'.¹⁷ I can find no authority to suggest that the Governor-General or Governor, as opposed to the Crown, was ever delegated to wield that power.

The position in the Commonwealth and State jurisdictions is affected by historical circumstances. In 1874 and 1875, in New South Wales, there was controversy over the exercise of the Governor's decision to remit part of the sentence of Frank Gardiner, a bushranger. Further Letters Patent were issued from the UK, and in 1892, new Royal Instructions were furnished, so that ultimately the Governor of New South Wales was

¹³ *Smith v Corrective Services Commission (NSW)* (1980) 2 NSWLR 171, per Hope JA [28] with whom Street CJ and Moffit P agreed. This point was not mentioned in the High Court, *Smith v Corrective Services Commission of NSW* (1980) 147 CLR 134.

¹⁴ H E Renfree, *The Executive Power of the Commonwealth of Australia* (1984) 493.

¹⁵ *Smith* above n 2 at 413.

¹⁶ F W Maitland, *The Constitutional History of England* (1908, reprinted 1955) 479.

¹⁷ Clifford Dorne and Kenneth Gewerth, 'Mercy in a Climate of Retributive Justice: Interpretations from a National Survey of Executive Clemency Procedures' (1999) 25 *New England Journal on Criminal and Civil Confinement* 413, 438. The President's power is not inherent, it is grounded in the US Constitution, Article II, Section 2, *ibid*.

required to exercise the prerogative only after receiving advice from the Executive Council or a pertinent Minister.¹⁸

Finally, the position was amended by legislation passed by the United Kingdom Parliament and all Australian Parliaments, together with corresponding Letters Patent. New South Wales passed the *Australia Acts (Request) Act 1985* (NSW) which made detailed prearranged requests for legislation to the United Kingdom and Australian Parliaments.¹⁹ These requests were answered by, *inter alia*, the *Australia Act 1986* (Cth). As a consequence of this legislation, s 9F was inserted into the *Constitution Act 1902* (NSW) reading:

9F Letters Patent and Instructions cease to have effect

The Letters Patent dated 29 October 1900, as amended, relating to the office of Governor of the State and all Instructions to the Governor cease to have effect on the commencement of the *Constitution (Amendment) Act 1987*.

The *Constitution (Amendment) Act 1987* (NSW) was assented to on 3 June 1987. In the Commonwealth sphere, Clause I of the Letters Patent Relating to the Office of Governor-General published in the *Commonwealth of Australia Gazette* on 24 August 1984, revoked the Letters Patent and Instructions both dated 29 October 1900, as amended. In other words, whatever prerogatives the Governor-General and Governors might possess, they are to be determined by reference to local sources, without consideration of the present scope of the Royal Prerogative of Crown of the United Kingdom.

Anomalously, while there are provisions which describe the Governor-General's prerogative with respect to certain territories, I can locate no similar provision with respect to Australia itself. Yet, the Governor-General must possess the type of prerogative described in these statutes. I shall take as an example only, s 66 *Norfolk Island Act 1979* (Cth), but similar or identical provisions are found in these other

¹⁸ Twomey above n 10 at 662-4.

¹⁹ *Australia Acts (Request) Act 1985* (NSW) ss 3-5.

Commonwealth statutes: s 17 *Cocos (Keeling) Islands Act 1955*, s 12 *Heard Island and McDonald Islands Act 1953*, s 13 *Australian Antarctic Territory Act 1954*, and s 13 *Ashmore and Cartier Islands Acceptance Act 1933*. Section 66(1) of the *Norfolk Island Act 1979* (Cth) reads:

66 Grant of pardon, remission etc

(1) The Governor-General, acting with the advice of the Attorney General, may, by warrant under his or her hand, grant to a person convicted by a court of the Territory exercising criminal jurisdiction a pardon, either free or conditional, or a remission or commutation of sentence, or a respite, for such period as he or she thinks fit, of the execution of sentence, and may remit any fines, penalties and forfeitures imposed or incurred under a law in force in the Territory.

However, it is clear that in New South Wales, a pardon has the same effect as quashing a conviction.²⁰ It is now time to consider some of the key concepts.²¹

The Concepts

The concept of ‘mercy’ itself is familiar, even if its application can be controversial. ‘Mercy’ is defined by the *Macquarie Dictionary* as:

1. Compassionate or kindly forbearance shown towards an offender, an enemy, or other person in one’s power; compassion, pity or benevolence
2. disposition to be merciful ...
3. discretionary power as to clemency or severity, pardon or punishment, or the like ...
4. an act of forbearance, compassion or favour, esp. of God towards his creatures.²²

²⁰ *Criminal Records Act 1991* (NSW) ss 12(1)(a), 19.

²¹ There is English authority, which is probably good in New South Wales, that the exercise of the prerogative of mercy is non-justiciable: LexisNexis Butterworths, *Halsbury’s Laws of Australia*, (at 3 February 2007) 10 Administrative Law, ‘IV Judicial Review’ [10-1396] <<http://www.lexisnexis.com.au>>. A clear outline of the prerogative system and its workings in Canada is found in Paul Lordon, *Crown Law* (1991) 86-91.

²² *Macquarie Dictionary* (2nd revised edition). Interestingly, the etymology of the word is connected with the Latin ‘merces’ meaning a wage, fee, bribe, rent or price, and is cognate with ‘merx’ a market. I suspect that from the primary sense of ‘wage’ it came to mean ‘a favour’, and hence its modern meaning.

When one speaks of a ‘merciful sentence’, there are, of course, degrees. One might speak of a ‘merciful sentence’ as a circumlocution for a ‘lenient sentence’. In *R v Radich*²³ the New Zealand Court of Appeal deplored the situation when courts were ‘weakly merciful’. This phrase has since been cited frequently (see *R v Rushby*)²⁴.

In practical terms, the judiciary not infrequently extends lenience, and can show mercy.²⁵ The topic is immense. Solely for reasons of practicality, I shall chiefly consider here the law relating to the extension of ‘mercy’ as the prerogative of the Head of State. The pardon is the fullest exercise of the prerogative of mercy. In her specifically legal and philosophical study of the concepts, Moore’s definition of ‘clemency’, reads:

An act of clemency, as it constitutes the subject of this book, is *an official act by an executive* that removes all or some of the actual or possible punitive consequences of a criminal conviction.²⁶ (My italics.)

Moore goes on to distinguish different types of ‘pardons’. For example, she observes, a pardon may be either conditional or unconditional, it may fully relieve the person pardoned from all the consequences of conviction, or it may only partially do so, and it may apply to an individual offender or to a class of offenders. Finally, alluding to President Ford’s pardon of Richard Nixon, Moore observes that although pardons are usually granted after conviction, they need not be.²⁷ I shall not pursue here the distinctions between amnesties, pardons, reprieves and commutations.²⁸

Etymologically, the word ‘prerogative’ has the sense of possessing the right to ask or speak first. However, the sense is now slightly different. OED states that the noun means:

²³ [1954] NZLR 86, 87.

²⁴ [1977] 1 NSWLR 594 at 597 per Street CJ.

²⁵ See for example, the provisions for finding a matter proved but not proceeding to conviction, as in s 10 *Crimes (Sentencing Procedure) Act 1999* (NSW) and the ample case law, starting from the dicta of Windeyer J in *Cobia v Liddy* (1969) 119 CLR 257. I do not examine this aspect of the law.

²⁶ Kathleen Dean Moore, *Pardons: Justice, Mercy, and the Public Interest* Oxford University Press 1989, 4.

²⁷ *Ibid* at 5.

²⁸ The interested reader should refer to Moore, *ibid*.

A prior, exclusive, or peculiar right or privilege.... *esp.* in *Constitutional Hist.* That special pre-eminence which the sovereign, by right of regal dignity, has over all other persons and out of the course of the common law, the *royal prerogative*, a sovereign right (in theory) subject to no restriction or interference.

The concept of the *prerogative* of mercy is therefore revealing, for it underscores the fact that conceptually, mercy is not the same type of category as punishment. It is a different concept which can impinge upon the punishment, and most particularly, upon the condign punishment.²⁹

The Epistle of St James states that ‘mercy exalteth itself over judgment’ (2:13). However, one needs minimal experience to realise that at least some commentators, who would otherwise endorse the teachings in the volume where James is found, are inclined to reverse the stated positions of mercy and judgment.

Finally, forgiveness is really a different concept, even if it is related. A victim of a crime, for example, may forgive a criminal, yet believe that the criminal should be punished for social reasons, such as deterrence.³⁰ Pardon on the other hand, forgoes the condign punishment of an offender without necessarily marking any forgiveness. Kant, for example, seems to have believed that forgiveness was ethically indefensible in the court system, as justice itself demanded retribution.³¹

The Prerogative of Mercy and Sentencing

If the quality of mercy, ‘is not strain’d’, but ‘droppeth as the gentle rain from heaven’,³² then it is perhaps not unfair to suggest the intention of Part 7 of the Act is to monopolise the collection of any precipitation, channel it into reservoirs, test for random elements,

²⁹ I return to this idea later, but it seems to me to be implicit in the treatment of this topic in the *Encyclopaedia Judaica* (1996, corrected edition.), vol 11, 1382-3.

³⁰ Forgiveness is, of course, a large issue in ethical philosophy, and is often related to the question of retribution: see Trudy Govier, *Forgiveness and Revenge* (2002) 4-5.

³¹ Of course, Kant’s position was not always luminously clear, and may have varied. See the discussion by Jeffrie G Murphy, *Retribution, Justice and Therapy: Essays in the Philosophy of the Law* (1979) 82-4.

³² William Shakespeare, *The Merchant of Venice*, IV.i.180-1.

and dispense it back, all through the court system. First, it should be noted that such a situation does not obtain federally. In the Commonwealth sphere, section 21D *Crimes Act 1914* (Cth) reads:

(1) Nothing in this Part shall be construed as affecting the powers vested in the Governor-General in the exercise of the Royal prerogative of mercy.

(2) This Part does not affect the operation of any other law of the Commonwealth ... relating to the release of offenders.

However, neither here nor anywhere else, are the ‘powers vested in the Governor-General’ spelled out. Part VIIC *Crimes Act 1914* (Cth) titled ‘Pardons, Quashed Convictions and Spent Convictions’ is quite different from Part 7 of the Act. The Commonwealth provisions only deal with the expunging of offences and related matters. There is no doubt that the prerogative power still exists, and so one must look to the common law, which I have mentioned above.

Commonwealth legislation mentions the prerogative in various places, including s 24 *Transfer of Prisoners Act 1983* (Cth) which allows the Queen or the Governor of a State to exercise the royal prerogative of mercy when a Commonwealth prisoner is transferred to the State system.³³ I rather suspect that this means that both the Governor-General and the State Governor could exercise the prerogative in those circumstances, but the State Attorney General could not. Also, s 189 of the *Defence Force Discipline Act 1982* (Cth) preserves the prerogative despite the provisions of that Act. Section 58 of the *Defence Force Discipline Appeals Act 1955* is to the same effect. The International Convention for the Suppression of Counterfeiting Currency, which is a schedule to the *Crimes (Currency) Act 1981* (Cth), also allows the prerogative of mercy to be exercised even if the relevant nation has subscribed to the Convention.

³³ I am not aware of any case law on the subject. See also s 18 *Commonwealth Places (Application of Laws) Act 1970* (Cth) and s 15 *Commonwealth Places (Mirror Taxes) Act 1998* (Cth).

However, in New South Wales, the starting point is that sentencing is chiefly governed by the *Crimes (Sentencing Procedure) Act 1999* ('the Act'). Section 102 of that Act came into force on 3 April 2000 and reads:

Nothing in this Act limits or affects the prerogative of mercy.

In New South Wales, the most important decision on the relationship between the sentencing work of courts, and the exercise of mercy as manifested in the pardon, is *R v Vachalec*,³⁴ where Street CJ, delivered the judgment of the Court of Criminal Appeal (Nagle CJ and Lee J implicitly agreeing). The appellant prisoner had been admitted to hospital 109 times for oesophageal obstruction caused by swallowing acid as a child. His argument was that the prison authorities were not taking proper care for his critical condition, and that the Court of Criminal Appeal, now cognizant of this, should release him from gaol forthwith. In effect, Vachalec asked the court to pardon him, although those precise terms were not used.

This was rejected. Street CJ held that all the Court of Criminal Appeal could do was consider the legal matters of the appeal from the decision at first instance. His Honour held at 353-354:

This Court as the Court of Criminal Appeal functioning within its well-established jurisdictional boundaries is concerned, both in appeals against conviction and appeals against sentence, primarily to ascertain whether the decision of the first instance judge was in error and, if so, in what way it should be corrected. Normally error requires the evaluation of the material placed before the first instance court. There are, however, well-established bases upon which error in the first instance proceedings can be disclosed by fresh evidence or new evidence. In addition the Court's jurisdiction is exercisable where it is shown that there has been a miscarriage of justice. ... This Court exercises judicial power; it has no power or authority to give administrative directions regarding the treatment of prisoners. Nor has it power or authority by administrative order to change the character or concomitants of

³⁴ (1981) 1 NSWLR 351.

sentences or to bring about total or qualified release of persons in custody. That power and authority resides in the hands of the Executive Government.

More recently, in *R v Murray*,³⁵ Ireland AJ (Heydon JA and Smart AJ agreeing) these *dicta* were adopted. That case dealt with an applicant who sought the exercise of the prerogative of mercy after he had been convicted and sentenced to five counts of passing valueless cheques in contravention of s 178B of the *Crimes Act 1900*, and one count of obtaining a benefit by deception, in contravention of s 178BA of the *Crimes Act 1900*. Four further offences of passing valueless cheques were taken into account. The applicant had an extensive criminal history, including serious offences. The sentencing judge had paid close attention to the facts, the personal circumstances of the applicant, the plea of guilty, and then deferred passing sentence upon the applicant's entering a recognisance in the sum of \$1,000 to be of good behaviour for two years. Ireland JA described the penalty as being 'minimal in the extreme'.³⁶ Indicative of both the applicant's significant antecedents and the lenience of the sentence, the applicant described the penalties imposed as being: 'the best sentence I ever received in my life'.³⁷ However, following *Vachalec*, Ireland AJ held at that the appeal was incompetent.³⁸

The prerogative of mercy is most importantly mentioned in Part 7 *Crimes (Appeal and Review) Act 2001* (NSW), which came into effect on 23 February 2007. It replaces Part 13A *Crimes Act 1900* (NSW), which was headed: 'Review of convictions and sentences.' Part 13A had been inserted into the Act by the *Crimes Legislation (Review of Convictions) Amendment Act 1993* (NSW), which was assented to on 9 November 1993, commenced on 14 November 1993 and was removed on 23 February 2007.

The *Crimes (Appeal and Review) Act 2001* (NSW)

³⁵ [2000] NSWCCA 331.

³⁶ *Ibid* at [7].

³⁷ *Ibid* at [7].

³⁸ *Ibid* at [11]. The passage from *Vachalec* has also been cited with approval by the NSW Court of Criminal Appeal in *Jones* (1993) 70 A Crim R 449, 456-457.

It is critical to note first the terms of s 114 *Crimes (Appeal and Review) Act 2001*:

114 Prerogative of mercy preserved

Nothing in this Act limits or affects in any manner the prerogative of mercy.

This provision is found in Part 9 *Crimes (Appeal and Review) Act 2001* (NSW), which is headed ‘Miscellaneous.’ Its predecessor, s 474P *Crimes Act 1900* was in the former Part 13A. Therefore, the new legislation separates out the prerogative of mercy from the other provisions which we shall examine.

The prerogative of mercy is retained in certain other NSW Acts notwithstanding their own provisions, which may otherwise seem inconsistent. These provisions are:

- s 43 *Children (Detention Centres) Act 1987*
- ss 19A(6), 61JA(4) *Crimes Act 1900*
- s 270 *Crimes (Administration of Sentences) Act 1999*
- s 102 *Crimes (Sentencing Procedure) Act 1999*
- s 27 *Criminal Appeal Act 1912*
- s 33A(4) *Drug Misuse and Trafficking Act 1985*
- s 123 *Fines Act 1996*
- ss 7(2)(b) and (3) *Habitual Criminals Act 1957*
- s 28(5)(a) *Prisoners (Interstate Transfer) Act 1982*, applying the prerogative of mercy to persons who are subject to translated sentences

As an example, section 43 *Children (Detention Centres) Act 1987* reads:

Nothing in this Act limits or affects in any manner the Royal prerogative of mercy.

The other provisions are fairly similar, except that ss 7(2)(b) and (3) *Habitual Criminals Act 1957* effectively provide the Governor’s prerogative of mercy a further facility, the

power to grant an habitual criminal a written licence to be at large. In addition, schedule 1(9) *Ombudsman Act 1974* excludes from the Act's ambit the conduct not only of the Governor, but of a public authority relating to an exercise of the prerogative of mercy.

One very important matter arises at this point. Section 14 *Interpretation Act 1978* (NSW) provides that:

In any Act or instrument, a reference to the Governor is a reference to the Governor with the advice of the Executive Council, and includes a reference to any person for the time being lawfully administering the Government.

There is no definition of 'Governor' in the *Crimes (Appeal and Review) Act 2001*. The term is defined in s 4(1) *Crimes Act 1900* thus:

"Governor" means, except in respect of the exercise of the pardoning power, the Governor with the advice of the Executive Council.

However, this definition has not made its way into the *Crimes (Appeal and Review) Act 2001*, although the pardoning power is no longer referred to in the *Crimes Act 1900*. The upshot of this legislative oversight is fairly significant: it means that in Part 7 of the Act, the 'Governor' is now the Governor acting on advice of the Executive Council, which continues under s 35B *Constitution Act 1902* (NSW). This is, perhaps, anomalous, because, as we shall see, throughout Part 7 *Crimes (Appeal and Review) Act 2001* the Governor is not being advised by the Executive Council but by judicial officers.

To return to Part 7 of the Act, the relevant provisions are complex, and many matters are left implicit in them. In order to better understand how they function, I will first of all set out a summary, and then deal with them in more detail. I have reduced the summary to five steps:

Step 1: a convicted person or someone on that person's behalf makes:

- (a) A ‘petition for a review of a conviction or sentence or the exercise of the Governor’s pardoning power’ pursuant to s 76 of the Act; or
- (b) An application for review of conviction or sentence to the Attorney General (see the discussion of s 77 of the Act below); or
- (c) An application for an inquiry into sentence or conviction directly to the Supreme Court [s 78].

Step 2: (a) The Governor may direct that there be an inquiry *by a judicial officer* into the conviction or sentence [s 77 (1)(a)];³⁹ or

(b) The Attorney may ask *the Court of Criminal Appeal* either to deal with the whole case as an appeal, or to ‘give an opinion on any point arising in the case’ [s 77(1)(b) and (c)]; or

(c) The Supreme Court may either direct that there be an inquiry into the conviction or sentence *by a judicial officer* or refer the case to *the Court of Criminal Appeal* to deal with as an appeal [s 79(1)].

Step 3: When the inquiry is complete, and the report written, then:

(a) Where the inquiry was directed by the Governor, the report is sent to the Governor and may also be sent by the prescribed person to the Court of Criminal Appeal to consider the conviction and sentence [s 82(1) and (2)]; or

(b) Where the inquiry was directed by the Minister, (i) if the whole case was referred, the Court of Criminal Appeal deals with it as if it were an appeal under the *Criminal Appeal Act 1912*, or (ii) if asked for an opinion, the Court of

³⁹ As we shall see when we discuss *R v McVittie* [2005] NSWCCA 267 below, it appears that although the direction is not given in the Act, the Governor in fact refers at least some petitions to the Minister.

Criminal Appeal furnishes the Attorney with the advice sought [ss 86 and 87(1)];
or

(c) Where the inquiry was directed by the Supreme Court, (i) the judicial officer sends the report to the Chief Justice of that court and may refer it to the Court of Criminal Appeal [s 82(1)(b) and (2)] or, (ii) if the Supreme Court referred the matter to the Court of Criminal Appeal under s 79(1)(b), then that court deals with it as if it were an appeal under the *Criminal Appeal Act 1912* [s86].

Step 4: (a) Following step 3(a), it is not stated explicitly, but the only way for the provisions to all work is that if the judicial officer has not also referred the case to the Court of Criminal Appeal, then the Governor may ‘dispose of the matter in such manner as to the Governor appears just’ [s 82(4)], but if it has been referred to the Court of Criminal Appeal, then the Court of Criminal Appeal deals with the reference under Part 7 Division 5; or

(b) Following step 3(b), the Court of Criminal Appeal will dispose of the case [s 86] unless the Minister had sought the court’s opinion under s 77(1)(c), in which case, the court furnishes its opinion to the Minister [s 87(1)]; or

(c) After step 3(c), the Court of Criminal Appeal disposes of the case [s 86].

Step 5: Where the judicial officer sent the report not only to the Governor but also to the Court of Criminal Appeal, under s 82(2), then, although it is not stated in the Act, it must follow that once the Court of Criminal Appeal has dealt with the matter, which it does under s 88(2), the Court of Criminal Appeal deals with it to completion. There is no provision for further referral to the Governor. That is, it appears that the judicial officer may circumvent the Governor who first referred the case. In every other instance mentioned in step 4, the matter has been completed by the Court of Criminal Appeal.

Before passing to consider this legislation in more detail, one matter must be noted: as we saw in step 1, s 76 of the Act speaks of a ‘petition for a review of a conviction or sentence or the exercise of the Governor’s pardoning power’. In none of the provisions which followed was anything at all said about the exercise of the pardoning power. The second reading speech of the *Crimes Act 1900* provisions, on 27 October 1993, did not even avert to this power. In fact, if one read Part 13A *Crimes Act 1900* or Part 7 *Crimes (Appeal and Review) Act 2001* rather quickly, one might easily overlook or misconstrue the references to this power. The second reading speech does not shed abundant light on the rationale for these provisions. The reference in s 76 to the ‘Governor’s pardoning power’ is therefore anomalous. As with the definition of ‘Governor’ still being found within s 4 *Crimes Act 1900*, I would suggest that the *Crimes (Appeal and Review) Act 2001* could be usefully amended so as to remove this confusion.

To work through these provisions more methodically, some repetition of the five steps will be unavoidable, because the provisions are fairly difficult. Section 76 states that a convicted person, or someone on their behalf, may petition the Governor for: ‘a review of a conviction or sentence or the exercise of the Governor’s pardoning power’. The person who may write on the convict’s behalf will usually, one imagines, be a legal representative.

There is no definition of the ‘pardoning power’ in the Act, but something, at least, of its ambit emerges. As noted, the terms of ss 77(1)(b) and (c) clearly imply that a petition may be presented to the Minister (presently the Attorney General).⁴⁰ Between them, the Governor and the Attorney, having considered the petition, may do one of three things under s 77 of the Act, either:

⁴⁰ Incidentally, this discloses an error in Mr Hartcher’s peroration, cited above. The Governor acts on behalf not of the Premier, but the Executive Council, and in this legislation, that of the judicial officer [ss 82(1)(a)], the Supreme Court of NSW [s 82(3)] and the Court of Criminal Appeal [s87(2)]. However, in every case, the Governor is empowered to act as the Governor sees fit: [ss 82(4) and 87(2)].

- (a) the Governor may direct that an inquiry be conducted by a judicial officer into the conviction or sentence;
- (b) the Attorney may refer the whole case to the Court of Criminal Appeal, to be dealt with as an appeal under the *Criminal Appeal Act 1912*, or
- (c) the Attorney may request the Court of Criminal Appeal to give an opinion on any point arising in the case.

However, the Governor and Attorney may do so only if the application meets the requirement of s 77(2) that: ‘there is a doubt or question as to the convicted person’s guilt, as to any mitigating circumstances in the case or as to any part of the evidence in the case.’ That is, they may not simply accede to any petition. The matter must be handled by a court, or a judicial officer. The provision is therefore silent as to what the Governor may do if desirous of simply exercising the prerogative of mercy.

This, in my view, is one of the most serious problems with this legislation. It is, quite simply, confusing, and if a practitioner missed the reference to the prerogative of mercy in s 114, the busy machinery of Part 7 could easily mislead one into thinking that Part 7 did in fact comprise the prerogative of mercy.

The words ‘judicial officer’ are defined in s 74 of the Act to mean: ‘a judicial officer (or former judicial officer) within the meaning of the *Judicial Officers Act 1986*.’ Section 3 *Judicial Officers Act 1986* contains a lengthy definition, and may be consulted if needed.

When the matter goes to the Court of Criminal Appeal, the procedure is assimilated to an ordinary appeal.⁴¹ Thus, rule 78 *Criminal Appeal Rules* reads:

78 Petitions under section 474C (1) of the *Crimes Act 1900*

⁴¹ This means that the principles applicable to overturning convictions or reviewing sentences are imported into the ‘review’: see the discussion of *Mallard v The Queen* [2005] HCA 68 and *JJT v Regina* [2006] NSWCCA 283, below.

When the Minister under section 474C (1) of the Crimes Act 1900, on a petition for a review of a conviction or the exercise of the pardoning power, refers the whole case to the Court, the person convicted shall be deemed an appellant who has obtained the leave of the Court to appeal.⁴²

The reference to the former legislation does not seem to have been updated. However, the matter need not go the Court of Criminal Appeal, for s 77(3) of the Act provides that the Governor or the Minister may simply refuse to consider a petition. Neither in s 76 itself nor elsewhere, is it stipulated that a petitioner has a right to submit a petition to the Minister who administers the *Crimes (Appeal and Review) Act 2001* (the Attorney General).⁴³, but a reading of these provisions demonstrates that either (1) this must be the case, for the Minister is given directions as to how to deal with such petitions; (2) the Governor can refer the petitions to the Minister; or (3) both (1) and (2) obtain. As we shall see when we come to *R v McVittie*⁴⁴ below, it appears that on some occasions at least, the Governor does refer petitions to the Minister.

The Act does not make provision for the Governor to refer petitions to the Minister. Neither, however, does it prohibit the practice, which one might think was benign enough, but then s 77(1) does set out three different options, one for the Governor and two for the Minister. There is no reason why the Governor needs to have any power other than that of referring petitions to the Minister, and allowing the Minister to exercise the option which is presently reserved to the Governor alone under s 77(1)(a) of referring the case to a judicial officer. The anomalous drafting only arises because Parliament has involved the Governor in a review process which is foreign to the Governor's historical role.

The Act offers more guidance to the Governor and the Minister, stating in s 77(3)(a) that they might refuse to consider the petition if it appears that the matter:

⁴² Rule 78A *Criminal Appeal Rules* picks up other provisions in pt 13A of the Act, and is of no interest.

⁴³ As of 12 March 2007, the *Allocation of the Administration of Acts 2006* still refers not to the *Crimes (Appeal and Review) Act 2001*, but to the *Crimes (Local Courts Appeal and Review) Act 2001*.

⁴⁴ [2005] NSWCCA 267.

(i) has been fully dealt with in the proceedings giving rise to the conviction or sentence (or in any proceedings on appeal from the conviction or sentence), or

(ii) has previously been dealt with under this Part or under the repealed provisions, or

(iii) has been the subject of a right of appeal (or a right to apply for leave to appeal) by the convicted person but no such appeal or application has been made, or

(iv) has been the subject of appeal proceedings commenced by or on behalf of the convicted person (including proceedings on an application for leave to appeal) where the appeal or application has been withdrawn or the proceedings have been allowed to lapse, and

(b) the Governor or the Minister is not satisfied that there are special facts or special circumstances that justify the taking of further action.

That is, the statute arguably indicates a desire that the prerogative of mercy not be exercised if the petition which seeks its exercise is only reiterating matters which have been or could have been dealt with, whether by a court or under this procedure. Further, the Governor or the Minister may defer consideration of the petition if an avenue of appeal has not been exhausted, or the petition is insufficiently informative: s 77(3A). But it is interesting that the Governor may dismiss a petition without reference to a court or judicial officer, yet the Act is silent as to whether the Governor may not grant it without such reference. It would appear that the Governor can do so – hence s 144 of the Act. But so as not to be misleading, Part 7 should specifically refer to the power to consider the application and grant it without using the machinery of what is, effectively, an extraordinary appeal.

As we saw, a convicted person also has a right, preserved in s 78 of the Act, to apply directly to the Supreme Court for an inquiry into a conviction or sentence. These applications must be notified to the Minister, under s 78(2) of the Act. If the Supreme

Court believes that there is a relevant question, then it may deal with these applications in much the same way as the Minister may deal with petitions under s 77 of the Act, that is, it may direct that an inquiry be conducted into the conviction or sentence by a judicial officer, or refer the case to the Court of Criminal Appeal, 'to be dealt with as an appeal under the *Criminal Appeal Act 1912*,' [s 79(1)(b)].

Before the Supreme Court can so act, s 79(2) provides that there must be: 'a doubt or question as to the convicted person's guilt, as to any mitigating circumstances in the case or as to any part of the evidence in the case.' Also like the s 76 petition, the Supreme Court may defer or even refuse to deal with an application, again, in circumstances similar to those laid out in ss 77(3)(a) and (b), eg the matter has been fully canvassed.⁴⁵ Section 79(4) provides for an interesting variation from the procedure to be followed by the Governor: it states that while the proceedings it contemplates 'are not judicial proceedings ... the Supreme Court may consider any written submissions made by the Crown with respect to an application.' Clearly, someone would need to advise the DPP that such an application has been made and to invite submissions.

Sections 77(4), 78(2) and 79(5) *Crimes Act 1900* provide a system of reporting so that various organs of government are aware of what is occurring. The Minister provides a report to the registrar of the Criminal Division of the Supreme Court as how any petition was dealt with by the Governor or the Minister, and the same registrar must advise the Minister of any application received and how it was dealt with.⁴⁶

Section 80 directs that the inquiry be conducted 'as soon as practicable' once the direction for it has been given. Section 81(1) states that the inquiry must be conducted by a judicial officer. That officer is vested, pursuant to s 81(2), with:

- (a) the powers, authorities, protections and immunities conferred on a commissioner by Division 1 of Part 2 of the *Royal Commissions Act 1923* ...

⁴⁵ Sections 474E(3) and (3A) of the Act.

⁴⁶ I made enquiries of the Criminal Division of the Supreme Court and was told that they maintained no statistics.

There are ancillary provisions in s 81(2), but these are of no direct interest to us. What is more pertinent is that under s 82 of the Act, when the inquiry is complete, the judicial officer sends a report of the inquiry's results, with a complete transcript of the inquiry depositions to the Governor or to the Chief Justice, depending upon which of these directed the inquiry be held. More significantly, under s 82(2):

(2) The judicial officer may also refer the matter (together with a copy of the report) to the Court of Criminal Appeal:

(a) for consideration of the question of whether the conviction should be quashed (in any case in which the judicial officer is of the opinion that there is a reasonable doubt as to the guilt of the convicted person), or

(b) for review of the sentence imposed on the convicted person (in any case in which the judicial officer is of the opinion that there is a reasonable doubt as to any matter that may have affected the nature or severity of the sentence).

Then, pursuant to s 82(3), where a report has been furnished to the Chief Justice, the Supreme Court must send its own report, together with the prescribed person's report, to the Governor. As s 82(4) provides:

The Governor may then dispose of the matter in such manner as to the Governor appears just.

I can find no authority on what this means. Neither the leading New South Wales sentencing commentary nor the major New South Wales criminal legislation text offer any suggestions.⁴⁷ There is not doubt at all that should a pardon, on any terms, be recommended, it would be within the Governor's power to issue it. However, what if the Governor was inclined to grant a pardon when the advice was to the contrary? Given the

⁴⁷ LexisNexis Butterworths, *Sentencing Law NSW* (looseleaf); see also LexisNexis Butterworths, *Criminal Legislation NSW* [8-474H].

wide terms of s 114 of the Act, it would appear that the Governor could grant the pardon. It is almost unthinkable that the Governor should do so, but not quite. Politics in both New South Wales and Australia have furnished examples of profound disagreements between the Governor-General or Governor, and their respective ministers. The important point here, however, is that under Pt 7 whatever course the Governor should take, it is available only after the entire procedure has been discharged, and – one would expect – practically amounts to the Governor’s signing off on what is in truth an extraordinary judicial review.

Once the Governor has decided to grant a pardon, what effect does that pardon have? This question has been controversial, as the High Court noted in *Kelleher v Parole Board of NSW*.⁴⁸ However, in New South Wales, there is provision to ensure that where a pardon is granted, the conviction can be quashed. Read with the definitions in s 83, section 84(1) of the Act provides that the Court of Criminal Appeal may ‘quash a conviction in respect of which a free pardon has been granted.’ The term ‘free pardon’ is nowhere defined in New South Wales legislation, and is only used in s 84 of the Act. There would seem to be no reason why, if a pardon is granted under s 114 of the Act, a party might not apply under s 84 to quash the conviction.

Note that s 84(2) explicitly provides that simply because a free pardon has been granted, the applicant is not entitled to have the conviction quashed. Importantly, s 84(4) provides:

(4) However, such an application may not be made in respect of a free pardon arising from an inquiry under Division 4 if the matter has previously been dealt with under this Division as a consequence of a reference to the Court, under section 82(2), by the prescribed person conducting the inquiry.

Division 4 comprises ss 80-82 of the Act. It therefore follows that where a pardon has been recommended as a result of an inquiry by a prescribed person, the applicant only has one opportunity to have the Court of Criminal Appeal quash the conviction. Even if the

⁴⁸ (1984) 156 CLR 264, 266-7, per Mason J.

Court of Criminal Appeal should dismiss the application, but the person subsequently obtain a pardon, the conviction will not be quashed by the Court of Criminal Appeal.

Should such an application come before the Court of Appeal, the procedure is governed by s 85 of the Act, which allows the Crown a right of appearance. The second reading speech for the former s 474K indicates that this amendment was for ‘clarification’. Section 85 also requires the Court of Criminal Appeal to consider (a) the s 82 reports of the judicial officer and, (b) where applicable, the Supreme Court report under s 82, and (c) the Crown’s and the applicant’s further submissions on the reports. Section 85(1)(c) directs that: ‘no other evidence is to be admitted or considered except with the leave of the Court.’ Sections 85 (2) and (4) provide:

(2) The rules governing the admissibility of evidence do not apply to any such proceedings. ...

(4) The provisions of Parts 3 and 4 of the *Criminal Appeal Act 1912* relating to proceedings on an appeal under section 5(1) of that Act apply to proceedings on an application under section 84, as if:

(a) any reference to an appeal were a reference to proceedings on such an application, and

(b) any reference to an appellant were a reference to the convicted person.

The provisions of ss 86-88 of the Act are rather mechanical, and have been adequately covered in the five step summary.

It is striking that this review process does not lead to a pardon in any real sense of the term, although the prerogative is now referred to as a ‘pardoning power’. Why one term (prerogative) should be dropped, but another one (pardon) retained, it is difficult to say. Perhaps the former was thought to smack too much of the ‘royal’ prerogative. What really subsists now is an extraordinary appeal or investigation. This is not to understate

the importance of this extraordinary appeal. However, the suspension of the rules of evidence which allows the court to conduct a more far-reaching enquiry is restricted to cases under s 84, that is, for the quashing of a conviction *after* the pardon has been granted.

Overall, a comparison of the former procedure with the present one shows that the new regime, both in its amendments and its continuities, and in its silence as to the means of seeking a pardon, shows an intention to assimilate the avenues available to the petitioner to an appeal, or, if one prefers, to an extraordinary appeal, notwithstanding that the right of the Governor to exercise the prerogative of mercy is maintained by s 114 of the Act.

The Case Law

It may be useful to consider some examples of what actually happens when a matter is referred to the Court of Criminal Appeal under these provisions. Of course, the cases will relate to the former Part 13A *Crimes Act 1900*. In *R v Rix*⁴⁹ the applicant sought referral of his 1988 conviction for armed robbery to the Court of Criminal Appeal pursuant to s 474E *Crimes Act 1900* (now s 79 of the Act). The matter was listed before Hulme J, who concluded that the application ‘raised a doubt or question as to part of the evidence in the case’, and accordingly referred the whole of the case to the Court of Criminal Appeal, where it was dealt with as an appeal under the *Criminal Appeal Act 1912*.⁵⁰ The most succinct summary of what occurred there is provided by Barr J with whom Buddin J agreed:

The parties approached the appeal upon a joint understanding that the evidence of confessions would be put aside. Apart from the photographs of the robber there was no evidence capable of proving beyond reasonable doubt that the Appellant was the robber. It was agreed that the appeal should succeed or not on that evidence alone. I agree with

⁴⁹ [2005] NSWCCA 31.

⁵⁰ *Ibid* at [1-3], per Hulme J with whom Barr and Buddin JJ agreed.

Hulme J that the photographs are not capable of proving beyond reasonable doubt that the Appellant was the robber.⁵¹

It appears that the Crown sought to support the conviction.⁵² In the event, the ‘appeal’ was allowed, the conviction quashed, and an acquittal entered.

The situation in *R v McVittie*⁵³ was rather different. There a petition under ss 474B and 474C (now ss 76 and 77) had been made to the Governor for a review of convictions after a trial before a jury in 1998.⁵⁴ The Attorney General referred the matter to the Court of Criminal Appeal to be dealt with as an appeal. The decision is silent as to how the petition was transmitted from the Governor to the Attorney General. Simpson J simply remarks:

Pursuant to s 474B of the *Crimes Act 1900*, Mr McVittie petitioned the Governor of New South Wales for a review of the convictions pursuant to s 474C(1)(b). The Attorney General of New South Wales referred the whole case to this Court to be dealt with as an appeal.⁵⁵

This is interesting, as of course neither s 474B nor s 474C (nor ss 76 and 77 of the Act) speak of the Governor remitting any petitions to the Minister.

The Crown conceded that the convictions ought to be set aside. There was clear evidence that two police officers had fabricated the applicant’s confession and planted a gun on him.⁵⁶ The Court of Criminal Appeal unanimously allowed the ‘appeal’, quashed each conviction, and entered a judgment of acquittal.

⁵¹ Ibid at [28].

⁵² Ibid at [21]-[26], especially [21].

⁵³ [2005] NSWCCA 267.

⁵⁴ Simpson J states at *ibid* [1] that he had unsuccessfully appealed against those convictions, but the only appeal I can find, relates to different charges.

⁵⁵ Ibid at [2].

⁵⁶ *R v McVittie* [2005] NSWCCA 267, [1-7], per Simpson J with whom Johnson and Rothman JJ agreed.

Different aspects of this law were canvassed in *Eastman v Director of Public Prosecutions (ACT)*⁵⁷ reversing the decision in *Director of Public Prosecutions (ACT) v Eastman*.⁵⁸ Before these proceedings came to the High Court, the applicant had been granted special leave by the High Court to appeal against his conviction for murder, but the appeal was dismissed. The applicant wrote to the Supreme Court of the ACT seeking an inquiry into his conviction pursuant to provisions which were, effectively, identical with those of ss 79(1) and (2) of the Act. The matter was referred to the Chief Justice of that court, but his Honour was not satisfied that there was a relevant doubt or question. Part of the registrar's letter to the applicant advising him of the Chief Justice's position read:

However, assuming that such doubt or question arises, you have the alternative of presenting your petition to the Executive. An inquiry under s 475 is conducted more appropriately at the direction of the Executive, which has the responsibility of the ultimate disposal of the matter.⁵⁹

The applicant was not to be deterred, and wrote again to the Chief Justice. His Honour replied, in part, as follows:

With regard to the matters (of fitness to plead) referred to ... I have not yet been able to decide whether they raise a doubt or question under s 475, or whether, if they do, the doubt or question is of sufficient substance to justify directing an inquiry.

In order to further consider the application I propose to instruct the Registrar to brief counsel to assist me at a hearing to take place in the Law Courts Building at [time and date] ... In the meantime I will receive and consider any further written submission which the applicant wishes to make. I will also consider, at the hearing, any application by a legal practitioner to appear and make submissions on behalf of the applicant or on behalf of the Attorney General or on behalf of the Director of Public Prosecutions. The hearing may be adjourned from time to time.

⁵⁷ [2003] HCA 28; (2003) 214 CLR 318.

⁵⁸ [2002] FCAFC 209.

⁵⁹ Ibid at [6] per Whitlam, Madgwick and Gyles JJ.

I have decided to decline to direct an inquiry into the (other) matters referred to ...⁶⁰

On the scheduled day, his Honour heard evidence and took submissions. Appearing were counsel assisting, counsel for the Attorney General, counsel for the Director of Public Prosecutions and a solicitor for the applicant. The Attorney General and the Director of Public Prosecutions opposed an inquiry, relevantly arguing, that 'fitness to plead did not raise a doubt or question as to guilt within the meaning of the section.'⁶¹ After that hearing, his Honour decided that there were sufficient grounds to refer the matter to a magistrate for a fuller inquiry.⁶² However, the DPP commenced proceedings in the Supreme Court of the ACT seeking orders against the Chief Justice, the magistrate and the applicant which would effectively have prevented the magistrate's inquiry. The DPP did not succeed in the Supreme Court.⁶³ The Director appealed to the Full Court of the Federal Court, seeking an order to restrain the magistrate from hearing the inquiry.

As the Full Court stated it, the Director contended that in this provision, 'guilt' refers to 'complicity in the crime charged, whereas fitness to plead is only an aspect of the trial process and has nothing to do with guilt in the ordinary sense of the word.'⁶⁴ The majority, Whitlam and Gyles JJ, Madgwick J dissenting,⁶⁵ accepted this argument, and the decision of the Chief Justice was set aside.

However, the High Court allowed the appeal. The important decision is that of Heydon J with whom Gummow, Kirby, Hayne and Callinan JJ agreed. McHugh J handed down a separate decision coming to the same result. Gummow J also agreed with McHugh J. Perhaps the most telling portion of Heydon J's decision is this:

[138] ... The short answer to the Director's contention that proceedings of which a convicted person lacked any comprehension because of a psychiatric state raised no doubt or question as to guilt, only as to whether the trial was a nullity, is that the more

⁶⁰ Ibid at [9].

⁶¹ Ibid at [10].

⁶² Ibid at [11].

⁶³ Ibid at [14-21].

⁶⁴ Ibid at [39].

⁶⁵ The headnote of the ALR mistakenly asserts that Madgwick J agreed with the majority.

radical certain types of defect in a trial resulting in a conviction are, the more they raise a doubt or question as to the fundamental propositions inherent in the conviction.

However, Heydon J also made some comments which are directly relevant to Part 7 *Crimes (Appeal and Review) Act 2001*, as s 77(2) uses what is effectively the same terminology as the former s 475 which was under consideration in *Eastman*: '(2) Action under subsection (1) may only be taken if it appears that there is a doubt or question as to the convicted person's guilt, as to any mitigating circumstances in the case or as to any part of the evidence in the case.' His Honour relevantly held:

[121] ... it is not necessary to decide whether 'guilt' means 'guilt duly determined' or whether a doubt or question about any aspect of the trial would have been sufficient to justify a s 475 direction. It would be enough for the appellant's purposes if the Chief Justice's direction were upheld on the basis that a doubt or question had arisen in relation to any portion of the evidence at the trial. On that approach, even if the word 'guilt' is to be construed as meaning 'guilt in fact', a question or doubt can arise not only in relation to the ultimate question of guilt in fact, but also in relation to a particular portion, or particular portions, of the evidence. ...

[122] Taking that path, an inquiry could have been directed in one of three circumstances. An inquiry could have been directed if there had been a doubt or question about guilt in fact. An inquiry could have been directed if there had been a doubt or question about any mitigating circumstance (usually a matter going to sentence, but possibly including matters which were 'mitigating' in the sense of provocation or diminished responsibility, leading to the conclusion that while the convicted person was guilty of a crime, it might be a different and lesser crime). Or an inquiry could have been directed if there had been a doubt or question about a particular portion of the evidence. That particular portion of the evidence might not have been decisive of guilt. But the Supreme Court judge might lawfully have initiated an inquiry into a particular portion of the evidence even though it was not decisive of guilt. After the inquiry the executive would be obliged to consider what 'shall appear to be just' in relation to a conviction which, though otherwise satisfactory, was the outcome of a trial at which a portion of evidence given was perjured,

or manifestly mistaken, or inadequately given, or not properly tested on cross-examination, or otherwise unsatisfactory.

Another decision in which the Crown unsuccessfully opposed the application for review was *R v Doyle*.⁶⁶ The applicant had been convicted of summary offences against the Commonwealth *Crimes Act 1914*, basically, offences of imposition on the Department of Social Security. The court did not address the issue of whether the procedure which the applicant adopted under ss 474D and 474E *Crimes Act 1900* (now ss 78 and 79) was the proper one when the charges were for Commonwealth offences.⁶⁷ The applicant's initial hurdle was that he had pleaded guilty, but the court accepted that there was some colour in his explanation that he acted under the constraint of the police. Indeed, the police had, amongst other matters, denied him bail upon fabricated grounds.⁶⁸ The Commonwealth DPP ran several unsuccessful arguments, of which the most interesting was that the provisions of Part 13A could not apply to convictions for summary offences. As Hulme J noted, the case law is against this argument, as are the clear words of s 3 *Crimes Act 1900*, read with the second schedule to that Act:

The sections mentioned in the Second Schedule, so far as their provisions can be applied, shall be in force with respect to all offences, whether at Common Law or by Statute, whensoever committed and in whatsoever Court tried.

Part 13A was to be found in the second schedule of the Act.⁶⁹ The 'appeal' was accordingly allowed, and the convictions quashed.

Finally, in the recent decision *JJT v Regina*⁷⁰ the Court of Criminal Appeal dismissed the appeal and confirmed the conviction. The leading decision was that of McClellan CJ with whom Simpson and James JJ agreed. Simpson J added some comments, with which James J agreed. Briefly, the applicant had been convicted of only one of four counts, and

⁶⁶ [2001] NSWCCA 252.

⁶⁷ However, I suspect that it is proper, by virtue of a combination of s 68(1)(d) *Judiciary Act 1903* and the definition of 'appeal' in section 2 of that Act

⁶⁸ *R v Doyle* [2001] NSWCCA 252 especially at [35] per Hulme J, with whom Spigelman CJ and Howie J agreed.

⁶⁹ *R v Doyle* [2001] NSWCCA 252, [8] per Hulme J and also the comments of Spigelman CJ and Howie J.

⁷⁰ [2006] NSWCCA 283.

acquitted of the other three. At the appeal pursuant to Part 13A *Crimes Act 1900*, following his representations to the Attorney General, one of the key witnesses against the applicant, his own daughter, reversed her unfavourable evidence, saying that she had lied at the trial.⁷¹ Citing the decision of the High Court in *Mallard v The Queen*⁷² McClellan CJ held that the role of the Court of Criminal Appeal was to determine:

whether, having regard to the evidence received at the trial, together with the evidence admitted in this appeal, the verdict of the jury cannot be supported.⁷³

However, the appeal was rejected. McClellan CJ concluded that ‘the jury could only have placed minimal if any weight in KT’s evidence. It had little if any evidentiary weight in the Crown case.’⁷⁴ Rather, his Honour suggested that the factor which led to the conviction on count 2 but an acquittal on the other three counts was that a contemporaneous complaint had been made in relation to count 2.⁷⁵ His Honour concluded that: ‘consideration of the evidence before the jury and the additional evidence admitted in the appeal does not lead to the conclusion that there is a significant possibility that an innocent person has been convicted.’⁷⁶ Simpson J agreed that the evidence of the applicant’s daughter was to be disregarded, adding that only if the applicant had been convicted on both the counts where she had given evidence would the unreliability of her evidence be a compelling consideration.⁷⁷

As we saw above, s 85(2) provides that the rules governing the admissibility of evidence do not apply to proceedings to quash a conviction after the pardon has been granted. Perhaps if the rules of evidence did not apply in proceedings under ss 86-88, there could have been a different result for JJT. It is difficult not to feel unease at the rejection of argument that the demonstrated unreliability of the daughter’s evidence justified quashing the conviction. She was, after all, called as a witness, and it is not easy to see how she

⁷¹ *JJT v Regina* [2006] NSWCCA 283, [1]-[2], [6], [42]-[46].

⁷² [2005] HCA 68, (2005) 224 CLR 125, at [10]-[11].

⁷³ *JJT v Regina* [2006] NSWCCA 283, [56].

⁷⁴ *Ibid* at [68].

⁷⁵ *Ibid* at [69].

⁷⁶ *Ibid* at [78].

⁷⁷ *Ibid* at [105]-[106].

could have been dispensed with, given that the complainant herself said KT was in the room and sitting directly opposite her at the relevant time.⁷⁸ Further, KT stated at the appeal that:

I was, like - wherever I was to go, like, if I was to go with my cousin or my aunty or someone, all they would talk about was the incident with my dad and by them always talking to me, made me believe that it did happen, but I didn't actually see it happen.⁷⁹

Neither McClellan CJ nor Simpson J considered the possible significance of KT's having been in the room and – on the complainant's evidence – sitting directly opposite. Indeed, Simpson J does not mention this at all. This brings us back to their honours' reasoning. Perhaps the contemporaneous complaint was given weight as there was corroborative evidence. How are we to know that the decisive difference was the contemporaneous complaint? It is not impossible that the jury gave the daughter's evidence some weight, and would only have convicted on count two because of that evidence, but for other reasons, had a reasonable doubt about the other count wherein she gave evidence. I am also unsure of Simpson J's view that only if the jury had convicted on both the counts where KT gave evidence would that be significant. There are simply too many possible views which the jury could have taken to make this as clear and certain as her honour puts it. Simpson J did say that the court was not charged with reviewing the jury's verdict.⁸⁰ 'The task of this Court', her Honour held, 'is to determine whether, in the light of the evidence as it must now be regarded, a miscarriage of justice has been shown to have occurred.'

And it must be conceded that this appears to be the law, following *Mallard* in the High Court. As the process in the Court of Criminal Appeal is assimilated to an ordinary appeal, the result may well have been the only one available. Certainly, it can be supported. However, it is difficult to see a policy reason why the question should not simply be whether the Court of Criminal Appeal finds that there are grounds to quash the

⁷⁸ Ibid at [11].

⁷⁹ Ibid at [43].

⁸⁰ Ibid at [43].

conviction. One can also support the view that *JJT* would raise grounds for seriously considering a pardon.

Proposals for Reform

The first proposal for reform is that the extent of the Governor's power to pardon should be clearly stated in the Act, along the lines of s 66 *Norfolk Island Act 1979* (Cth). Also, if any powers which were historically associated with the royal prerogative are not delegated to the Governor, such as the power to grant a pardon before conviction, this should be explicitly stated.

Secondly, and equally important, the definition of 'Governor' in section 4(1) *Crimes Act 1900* should be copied into s 3 *Crimes (Appeal and Review) Act 2001*, so that the prerogative of mercy is clearly vested in and exercisable by the Governor alone, who may then seek the advice of the Executive Council, should it appear desirable. At the present moment, there is an unnecessary anomaly when one considers the definition of 'Governor' in s 14 *Interpretation Act 1978* and the reality of all the people and institutions who advise the Governor under Part 7 of the Act.

Third, the power to grant a pardon should be kept entirely separate from the extraordinary appeal and review process, and not mixed, as in the terms of s 76 of the Act. Lawyers should be able to go to one place in the legislation and find all of the material needed to understand what the prerogative is, its limits, and how to invoke it. This is quite a serious matter, for s 76 of the Act, by referring to applications to the Governor to exercise the prerogative of mercy, gives the false impression that Part 7 sets out how that prerogative is to be involved and exercised. This is inimical to the proper functioning of the prerogative of mercy.

Fourth, the respective roles of the Governor and the Minister should be clarified. Can a person petition the Minister directly? Can the Governor refer a petition to the Minister, as we know occurs, from *McVittie*? The way the Minister suddenly appears in s 77 when he

is not mentioned in s 76 makes for confusion. I suggest removing the Governor from the 'extraordinary appeal', as I have termed it.

Fifth, it is anomalous that if one presents a petition directly to the Governor, the Governor may refer it to a judicial officer, as may the Supreme Court if the court is petitioned, but the Governor cannot refer the case to the Supreme Court or to the Court of Criminal Appeal, while the Minister can only refer it to the Court of Criminal Appeal, and the Supreme Court may refer the matter to either the judicial officer or the Court of Criminal Appeal. This should be addressed, and I would suggest that the best option is to remove the Governor from this process altogether, leaving the Governor with the prerogative powers. I would think, too, that the Minister should also be able to refer a matter to a judicial officer.

Sixth, I see no rationale, except perhaps to streamline proceedings, for allowing a judicial officer who has been referred a case by the Governor to send a copy of the report not only to the Governor but also to the Court of Criminal Appeal, as s 82(2) provides. Again, the best solution is surely to undertake a thorough task of streamlining, and remove the Governor from the process altogether.

Seventh, Parliament might give serious consideration to allowing the Court of Criminal Appeal, in any Part 7 matter before it, and not only those under s 85, to dispense with the rules of evidence. Indeed, I suggest that it should be explicitly stated that in the Court of Criminal Appeal, the only test for a Part 7 application should be whether to accede to the petition, and if so, to what extent. As I have contended, a case such as *JIT* causes one to wonder whether the assimilation of the pardoning power to the standard appeals has not gone too far.

This is not the place to defend the prerogative. However, commentators largely agree that the prerogative is of value where exceptional suffering has been visited upon the convict,

or there has been exceptional rehabilitation, or even where there has been a civil disturbance and a pardon is thought to be the best way of restoring social harmony.⁸¹

My starting point is that the legal system of New South Wales does possess a prerogative power of pardon. My thesis is that legislative reform could ensure that the power is more frequently invoked in deserving cases, and that it might be supplemented, but should never be displaced (effectively or directly) by a system of extraordinary appeals.

Having said that, we return to the issue of ‘weak mercy’, when mercy is shown too easily. One short, and sufficient reply, is that it is impossible to prevent errors in judgment. Mandatory sentencing, by removing individual judgment, actually ensures that individual justice is not done; and in the celebrated statement of Mahoney JA in *Kable v DPP*.⁸²

What may and should be done is not to be determined by the articulation of generalities. The law must be effective to do what needs to be done in the individual case. *If justice is not individual, it is nothing.* (My italics.)

A system where prerogative pardons are granted too freely is unworkable. But that is not occurring in New South Wales, despite Mr Hartcher’s apparent apprehension that Mr Carr would be making recommendations to the Governor which would emasculate the New South Wales rape laws. If my view of *JJT* is correct, we have at least one recent instance of where a prerogative to pardon might have at least removed the blemish of a conviction from *JJT*’s record. But a system where there is no prerogative power to extend mercy is one in which the workings of justice are severely inhibited.

⁸¹ It is strongly defended on many grounds by Kathleen Dean Moore. See generally: Moore, above n 26.

⁸² (1995) 36 NSWLR 374 at 394.

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