THE QUEEN V GAM (NO 2) [2004] VSCA 117

WINNEKE, P.:

In February 2002, a County Court jury, at Shepparton, convicted the applicant, G.A.M., of seven counts alleging the commission of sexual offences against his step-daughter (the complainant). Count 1 alleged an indecent act in the presence of a child; counts 2, 4, 5 and 7 alleged acts of incest; and counts 3 and 6 alleged acts of indecent assault. The offending was alleged to have occurred during a six month period between July 1999 and January 2000, at which time the complainant was 13 years of age. It was said to have taken place in the house at Seymour where the applicant lived with his wife, who was the mother of the complainant. The family comprised the applicant and his wife, the complainant and two other, younger, children of the marriage between the applicant and his wife. The evidence against the applicant was almost entirely confined to the evidence of the complainant, although there was evidence of a "recent complaint" made by the complainant to her grandmother (the applicant's mother) and some evidence from a doctor to whom the complainant had been referred at the Royal Children's Hospital, who said that she had examined the complainant on 14 January 2000 and had found, inter alia, two "superficial abrasions" on what she described as the "anal verge". That evidence had some potential relevance to count 7 on the presentment which alleged incest in the form of anal penetration, but was also left to the jury in the alternative of "attempted incest".

1 The trial judge sentenced the applicant to a total effective sentence of six years and nine months and fixed a non-parole period of five years.

2 G.A.M. applied to this Court for leave to appeal against his convictions and the sentences imposed. The Court heard the application in October 2003. In respect of the conviction application, the Court entertained six grounds of appeal which had, on 30 September 2003, been substituted for the original grounds by the Registrar. After hearing counsel for both parties, the Court, on 4 December 2003[1], refused the application for leave to appeal against conviction, but granted the application for leave to appeal against sentence and substituted a total effective sentence of five-and-a-half years; and directed that the applicant serve a period of three years and nine months before becoming eligible for parole. G.A.M. has presently served approximately two years and four months of the sentence imposed.

3 In accordance with the *Supreme Court (Criminal Procedure) Rules* 1998, the Registrar, on 5 December 2003, gave notice (in the form "6-2L, Rule 2.30") of this

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[1] *R. v. G.A.M.* [2003] VSCA 185.

Court's determination of the application to the various persons (including the trial judge and the Registrar of the County Court) to whom notification is required by the Rules. The notice (entitled "Notification of Result of Appeal or Application") recited, inter alia:

> "Take notice that the Court of Appeal has considered applications for leave to appeal against conviction and sentence by [G.A.M.] … and has finally determined [them] and decided, [inter alia]:
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> Application for leave to Appeal against conviction dismissed … ."

It can, in my view, be presumed that this Court's determinations had been perfected at the time when the application, now before the Court, was filed on 27 April 2004[2].

4 In this State, the vast majority of matters which come before the Criminal Division of the Court of Appeal are precipitated by the filing of applications for leave. This is in accordance with the provisions of Part VI of the *Crimes Act* 1958 (Vic.), which derive from the *Criminal Appeal Act* 1907 (U.K.). Relevantly, the statutory scheme contained in Part VI provides only for a limited right of appeal to persons convicted; namely on a ground which involves a question of law alone; or upon a ground certified by the trial judge. Otherwise, s.567 of the Act only provides for appeals against conviction or sentence "with the leave of the Court of Appeal". As I have already said, the majority of challenges to convictions come before the Court by way of application for leave. Thus, it is the practice of the Court to hear and determine the proposed grounds of appeal in the course of the application. If, after full argument, the Court is of the view that the appeal should be allowed, it grants the application and announces that the appeal is treated as having been instituted and heard *instanter*, and allowed. If, on the other hand, the Court comes to the view that the grounds have no merit, and that the appeal should be dismissed, it simply refuses or dismisses the application. These practices are in conformity with the *Supreme Court (Criminal Procedure) Rules* 1998. Rule 2.01 defines "appeal" as meaning an appeal under the *Crimes Act* and "includes an application for leave to appeal". Rule 2.07(1) provides that:

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2 *R. v. McNamara (No.2)* [1997] 1 V.R. 257 at 268.

> "If an application for leave to appeal is made to the Court of Appeal, the Court of Appeal may treat the hearing of the application as the hearing of the appeal."[3]

Thus, if after a full hearing of the application upon its merits, the Court dismisses or refuses an application for leave to appeal, the notification of its determination treats that determination as final and one which passes into record.

5 By notice of application dated 27 April 2004, and filed in the Registry, G.A.M. seeks an extension of time within which to file a further application for leave to appeal against his convictions. He has also filed a copy of the application for leave to appeal against the convictions which he would propose to rely upon should the "extension application" be granted. In truth, therefore, the substantive application which is before the Court is an application to extend the time within which the applicant should be granted leave to file a further application for leave to appeal against the convictions recorded against him[4]. The grounds recited in the proposed "conviction application" allege that the convictions recorded against him on 28 February 2002 were obtained by "fraud", and that the dismissal of his application by this Court on 4 December 2003 was procured by the same "fraud". The fraud alleged is said to consist of false evidence given at trial by the complainant who, so it is said, by statutory declaration made on 27 January 2004, has recanted her complaints of sexual assault and has averred that all the allegations of sexual assault which she made in her evidence against G.A.M. were false allegations. Also filed in the Registry of this Court is an affidavit sworn by Freny Bagli, a Solicitor from Victoria Legal Aid, exhibiting the statutory declaration alleged to have been made by the complainant in Warrnambool, which declaration purports to be witnessed by a member of the Warrnambool Police. Miss Bagli's affidavit also deposes that on 2 February 2004 she forwarded the original statutory declaration to the Office of Public Prosecutions. Together with these documents is an affidavit of Laura McDonough, a Solicitor of Victoria Legal Aid, who deposes, inter alia, that she has been told by

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[3] The 1998 Rules will be replaced, as and from 1 July 2004 by the Supreme Court (Chapter VI …) Rules 2004. Rule 2.07.1 is in the same form as Rule 2.07(1) of the 1998 Rules.

[4] See s.572(1) *Crimes Act*.

Jenny Combes of the Office of Public Prosecutions that the complainant has been interviewed by the Warrnambool Police about her statutory declaration, and that "a decision is yet to be made whether she will be charged with a criminal offence".

6 It will become apparent in the course of these reasons that the real issue between the applicant and the Director of Public Prosecutions is whether, assuming that there is merit in the grounds identified by the applicant in his proposed further application for leave to appeal against conviction, this Court has the power to entertain that application and, thus, "re-open" the former application which has already been refused on its merits; or whether the only avenue now open to G.A.M. is to apply to the Attorney-General pursuant to s.584 of the *Crimes Act* (the "petition of mercy" provisions). If the Court considered that it had the power to "re-open" the application for leave to appeal against conviction, and considered that there were merits in the proposed grounds, it would no doubt grant the application to extend the time limited by the Rules for doing so. If the Court regarded that it had no power , and that its previous disposal of the matter has rendered it *functus officio*, it would simply refuse the application for extension of time.

7 Upon receipt of the documents referred to in paragraph [6], this Court listed the matter for mention on Wednesday, 5 May 2004. Mr. Clelland, S.C. (with Mr.Armstrong) appeared on behalf of the applicant G.A.M. and the Director of Public Prosecutions (Mr. Coghlan, Q.C.) appeared in person. The contention on behalf of G.A.M. was that this Court has the power to, and should, entertain the second application for leave to appeal against the conviction, and thus reopen and enquire into the issue whether the convictions recorded against G.A.M. were procured by false evidence, and thus unsafe and unsatisfactory. It is put, and indeed it could not be contested, that the evidence of the complainant was critical to the convictions of G.A.M. That much is made clear in the decision of this Court dismissing the application[5]. It is, therefore, submitted that the convictions were procured by a fraudulent process, and that the appellate process has been tainted by

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5 *R. v. G.A.M.* [2003] VSCA 185 at para [25].

the same fraud. Thus, so it is contended, this Court should not hesitate to entertain a second application, based upon fresh evidence, for leave to appeal against conviction in order that its records can be "set right". Reliance is placed upon a passage of the judgment of this Court in *R. v. McNamara (No.2)*[6], in the following form:

> "What has been set out above compels us to conclude that, *at least in the absence of fraud or some fundamental procedural mistake,* where an order of this court (or its predecessor) dismissing an appeal on the merits has been perfected, the court is *functus officio*.
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> This restriction on the power of the court has not been shown in the past to have prevented the correction of any established miscarriage of justice. If it be shown that such a miscarriage of justice continues to have effect – for example, if irrefutable evidence shows an imprisoned person is or may very well be innocent, then the present availability of a petition for mercy will correct that injustice." (my emphasis)

8 Mr. Coghlan resisted the application. In the first place, he informed the Court that – when the Office of Public Prosecutions was alerted to the complainant's statutory declaration - the police had made investigations resulting in a further written statement, signed by the complainant, in which she acknowledged that she stood by her evidence at the trial, and disclaimed the statements made in the statutory declaration which she said had been made at the instance of others. Since then, the Director informed the Court, the matter was still in the hands of the police investigators, whose investigations were not complete. In the light of these events, the Director told us that he had taken the view that he was unable to conclude that the applicant was being unlawfully detained. He further told the Court that, if there was a plausible basis for acting on the statutory declaration, he would have taken such action as was necessary to secure the applicant's release. As matters stood, the Director informed us that he had no basis for taking that action. Furthermore, it was the Director's submission that, in the events which have happened, this Court's decision on the applicant's application for leave to appeal against his conviction had been perfected, and that the applicant's proper (and only) course was to invoke the

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6 [1997] 1 V.R. 257 at 268.

prerogative procedure contained in s.584 of the *Crimes Act* 1958. Following the hearing on 5 May 2004, and in response to the Court' request, the Director filed an affidavit sworn by Jennifer Combes who attested (inter alia) to the fact that Senior Detective Ryan of the Warrnambool Police had interviewed and taken a statement from the complainant. However, the statement was not annexed to her affidavit. Since then, however, Ms. Combes has made, and furnished to the Court, a further affidavit sworn 15 June 2004, in which she deposes to the fact that Senior Detective Ryan has now, apparently, completed his investigation; and she has exhibited the statement which Senior Detective Ryan took from the complainant, together with a record of interview which he had with her on 4 February 2004. Each of these documents affirms that the evidence which the complainant gave at the trial was true and that her statutory declaration was not. The statutory declaration simply recited, she said, what her mother had written out for her. On the other hand, also annexed to Ms. Combes' affidavit was a statement made by the complainant's younger sister in which she recorded that the complainant had told her that she (the complainant) had made her original pre-trial allegations against G.A.M. because she was "pressured" by her grandmother, even though she (the complainant) "did not really want to make the statement" to police which she had. Also attached to Ms. Combes' affidavit were copies of interviews with the complainant's mother and copies of hand written "drafts" of what appeared in the statutory declaration, together with a copy of a letter written by the complainant, in affectionate terms, to G.A.M. whilst he was in prison. The complainant's mother has denied that the statutory declaration represented anything other than that which the complainant wished to record.

9 Since the completion of the hearing on 5 May 2004, further submissions, in writing, have been forwarded to the Court by Mr. Clelland and the Director. These submissions have been directed both toward the merits of the application, and the Court's power to entertain it. The parties have informed the Court, through the President's associate, that they do not wish to make any further submissions.

10 Although the material which is now before the Court raises substantial disquiet about the complainant's credibility, and hence the safety of the verdicts recorded at the trial, I am satisfied – for reasons which I will hereafter give – that this Court has no power to re-open the conviction application (and thus to entertain the present application); and that, if the safety of the convictions is to be re-visited by this Court, it will have to be pursuant to a reference by the Attorney-General in accordance with the prerogative of mercy provisions found in s.584 of the *Crimes Act*.

Jurisdiction to entertain further application

11 The argument of Mr. Clelland in support of the application was that the trial – and the application for leave to appeal – had been vitiated by fraud, or fundamental procedural mistake of the type to which this Court adverted in *McNamara's* case[7], and which I have emphasized in the extract of the judgment set out in paragraph [8] hereof. As matters now stand, there is no basis upon which I could be satisfied that the trial has miscarried on account of fraud; nor a basis upon which I could conclude that the process in this Court was vitiated by fraud. In any event, it is my view that – this Court's orders on the previous application having been made after a hearing on the merits and having been perfected – there is no power to re-open that application. I do not regard the emphasized comments made by this Court in *R. v. McNamara* (supra) as indicating that this Court has the power, in circumstances such as those existing in this case, to re-open the conviction application at the instance of the applicant. Although the words of qualification in the first paragraph of the passage cited (see para [8]) suggest that an application or appeal which has been determined on its merits might be re-opened in the presence of "fraud", it is apparent from the context of the judgment, and the authorities referred to, that the circumstances to which the Court was referring were those which have been applied where the Court allows a prisoner to withdraw a notice of abandonment which, by virtue of the Rules, is deemed to be the dismissal of the appeal. Various courts, both in England and Australia, have spoken of the "very restricted circumstances" in

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[7] Supra at 268.

which appeals which have been abandoned might be re-opened, even though no appeal has been heard on its merits. However, the authorities (to which I will refer) demonstrate that, whilst an abandoned appeal might be re-opened where the abandonment has been procured by fraud or procedural error or mistake, the hearing and disposal of an appeal or application on its merits renders the Court *functus officio*. In England, the position in respect of re-instatement of abandoned appeals was summed up by Lord Goddard, C.J. in the case of *R. v. Moore*[8]. His Lordship said:

> "There have been from quite early days in the history of the court, applications for leave to withdraw a notice of abandonment, and it is exceedingly difficult to understand what power the court has to give leave to withdraw a notice of abandonment, considering that by the rules, which have the force of a statute, the appeal has been dismissed. An examination of the cases has shown that, except in one case at any rate, the court has only allowed notice of abandonment to be withdrawn if they are satisfied that there has been some mistake. No doubt if a case could be made out that a prisoner had in some way or another been fraudulently led or induced to abandon his appeal, the court in the exercise of its inherent jurisdiction would say that the notice was to be regarded as a nullity; but where there has been a deliberate abandonment of an appeal, in the opinion of the court there is no power or right to allow the notice of abandonment to be withdrawn and the appeal reinstated, because the appeal having been dismissed the court has exercised its powers over the matter and is *functus officio*."

12 These observations were quoted with approval, but distinguished, by the Courts-Martial Appeal Court (Lord Parker, C.J. , Widgery, L.J. and Lawton, J.) in *R. v. Grantham*[9]; a case in which the applicant had been convicted at a general court martial held in Germany of murder and sentenced to life imprisonment. He had then applied for leave to appeal against his conviction, an application which was refused by the Appeal Court. Some 12 months later he made a further application for leave to appeal against his conviction and for extension of time for application for leave to appeal; and lodged with the court an application to call further evidence. The further evidence which he desired to lead was, relevantly, evidence that one of

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8 [1957] 1 W.L.R. 841 at 842.

9 [1969] 2 Q.B. 574.

the witnesses at the trial had given false evidence pertinent to the applicant's conviction. The relevant provisions (s.8(1)) of the *Courts-Martial (Appeals) Act* 1968) provided that:

> "Subject to the provisions of this Act a person convicted by court-martial may, with the leave of the appeal court, appeal to the court against his conviction."

The *Courts-Martial (Appeals) Act* was modelled, as is Part VI of the *Crimes Act* (Vic.), upon the *Criminal Appeal Act* 1907 (U.K.).

13 In giving the reasons for the decision of the Courts-Martial Appeal Court, Widgery, L.J. (who delivered the judgment of the court) said[10]:

> "Both this court and the Court of Appeal have from time to time allowed an appeal, or an application for leave to appeal, to be 're-listed' for further argument when some procedural defect in the original disposal of the matter has come to light. Thus if, through a misunderstanding, counsel has not appeared, or papers submitted by the applicant have been delayed in the post, the court has restored the matter to the list to hear argument or consider the papers as the case may be. No member of the present court, however, can recollect a case in which an application or appeal once effectively disposed of has been re-opened by the court. Indeed, it has been assumed that the court is then *functus officio* and that if new matter comes to light thereafter the applicant's proper course is to petition the Secretary of State who can himself refer the matter to the court under section 34 of the *Courts-Martial (Appeals) Act* 1968 or section 17 of the *Criminal Appeal Act* 1968. It is this assumption which is now challenged in the present application."

Their Lordships then went on to refer to authorities, and in particular to authorities where applications had been made for leave to withdraw notices of abandonment[11]. The Court said that leave to withdraw a Notice of Abandonment would rarely be given because the *Courts-Martial Appeal Rules* (like the *Criminal Appeal Rules* 1968 (U.K.)) provide that:

> "Where an appeal or application for leave to appeal is abandoned, the appeal or application shall be treated as having been dismissed or

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10 Supra at 578.

11 See, for example, *R. v. Pitman* (1916) 12 Cr.App.R. 14; *R. v. Healey* (1956) 40 Cr.App.R. 40; *R. v. Moore* (supra).

refused by the Court."[12]

The Court noted the argument before it that the practice which had been adopted with regard to the grant of leave to withdraw notices of abandonment could be applied to the case where the appeal or application had been decided on its merits, but fresh evidence had subsequently came to light. The court concluded (at page 580):

> "This court is created by statute and has no jurisdiction beyond that which Parliament has conferred upon it. By the combined effect of sections 8 and 9 of the *Courts-Martial (Appeals) Act* 1968 a person convicted by court-martial has a right to appeal but must, as a first step, obtain the leave of the court before presenting his appeal. Parliament must be presumed to be mindful of the need to make an end to proceedings and prima facie an appeal means one appeal and 'an application' means one application. Although s.11(2) contains some safeguard against frivolous applications we do not think that repeated applications are contemplated merely because they are made at the applicant's own risk.
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> If s.8 envisages more than one appeal arising out of the same conviction, the purpose of the Secretary of State's powers under s.34 becomes obscure, because it would follow that the applicant could always approach the court directly without the intervention of the Secretary of State.[13] Nor do we see any reason for distinguishing between applications and appeals in this respect because the right to apply for leave is not a separate right but part and parcel of an indivisible right of appeal conferred by s.8 . …
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> In the judgment of this court the language of the Act as a whole points to the conclusion that s.8 confers a single right of appeal which incorporates a right to apply once, and once only, for leave to appeal under s.9. We are reinforced in this view by the fact that when Parliament consolidated the early legislation in the Act of 1968 it must be presumed to have done so with the knowledge of Lord Goddard, C.J.'s judgment in *R. v. Moore* … and in the belief that beyond the bounds there stated the court had no power to sanction withdrawal of an abandonment or the making of a fresh application for leave. "

14 The three very experienced criminal judges who comprised the Courts-Martial Appeal Court in *Grantham*, made a further statement which has some

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[12] It should be noted that Rule 2.10(2) of the *Supreme Court (Criminal Procedure) Rules* 1998 (Vic.) similarly provides that, in this State, "an appeal or application shall be taken to be dismissed on the date the notice of abandonment is filed".

[13] S.34 is the equivalent of s.584 *Crimes Act* (Vic.).

relevance to the application before this Court. Their Lordships said at the conclusion of their judgment (at 580):

> "Mr. Eastham, however, takes one final point. He refers us to section 28(1) of the Act [that is, the *Courts-Martial (Appeals) Act* 1968], under which this Court can receive fresh evidence, and points out that under s.28(2) it is provided that where such evidence is tendered the court shall receive it if the conditions of the sub-section are satisfied. Accordingly he contends that where an application for leave is based on fresh evidence of an acceptable kind the Court must have jurisdiction to hear the application, since it cannot otherwise comply with the mandatory terms of s.28(2). In our judgments, however, section 28 presupposes the existence of a competent appeal or application, and is concerned only with the procedure thereon."

15 Section 28 of the *Courts-Martial (Appeals) Act* is the counterpart of s.574 *Crimes Act* (Vic.), save that, in certain circumstances, there is an obligation on the Court to receive evidence which it regards as relevant and credible (as does, now, s.23 of the *Criminal Appeal Act* 1968 (U.K.)). Nevertheless, that does not affect the authority of the proposition that the "fresh evidence" provision "presupposes the existence of a competent appeal or application". As I have indicated, this matter assumed some relevance on this application because applicant's counsel suggested that this Court could use its powers under s.574 to call evidence from the complainant or other persons touching or concerning the propriety of the conviction. That, however, will depend upon the competency of the application.

16 The decision of the Court in *Grantham* has, more recently, been followed in the case of *Pinfold*[14] which involved an application for leave to appeal out of time against a conviction for murder recorded some years before. The application was based upon a statement which had been made by the principal prosecution witness whose evidence had been crucial to the conviction of the applicant. The applicant had previously appealed against his conviction in 1981, and the appeal was dismissed. In 1986, the witness had sworn a number of affidavits, the effect of which was that he had lied on his oath at the trial about the applicant's role in the murder of which he was convicted. The new application was founded on the proposition that s.23 of the

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14 [1988] 1 Q.B. 462.

Criminal Appeal Act 1968 (the "fresh evidence" section) permits a new application or appeal to be launched, despite the fact that an earlier appeal had been dismissed on its merits; provided that "it is a fresh point that is being raised". The Court of Appeal (Lord Lane, C.J., Boreham and Pill, JJ.) refused the application, basing itself on the decision of the Courts-Martial Appeal Court in *Grantham* (supra), in particular that Court's observations (at 580) that Parliament "must be presumed to be mindful of the need to make an end to proceedings and prima facie an appeal means one appeal and 'an application' means one application", and the Court's further observation (p.580) that, if that were not so, then the purpose of the Secretary of State's powers under s.17 of the *Criminal Appeal Act* [the equivalent of s.584 *Crimes Act* (Vic.)] "becomes obscure". Further, and in particular, the Court placed emphasis on the statement made by the Courts-Martial Appeal Court that s.28 of the *Courts-Martial (Appeals) Act* 1968 (the "fresh evidence" section) "presupposes the existence of a competent appeal or application".

17 The decisions in *Grantham* and *Pinfold* have led Rosemary Pattenden, in her work English Criminal Appeals 1844-1994[15] to note (under the heading "Repeat Appeals"):

> "Once an appeal is dismissed, the C.A.C.D. [Court of Appeal, Criminal Division] has at present no jurisdiction to entertain any further appeal by the convicted person. It is quite immaterial that 'the appellant' wishes to raise new points or to have points decided which were argued, but left unanswered in a previous appeal or that the first appeal never progressed as far as a hearing before the full Court at all because leave was refused or the appeal was abandoned. Among the questions which the Royal Commission on Criminal Justice considered was whether the law should be changed to allow convicted persons to appeal two or more times against conviction [*Report*, Cd. 2263 (1993), Ch.10, para 71]. The existing ban on multiple appeals is rooted in the need to achieve finality in criminal matters. Should there be any reason for re-opening the case the matter must be brought to the attention of the Home Secretary who can refer the case back to the Court under section 17 of the *Criminal Appeal Act* 1968."

The author noted (in footnote 18, p.85) that:

> "In very limited circumstances an abandonment may be treated as a

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15 At p.85.

nullity."

The position in Australia

18 The High Court of Australia, and Courts of Criminal Appeal in the States which adopted a criminal appellate system modelled on the *Criminal Appeal Act* 1907 (U.K.), had themselves concluded (before the English authorities to which I have referred) that an appeal or application which had been decided on its merits and had passed into record, could not be re-opened. In this State, this Court's predecessor has considered the question of a prisoner's right to apply for leave to withdraw a notice of abandonment which, according to the rules, is equated to a dismissal of his application or appeal. In *R. v. Gardner*[16] the court said:

> "In the early English decision of *R. v. Moore*, to which Winn, L.J. referred in *Sutton's* case [[1969]1 W.L.R. 375], the then Lord Chief Justice of England, Lord Goddard, had said that when a notice of abandonment had been deliberately given, the Court of Criminal Appeal would not grant leave to withdraw it except in the most exceptional circumstances and, indeed, *unless it was shown that some mistake or fraud had occurred*, which deprived the notice of legal effect, so as to make it a nullity. Short of that the Lord Chief Justice said, having regard to the terms of the rule, the court had exercised its powers and become *functus officio*, and in such circumstances there was no power for the court to grant leave to withdraw." (my emphasis)

Having referred to the circumstances of the matter before them, the Court went on[17]:

> "In other words, this court is satisfied that *in the absence of fraud or mistake*, he deliberately chose at that time to abandon the application. Upon reflecting on the matter later he decided that he had been in error in assenting to the course proposed by his legal advisers and in accepting their advice, and he thereupon set about, some 7 or 8 days later, to seek to have the position rectified either by a fresh application to this Court for leave to appeal or by obtaining leave to withdraw the notice of abandonment. … In a case such as this where there has been a deliberate choice by the applicant based upon legal advice to abandon the appeal, a choice not influenced *either by fraud or mistake* or any other factor which would justify the court in saying that the notice was a nullity, we are of opinion that no such special circumstances exist as would justify the Court, even assuming that it has power to do

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16 [1970] V.R. 278 at 280.

17 At p.281.

so, in giving leave to withdraw the notice of abandonment." (my emphasis)

19 In a case determined very shortly after *Gardner's* case, namely *R. v. Zakarian*[18], the Court of Criminal Appeal did give leave to a prisoner to withdraw his notice of abandonment on the grounds that he had never intended to abandon his application for leave to appeal against conviction, but only his application for leave to appeal against sentence; and accepted that it was "a mistake" which had led to the notice including, as well, the application for leave to appeal against conviction. The notice of abandonment in these circumstances, the Court said, was a nullity coming within the concepts of "mistake or fraud" in which the courts had been prepared to give leave in exceptional circumstances to withdraw a notice of abandonment.

20 It thus seems to me that the concepts of "fraud or fundamental mistake" have been applied to circumstances in which the court is prepared to grant leave to withdraw notices of abandonment but, so far as I am aware, have not been applied to cases where a prisoner wishes to reopen an appeal or application after a determination of that appeal or application upon its merits.[19] Insofar as the words cited by this Court in *R. v. McNamara (No.2)* (supra) (to which, in para [8], I have referred) suggest that such an appeal, or application, decided on its merits, can be reopened in consequence of fraud or procedural mistake, it seems to me that the Court may have overstated the principle which, so the authorities suggest, is only applied to grants of leave to withdraw notices of abandonment. Many of those authorities were referred to in *McNamara's* case. The most significant of them I will refer to hereunder. In any event, the application which was brought to this Court by G.A.M. in December of last year was decided, as the rules provide, on the material placed before the Court. In those circumstances, and for reasons to which I have previously adverted, I find it difficult to conclude that the appellate process was vitiated by fraud, using that term in its relevant sense. It could scarcely be

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18 [1971] V.R. 455.

19 In *Saxon* (1998) 101 A.Crim.R. 71 at 81, Smart, J. reserved for future consideration the question whether the Court of Criminal Appeal could re-open an appeal determined on its merits in the event that it was revealed that the conviction was obtained by fraud.

suggested that, because there is "fresh" material reflecting on the truth and accuracy of the complainant's evidence at trial, either the trial or the appeal was a "nullity".

21 *R. v. Edwards (No.2)*[20] was a case where the South Australian Court of Criminal Appeal had heard and dismissed an appeal against conviction, and where it was alleged that, since the conviction, certain evidence had come to the knowledge of the appellant which (it was said) was not available at the time of his trial or any time prior to the conclusion of the appeals, which had been brought both to the Court of Criminal Appeal in South Australia and to the High Court. The appellant thus sought, first, an extension of time within which he might give notice of appeal against his conviction; and, second, an application for leave to appeal against the conviction on the "fresh evidence" grounds. The Court of Criminal Appeal (S.A.) had heard (the year before) the appeal by the appellant against his conviction on matters of law, and applications by him for leave to appeal against his conviction on matters of fact; and also leave to appeal against his sentence. The Court had dismissed his appeal and refused the applications for leave. Section 5 of the *Criminal Appeals Act* 1924 (S.A.) was, to all intents and purposes, in the same form as the provisions of s.567 of the *Crimes Act* 1958 (Vic.). The Court (whose judgment was read by Angas Parsons, J.)referred[21] to the fact that the Court of Criminal Appeal is a statutory court. It said:

> "An appeal lies to it on any of the grounds mentioned in section 5 above … . The right of the appellant, under this section, to appeal, has been exercised. There is no express power to entertain a second appeal, *or to hear a second application for leave to appeal, and there is no precedent in either case for its being done*. There can be no doubt that the court has power to entertain a second application for leave to appeal, at any rate where it has not heard the merits of the application." (my emphasis)

The Court went on to refer to the various authorities concerning leave to withdraw a notice of abandonment. The Court said[22]:

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20 [1931] S.A.S.R. 376.

21 At page 378.

22 At page 379.

> "The notice of abandonment having been given the appeal was, by virtue of the rule, dismissed, because it was abandoned. We think it is clear that the Court of Criminal Appeal in the two cases referred to were only considering and speaking of an appeal which had been 'dismissed' in that way. In each case the application was made ex parte, and it is not to be supposed that the court would assert a jurisdiction to hear a second appeal without considering the question of jurisdiction to do so."

Having considered the position of the Court of Appeal, "on the civil side", the Court continued[23]:

> "Before the passing of the *Criminal Appeals Act* 1924, a man who had been convicted, though in truth he were innocent, had no alternative but to apply for clemency under the Royal Prerogative of Mercy. Then came a time when, in order to prevent miscarriages of justice, a right of appeal was given, and it was given as a right on questions of law, but subject to leave on questions of fact. But there might be cases, despite an appeal having been heard, where justice requires some further investigation, and in order to meet such cases in South Australia, the power was entrusted to the Chief Secretary to make a proper investigation of any petition presented to him for mercy, and if after such proper investigation was made he obtained the concurrence of the Attorney General, he could transmit it to this Court, which would then be clothed with power to reopen the matter."

The Court went on to consider the consequences of a determination that the Court had jurisdiction to entertain further appeals from time to time after the first appeal had been dismissed. It said that such a practice or procedure:

> "… would lead to manifest inconvenience and possibly great absurdity. A convicted person who, after his appeal has failed, makes discovery of evidence from which an inference can properly be drawn that it is reliable and likely to have affected the verdict of the jury if they had heard it is not left, by the Act without redress, for he can apply under section 22 [the equivalent of s.584 *Crimes Act* (Vic.)] …"

22 This decision in *Edwards* was adopted and followed by the Court of Criminal Appeal (N.S.W.) in *R. v. Grierson*[24] where a jury, in December 1932, had found Grierson guilty of various offences in respect of which he had been sentenced to a term of imprisonment of 35 years. In March 1933 his appeal against conviction and

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[23] At page 380.

[24] (1937) 54 W.N. (N.S.W.) 144.

sentence was dismissed by the Court of Criminal Appeal save and except that the sentence of 35 years was altered to a sentence of penal servitude for life. An application by Grierson for special leave to appeal from the decision of the Court was refused by the High Court in August 1933. In June 1934 various representations were made on Grierson's behalf to the Minister of Justice (New South Wales) for enquiry under s.475(1) of the *Crimes Act* 1900 (N.S.W.) on the ground that certain material facts had become known respecting the evidence of one of the material Crown witnesses. The Minister would not recommend an inquiry under that section; and in July 1937 Grierson appeared in person before the Court of Criminal Appeal in support of a further application for leave to appeal against his conviction and sentences. The Court of Criminal Appeal accepted a submission by the Solicitor-General that the Court had no jurisdiction to entertain the application on the basis that an appeal had already been maintained in the Court and dismissed after the merits had been determined. Jordan, C.J. had said[25]:

> "The point which has been raised is exactly covered by the decision … in *R. v. Edwards (No.2)* [supra] and I am of the opinion that this Court should follow that decision. When an appeal has once been fully heard and disposed of that is, in my opinion, an end of the matter so far as appeal is concerned, and the prisoner cannot continue to appeal from time to time thereafter, whenever a new point occurs to him or to his legal advisers or whenever a new fact is alleged to have come to light. This does not mean that injustice must necessarily occur when new substantial evidence pointing to the prisoner's innocence is discovered after his appeal is finally disposed of. In such a case recourse may be had to section 26 of the *Criminal Appeal Act* 1912, or to section 475 of the *Crimes Act* 1900. There is no reason to suppose that the procedure provided by those sections is not adequate for the consideration of any matter which it may now be sought to raise on behalf of the prisoner."[26]

23 The decision was the subject of an application for special leave to appeal to the High Court.[27] The High Court rejected the application. Rich, J. said[28]:

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25 At pages 144-5.

26 I note that s.26 of the *Criminal Appeal Act* 1912 and s.475 of the *Crimes Act* 1900 are the equivalent of s.584 *Crimes Act* (Vic.).

27 *Grierson v. The King* (1938) 60 C.L.R. 431.

28 At page 434.

> "In making the remedies provided by section 475 of the *Crimes Act* 1900 and section 26 of the *Criminal Appeal Act* 1912 available to a prisoner after conviction the legislature has, I think, recognised that the jurisdiction of the Court of Criminal Appeal is confined within the limits of the Act and that when the Court has heard an appeal on its merits and given its decision the appeal cannot be reopened."

Starke, J. dismissed the application for special leave, stating that he agreed "entirely with the reasons given by Jordan, C.J.". Dixon, J. said[29]:

> "The Supreme Court held, in accordance with the Supreme Court of South Australia (*R. v. Edwards [No.2]*) that a second appeal from a conviction could not be entertained after the dismissal, upon the merits, of an appeal or application for leave to appeal and that the first appeal could not be reopened after a final determination.
>
> In my opinion this conclusion is correct. The jurisdiction is statutory, and the Court has no further authority to set aside a conviction upon indictment than the statute confers. The *Criminal Appeal Act* 1912 (N.S.W.) is based upon the English Act of 1907. It does not give a general appellate power in criminal cases exercisable on grounds and by a procedure discoverable from independent sources. It defines the grounds, prescribes the procedure and states the duty of the Court. The statute deals with criminal appeals rather as a right or benefit conferred on prisoners convicted of indictable offences and sets out the kinds of convictions and sentences from which they may appeal and lays down the conditions on which they may appeal as of right and by leave and the procedure which they must observe. It limits the time within which appeals and applications for leave to appeal may be brought, subject, however, to a discretionary power in the Court to extend the period except where the sentence is capital. The grounds or principles upon which the Court is to determine appeals are stated, and the duty is imposed on the Court of dismissing an appeal, unless on those principles it determines that it should be allowed. The determination of an appeal is evidently definitive, and a conviction unappealed is equally final. No considerations controlling or affecting the conclusion to be deduced from these provisions are supplied by analogous civil proceedings …
>
> If the prisoner has abandoned his appeal, the Court of Criminal Appeal in England will exercise a discretion to allow him to withdraw his notice of abandonment, notwithstanding that it operates as a dismissal of the appeal … . But in such a case there has been no determination by the Court, and there is no English case in which, after such a determination, an appeal has been reopened or a fresh appeal has been entertained.
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> Notwithstanding the dismissal of an appeal, the powers conferred by

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[29] At pages 435-437.

> section 26 of the *Criminal Appeal Act* of 1912 (N.S.W.) and by section 475 of the *Crimes Act* 1900 (N.S.W.) remain exercisable at the instance of the executive."

24 Many of the authorities to which I have referred were applied by this Court in its decision in *R. v. McNamara [No.2]* (supra). In my view, and subject to what appears hereunder, they result in the conclusion that this Court has no power to reopen either an application for leave to appeal or an appeal (whether against conviction or sentence) which has been determined on the merits on the grounds of fresh evidence.

25 The principle established in *Grierson's* case has consistently been followed in those States of Australia whose statutory appellate procedures derive from the English Act of 1907. Thus, in Victoria, the principles have been applied in *McNamara [No.2]* (supra) and also in *R. v. De Jonk*[30]; in Western Australia in *R.v. Stone*[31]; and *Vella*[32]; in New South Wales in *Saxon*[33]; and in South Australia in *Caruso*[34]. These decisions appear to recognize the principle that once an appeal or application for leave to appeal against conviction or sentence has been dismissed and the decision of the Court of Appeal has passed into record, a further appeal or application, based on fresh evidence, cannot be entertained by the Court which is, by then, *functus officio*. The principle takes its colour from the statutory appellate process contained in Part VI of the *Crimes Act* including as it does, the prerogative process contained in s.584. The substance of that statutory process does not take its colour from common law principles nor from principles which govern appellate processes in the civil arena. Thus, once the application for leave or the appeal has been decided on its merits and has passed into record, it cannot be reopened. Whether the appeal is "an appeal" as of right or one for which leave is required does not matter.

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30 Court of Appeal (Vic.), unreported, 18 September 1997, per Tadgell, J.A. at page 11.

31 (1989) 42 A.Crim.R. 189 at 191.

32 (1991) 52 A.Crim. R. 298 at 300.

33 (1998) 101 A.Crim.R. 71 at 74 ff.

34 (1988) 37 A.Crim.R. 1 at pages 17-18.

26 More recently it has been suggested that, over a period of time, there have been some qualifications read into the seemingly strict approach adopted in *Grierson's* case. Thus, in *Saxon*[35], Wood, J. (as he then was) said:

> "Unless *Grierson* has been qualified in some fashion this Court has no option other than to follow it… . Far from having been questioned, its authority has been recognized in a number of subsequent decisions in New South Wales and in those States where a similar point has arisen for decision.
>
> Some exceptions have been noted including …
>
> (a) The discretion to allow a fresh appeal after abandonment of an earlier appeal, on the ground that the earlier appeal had not been the subject of any final determination … .
>
> (b) The discretion to reconvene and entertain further argument in respect of a submission or ground of appeal which had not been dealt with, if the application to consider the outstanding matter had been made before the judgment of the Court was perfected … .
>
> (c) The discretion to look at the matter afresh where there had been a denial of procedural fairness in a Court of Criminal Appeal …
>
> The submission that these exceptions rest upon a more general discretion to intervene, in the interests of justice, is not borne out by an examination of the decisions relied upon by the appellant." (footnotes omitted)

In referring to "[t]he discretion to look at the matter afresh where there had been a denial of procedural fairness in a Court of Criminal Appeal", Wood, J. referred to *Pantorno*[36]. He also referred to *McNamara [No.2]* (supra). In the case of *Pantorno*, certain statements were made by members of the Court[37] which raised a query whether a Court of Criminal Appeal, in circumstances where it could be shown that an inadvertent denial of procedural fairness had occurred, could reopen its proceedings for the purposes of rectifying the matter. In the case of *McNamara*[38], this Court noted that it had been submitted by counsel that the dicta in the joint

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35 (1998) 101 A.Crim.R. 71 at 76.

36 (1989) 166 C.L.R. 466; 38 A.Crim.R. 258.

37 Mason and Brennan, JJ. at page 474; and Deane, Toohey and Gaudron, JJ. at page 484.

38 Supra at pages 265-266.

judgment of Deane, Toohey and Gaudron, JJ. supported the contention that, at least in the circumstances referred in *Pantorno*, the Court of Criminal Appeal was entitled to revisit a matter which had been the subject of orders which had passed into record. Thus, it was submitted, that the gate which had been firmly closed in *Grierson* was partially open. Of these submissions, this Court, in giving its decision in *McNamara [No.2]*[39] said:

> "In our view these observations cannot be read as casting doubt upon the authority of *Grierson*. There has not in the present case been any denial of procedural fairness, nor has there been any mistake of the nature discussed in the cases to which reference has been made."

27 It was submitted on behalf of the applicant in this matter that the rigorous approach which has been adopted in respect of re-opening applications or appeals which had already been determined on their merits should not be applied in this State having regard to the practice which this Court adopts in disposing of appeals. As I have already noted, the vast majority of the appeals that come before the Criminal Division of the Court of Appeal are initiated by the filing of applications for leave and the grounds of the proposed appeal are heard and determined in the course of the application.

28 The applicant submits that because this Court treats the application as the hearing of the appeal and, if after full argument on the merits is minded to dismiss the appeal, simply records that the "application for leave to appeal is refused", then there can or should be no bar to the applicant filing a fresh application based on new grounds because the Court' s previous orders are interlocutory in nature and not final. The applicant submits that these propositions are supported by observations made by some of the judges of the High Court in *Postiglione v. The Queen*[40]. In *Postiglione* the applicant had pleaded guilty to importation of drugs and had been sentenced by the trial judge to 18 years' imprisonment with a non-parole period of 13 years and 10 months. He had co-operated with prosecuting authorities and had

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39 Supra at page 266.

40 (1997) 189 C.L.R. 295.

undertaken to give evidence against his co-conspirators including one Savvas. In accordance with the *Crimes Act* (Cth.) the judge had indicated that, but for Postiglione's co-operation, she would have imposed a sentence of 21 years with a non-parole period of 16 years and 10 months. As generally happens where a prisoner is willing to plead guilty and give co-operation, Postiglione had stood for sentence before his co-accused Savvas. Following the imposition of sentence by the trial judge, Postiglione had applied to the Court of Criminal Appeal (N.S.W.) for leave to appeal against his sentence on the ground of its severity. That appeal was heard and determined before Savvas was brought to justice. The application for leave to appeal was granted by the Court, but the appeal was dismissed. In the High Court proceedings, the Court was informed that no order had been taken out giving effect to the decision of the first Court of Criminal Appeal and it was not clear whether the Court's order had been perfected. In any event, a short time after Postiglione's appeal had been dismissed, Savvas was brought to trial. After he had been convicted and sentenced, Postiglione brought a second application for leave to appeal in the New South Wales Court of Criminal Appeal, complaining of a marked disparity between his sentence and that imposed upon Savvas. That application came on before a differently constituted Court of Criminal Appeal and appears to have been treated as a separate proceeding, not merely as an application to re-open the earlier appeal. The appeal to the High Court was brought from the second decision of the Court of Criminal Appeal (N.S.W.) in which that Court had granted leave on the second application but had dismissed the appeal.

29 With respect to the procedure which had been adopted on the second application to the Court of Criminal Appeal (N.S.W.), Dawson and Gaudron, JJ. – in their joint judgment in *Postiglione*[41] said:

> "In his reasons for judgment on the second application, Badgery-Parker, J. (with whom McInerney and Dowd, JJ. agreed) expressed the view, by reference to *Pantorno v. The Queen* (supra) that the Court of Criminal Appeal had jurisdiction to entertain that application notwithstanding the earlier application for leave to appeal. However,

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41 At pages 299-300.

because the appeal was to be dismissed, it was said that it was unnecessary to decide whether that was so. If the only order to be made was an order dismissing the application for leave to appeal, that may have been correct. However, a decision to grant leave on the second application and to dismiss the appeal then brought involved the assertion of jurisdiction to entertain the second application and, on the assumption that an order giving effect to the decision on the first application was perfected, an assertion of jurisdiction to entertain a second appeal against sentence.

If a final order was made perfecting a decision of the Court of Criminal Appeal on *Postiglione's* first application, the assumption of jurisdiction to entertain his second application and the ensuing appeal was contrary to the decision of this Court in *Grierson v. The King* (supra). It was held in that case that the *Criminal Appeal Act* 1912 (N.S.W.) does not confer jurisdiction to re-open an appeal which has been heard on the merits and finally determined. *A fortiori*, in a case where what is involved is a hearing of a second appeal. *Pantorno* does not suggest otherwise. The view was expressed in *Pantorno* that an intermediate Court of Appeal can entertain an application to remedy a denial of procedural fairness whether or not its order has been perfected. Nothing was said as to the jurisdiction of an appellate court to entertain a second appeal when the first had been heard and determined on the merits and an order perfected." (footnotes omitted)

Their Honours went on to say[42] that:

> "Moreover it will later appear that the only order which should have been made on *Postiglione's* first application was an order refusing leave to appeal, not an order dismissing the appeal."

This matter was again taken up by their Honours towards the conclusion of their judgment where they said[43]:

> "Some of the procedural difficulties involved in this case are referable to the fact that *Postiglione* was sentenced and his application for leave to appeal determined before his co-offender, Savvas, was brought to trial. That is the course usually taken in cases where an accused has agreed to give evidence against a fellow criminal. And there are good reasons why that course should be followed. However, it involves the difficulty, if leave to appeal against sentence is granted, and the subsequent appeal dismissed, that an appellant in *Postiglione's* position is denied an opportunity to complain of sentence disparity.
>
> Ordinarily, it is of no consequence whether an order is made dismissing an application for leave to appeal or whether leave is

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42 At page 300.

43 At pages 304-5.

> granted and the appeal dismissed. However, putting aside applications which are frivolous or vexatious, there is no reason in principle to prevent a person bringing a second application for leave to appeal if an earlier application has been dismissed. An application based on matters agitated on a previous application is properly to be regarded as frivolous or vexatious. But that is not the case where an application is based on a sentencing disparity which has subsequently emerged. That is always a possibility in a case of this kind. That being so, the interests of justice require that, if an application for leave to appeal against sentence is to be heard and determined against an applicant before a co-accused is brought to trial, leave be refused, rather than the appeal be dismissed." (footnotes omitted)

30 These observations suggest that their Honours are drawing a distinction between the refusal of an application for leave to appeal, and the formal dismissal of an appeal. Their Honours appear to conclude that a refusal of an application for leave, even after the merits have been considered, is of an interlocutory nature, and will not prevent the re-opening of that application and the appeal in the event that it becomes necessary when further relevant facts are known. Whether their Honours were intending to confine their remarks to applications for leave to appeal against sentence in circumstances where co-accused were to be sentenced at a later time (and were, in essence, suggesting that the orders should not be perfected until the co-offenders fate is known), or whether their Honours were intending their remarks to apply generally to all applications for leave to appeal, be they against conviction or sentence, is not entirely clear to me[44]. Their Honours referred to a number of decisions which discuss special features distinguishing applications for leave or special leave to appeal from other legal proceedings, both criminal and civil in nature. Each of those decisions involves circumstances which are quite different in their nature from those which apply to criminal appellate procedures which derive from the *Criminal Appeals Act* 1907 (U.K.).

31 Other judges of the Court in *Postiglione* commented upon the procedural

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[44] The authorities to which I have referred, and which preceded and include *Grierson v. The King*, make it clear, in my view, that all applications for leave, and appeals, - when decided on the merits and the orders perfected – are final. However there may be a query whether an application to a single judge pursuant to s.582 *Crimes Act* (Vic.) results in a final order in the event that the applicant fails to make an election within the time prescribed by the Rules.

problems which had arisen in the case. McHugh, J.[45] said:

> "Second, the competency of the Court of Criminal Appeal to hear the second appeal is called into question by uncertainty as to whether the first order of the Court of Criminal Appeal was perfected. If the first order was perfected, the appeal against sentence had already been conclusively determined on its merits by the first appeal. In that event, the *Criminal Appeal Act* 1912 (N.S.W.) does not permit the Court of Criminal Appeal to conduct a further appeal."

His Honour referred to *Grierson v. The King* (supra). Gummow, J. said[46]:

> "It follows that, if the proceeding in the Court of Criminal Appeal [on the second appeal] was competent, the appeal against sentence was correctly dismissed. … Further, it may be that the status of the first appeal was such as to render the later proceeding incompetent."[47]

His Honour disagreed with the majority in respect to the substantial merits of the appeal, but considered what the consequences of the remitter to the Court of Criminal Appeal (N.S.W.) should be. He said[48]:

> "If it transpired that the orders on the first appeal were perfected so that the second proceeding was incompetent, the result first reached there would stand … ."

His Honour added his agreement to what had been said by Dawson and Gaudron, JJ. with respect to the "reliance upon *Pantorno v. The Queen*".

Kirby, J.[49] said:

> "This Court was informed that the orders of the Court of Criminal Appeal following the first appeal were not perfected. In the second application that Court certainly purported to exercise and affirm its jurisdiction. Both parties before this Court supported that conclusion. In the nature of complaints of disparity in sentencing (and as the facts of this case demonstrate) it will quite often be the case that the disparity which is said to give rise to the justifiable sense of grievance is not finally known until a considerable time after the complaining prisoner was sentenced. Where the final sentencing of a co-offender, or of another relevant offender, remain outstanding it may well be sensible for a Court of Criminal Appeal to adopt the expedient proposed by Dawson and Gaudron, JJ. in their reasons. I shall

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45 At page 315.

46 At pages 326-7.

47 His Honour referred to *Grierson v. The King*.

48 At page 372.

49 At page 333.

> assume that there was no jurisdictional barrier to the appellant's second application. I shall return to that question in determining the orders which should be made."

Having discussed the merits of the application, Kirby, J. returned – as he said he would – to the procedural problems which had arisen in the second appeal. His Honour said[50]:

> "Dawson and Gaudron, JJ. have explained the procedural errors which may have occurred in the Court of Criminal Appeal. This Court has not received submissions or formal evidence about these possible errors. I am far from convinced that the Court of Criminal Appeal lacked jurisdiction to hear and determine the second application. However, in the circumstances, the desirable course is the one which their Honours propose."

32 One thing appears to be clear from the various judgments given in the case of *Postiglione*; and that is that the authority of the decision in *Grierson* has not been disturbed. As Wood, J. pointed out in the course of his judgment in *Saxon*[51]:

> "If any residual doubt existed after *Pantorno* as to the nature or extent of the relevant power, then that has, in my view, been unequivocally removed by the decision of the High Court in *Postiglione* … ."

His Honour then referred to the remarks made by Dawson and Gaudron, JJ. in *Postiglione*[52]; to remarks of McHugh, J.[53]; and to remarks of Gummow, J.[54]. His Honour continued:

> "For the reasons mentioned, I am of the view that the present case falls squarely within the decision in *Grierson*. The facts are not distinguishable, and recent authority in the High Court has neither weakened that decision nor opened the gate any wider for the reconsideration of an earlier appeal, or for the mounting of a second appeal. Nor does that authority, or other decision of any intermediate Court of Appeal, support the existence of some general discretion to intervene in the interests of justice."

33 In the light of the review which I have made of the authorities in England and

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50 At pages 343-4.

51 Supra at pages 80-81.

52 At page 300.

53 At page 315.

54 At page 327.

in this country, I do not accept the submission of counsel for the applicant that such authorities bind this Court to draw a distinction between the power of an appellate court to re-open a criminal appeal which has been dismissed on the merits and an application for leave which has been refused after argument upon the merits. Counsel has relied, for the existence of such a distinction, upon the various judgments delivered in *Postiglione* (supra), particularly the joint judgment of Dawson and Gaudron, JJ. where their Honours state that there is "no reason in principle to prevent a person bringing a second application for leave to appeal if an earlier application has been dismissed". However, neither McHugh, J. nor Gummow, J. expressed any view supporting the validity of such a distinction; and Kirby, J. expressed the view that, in circumstances where the sentencing of the co-offender remains outstanding, it may *"well be sensible to adopt the expedient proposed by Dawson and Gaudron, JJ. in their reasons*". (my emphasis). However, his Honour further stated that he was prepared to assume that there was, in the case at hand, "no jurisdictional barrier to the appellant's second application". His Honour did not find it necessary to refer to *Grierson v. The King*.

34 In the light of the peculiar circumstances which existed in *Postiglione*, and the various reasons given by the Judges to resolve them, I cannot accept the submission of the applicant's counsel that the decision binds this Court to conclude (contrary to *Grierson v. R.*) that an application for leave to appeal against conviction which has been dismissed or refused on its merits can be re-opened on the basis of "fresh evidence"; but that an appeal against conviction, which has been dismissed on the merits, cannot. That would truly be "an expedient" because it would wholly depend upon the words used by the appellate court in disposing of the application. I should also add that, as a matter of practice in this State, petitions for mercy (generally on the basis of "fresh evidence") are – and have been - presented to the Executive pursuant to s.584 *Crimes Act* following the conviction and sentence of persons charged with indictable offences; and the dismissal or refusal thereafter (on

the merits) of their applications for leave to appeal[55].

35 Mr. Clelland advanced other submissions in support of the application. In further support of his submission that there is a distinction to be drawn between the dismissal of an application for leave to appeal, and the dismissal of a "substantive appeal", he relied upon the decision, in the Queensland Court of Appeal, of *R. v. Pettigrew*[56]. The Court had been prepared to re-open an application for leave to appeal against sentence where the Court's orders on the initial application had been erroneously influenced by what was conceded to be incorrect factual information given to the Court as to the length of current sentences which the applicant was undergoing. The Court concluded that it had the power to correct its mistake by virtue of s.8 of the *Supreme Court of Queensland Act* 1991, which is part of the statute law of Queensland. Sub-section 8(1) of that Act provides that:

> "The Court has all jurisdiction that is necessary for the administration of justice in Queensland."

It had been submitted to the Court that, by reason of this sub-section, the principle established by the High Court in *Grierson v. R.* was inapplicable. Pincus, J.A., with whose reasons Mackenzie, J. agreed, said (at p.17):

> "The point is a narrow one and is whether, where this Court disposes of a matter on the basis of a mistake with respect to the content of orders previously made by the Supreme Court, or indeed any court, it has jurisdiction in an appropriate case to correct its mistake. The case is not one where the error involved any disputed or disputable question of fact; it was merely as to the content of orders made by courts of this State."

His Honour concluded that the matter was covered by s.8 of the *Supreme Court of Queensland Act*. The Court's conclusion has nothing to say about this Court's jurisdiction to re-open its decision finally disposing of an application for leave to appeal against conviction which has been determined on the merits.

36 Mr. Clelland also relied upon observations made by Fitzgerald, P. in the same

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55 cf. *Re Matthews and Ford* [1973] V.R. 199 at 200; *Re Ratten* [1974] V.R. 201 (application for leave dismissed by Full Court [1971] V.R. 87; *Re Knowles* [1984] V.R. 751 at 759; *R. v. M.H.R.* [2000] 1 V.R. 119 at 125.

56 (1996) 89 A.Crim.R. 1.

case (at 14) in which his Honour expressed the opinion that:

> "… the power to prevent injustice clearly includes power to set aside an interlocutory order refusing leave to appeal after that order has been perfected when the interlocutory order was based upon a factual misapprehension, shared by the parties and the Court, derived from ambiguity in the order of a lower court."

His Honour acknowledged that the matter before the Court was "significantly different" from *Grierson's* case and the earlier Queensland cases of *Smith*[57]. However, if his Honour was suggesting that the dismissal or refusal of an application for leave to appeal upon the merits against a conviction is to be regarded as interlocutory, in the sense that it can be re-opened upon fresh evidence, then I respectfully differ from that view.

37 In his helpful submissions, Mr. Clelland referred us to other authorities which, so he submits, have reflected a movement away from the strict approach taken in *Grierson*; and which should lead us to conclude that a previous refusal or dismissal, on the merits, of an application for leave to appeal against conviction can be re-opened if fresh evidence is available which casts doubt upon the propriety of the conviction. The authorities to which Mr. Clelland referred do not, in my view, have the effect for which he contends. In *R. v. A.*[58], the Queensland Court of Appeal entertained, but refused, a second application for an extension of time within which to appeal against conviction. In the course of her reasons for judgment (with which reasons Jones, J. agreed) McMurdo, P. referred to "debate", which had occurred during the course of the application, raising the question of the Court's jurisdiction to entertain the second application for extension of time following the Court's dismissal of the first application. The President referred to *Grierson*, *Smith [No.1]* and *Smith [No.2]* and said that they "suggest this Court has no jurisdiction to determine a second application for an extension of time within which to appeal against conviction". She also referred to *Re Sinanovic's Application*[59] in which Kirby,

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57 [1968] QWN 50; [1969] QWN 10.

58 [2003] QCA 445.

59 (2001) 180 A.L.R. 448.

J. had decided that the dismissal of an application for special leave to the High Court did not prevent a further application based on "new matters". However, her Honour said that it was unnecessary for her to decide the issue. Davies, J.A. did decide the matter. His Honour said (at para [41]) that what was before the Court was a further application to extend the time within which to appeal; the previous application being "much more clearly an interlocutory order [than a dismissal of an application for leave to appeal] notwithstanding that the [previous] application was dismissed because the Court thought that there were no merits in … the proposed appeal". His Honour had referred to no fewer than ten decisions given by the Court in the period between 2001 and 2003 in which the Queensland Court of Appeal had applied the principle stated in *Grierson*. His Honour said[60] (and this is the passage relied upon by Mr. Clelland):

> "The principle stated in *Grierson* is based on the statutory nature of an appeal and the finality of a decision given on such an appeal. Moreover it was said in that case to apply equally to a dismissal on the merits of an application for leave to appeal."

His Honour went on (at [40]):

> "The application of this principle to an earlier decision dismissing an application for leave to appeal is less clear, notwithstanding the statement by Dixon, J. in *Grierson* that it does apply. Such an order appears on its face to be an interlocutory one notwithstanding that it may be on the ground that the appeal would fail on its merits. However, the principle was applied to such a case by the Court of Criminal Appeal twice [his Honour referred to *Smith [No.1]* and *Smith [No.2]*], and appears to have been accepted by this Court in *R. v. Pettigrew* [supra], though the Court held that it had a limited power to reconsider such a decision. In my view there is a great deal to be said for the application of this principle to applications for leave to appeal against sentence in this Court as those applications are, in practice, treated as appeals …"

38 There is nothing in the reasons for decision given in *R. v. A.* which, in my opinion, disturbs the authority of *Grierson*. It is of interest to note that there was no reference in the closely reasoned judgment of Davies, J.A. to the decision in *Postiglione* (supra). In stating that the dismissal of an application for leave to appeal,

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[60] At page 38.

albeit on its merits, "appears to be an interlocutory one", Davies, J.A. drew from authorities in the area of the civil law such as *Licul and Ors. v. Corney*[61] and *Hall v. Nominal Defendant*[62]. However, it is apparent from the authorities to which I have previously referred that the statutory appellate rights contained in Part VI of the *Crimes Act* are *sui generis* and not to be construed by reference to analogous civil proceedings[63].

39 Finally Mr. Clelland submitted that the Court's capacity to re-open the application, or to hear a further application, so as to receive "fresh evidence" demonstrating a miscarriage of justice ought not be frustrated because of the time at which the evidence becomes available. The Court's power to do so, he submitted, should not depend on whether the Court's previous orders have been perfected or whether the previous determination was the dismissal of an appeal or application for leave. The short answer to these submissions, in my view, is that the Court's powers under s.574 of the Act to receive fresh evidence presupposes the existence of a competent application or appeal; it is not an independent "trigger" of a further appeal or application. Secondly, the Court's power to re-open an appeal or application which has been determined on the merits is exhausted once that

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61 (1976) 180 C.L.R. 213.

62 (1966) 117 C.L.R. 423.

63 cf. *Grierson*, supra, at 435-7.

determination has been perfected. The limits derive from the construction of the statutory provisions found in Part VI of the *Crimes Act*, including as they do the "prerogative powers" contained in s.584. The applicant is not without remedy because he can petition under that section.

40 For the reasons given the application for extension of time, in my opinion, should be refused. The applicant, as I have earlier said, is not without remedy. He would be wise, in the events which have now occurred, to exercise the rights given under s.584 of the *Crimes Act*.

CALLAWAY, J.A.:

41 I have had the considerable advantage of reading in draft the reasons for judgment prepared by the learned President. I agree with his Honour that this Court has no power to re-open, on the grounds of fresh evidence, either an appeal or an application for leave to appeal[64] that has been determined on the merits and that this application for an extension of time within which to give notice of a second application for leave to appeal against conviction should be refused.[65]

42 Sections 3 and 4 of the *Criminal Appeal Act* 1914, which was based on the English *Criminal Appeal Act* 1907, provided:

> "**Right of appeal in criminal cases**
>
> 3. A person convicted on indictment may appeal under this Act to the Full Court –
>
> (a) against his conviction on any ground of appeal which involves a question of law alone; and

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64 The President's judgment and mine are confined to applications determined by the Court of Appeal, as opposed to those determined by a single judge of appeal pursuant to s.582 of the *Crimes Act* 1958. I say nothing about the latter, even where no notice of election to have the application determined by the Court of Appeal is received by the Registrar under Rule 2.08.1.

65 The Rules contemplate that both a notice of application for leave to appeal and a notice of application for extension of time should be filed at the same time but the practice of the Court, correctly in my opinion, is to disregard the application for leave to appeal if the extension is refused.

(b) with the leave of the Full Court or upon the certificate of the Judge or Chairman of General Sessions before whom he was tried that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or any other ground which appears to the Full Court to be a sufficient ground of appeal; and

(c) with the leave of the Full Court against the sentence passed on his conviction, unless the sentence is one fixed by law.

Determination of appeals in ordinary cases

4. (1) The Full Court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice and in any other case shall dismiss the appeal.

Provided that the Full Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.

(2) Subject to the special provisions of this Act the Full Court shall, if they allow an appeal against conviction, quash the conviction and either direct a judgment and verdict of acquittal to be entered or direct a new trial to be had.

(3) Where a new trial is directed the Full Court may make such order as to them seems fit for the safe custody of the appellant or for admitting him to bail.

(4) On an appeal against sentence the Full Court shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence warranted in law (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal."

43 Section 3 specified the gateways to an appeal and s.4 dealt with the powers and duties of the Full Court on an appeal. The same distinction is maintained in ss.567 and 568 of the *Crimes Act* 1958. Those sections now provide:

"**567. Right of appeal in criminal cases**

A person convicted on indictment or for a relevant summary offence heard and determined by the County Court pursuant to section 359AA may appeal under this Part to the Court of Appeal –

(a) against his conviction on any ground of appeal which involves a question of law alone: Provided that the Court of Appeal in any such case may if it thinks fit decide that the procedure with relation to Crown cases reserved under Part III of this Act should be followed and require a case to be stated accordingly under that Part in the same manner as if a question of law had been reserved and thereupon the provisions of the said Part shall with the necessary modifications apply accordingly;[66]

(b) upon the certificate of the judge of the Trial Division of the Supreme Court or the County Court before whom he was tried that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact;

(c) with the leave of the Court of Appeal upon any such ground as is mentioned in paragraph (b) or any other ground which appears to the Court of Appeal to be a sufficient ground of appeal; and

(d) with the leave of the Court of Appeal against the sentence passed on his conviction, unless the sentence is one fixed by law.

568. Determination of appeals in ordinary cases

(1) The Court of Appeal on any such appeal against conviction shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice and in any other case shall dismiss the appeal:

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[66] This proviso corresponds with the second part of s.20(2) of the *Criminal Appeal Act* 1914. The provision corresponding with the first part of that sub-section is s.571.

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

(2) Subject to the special provisions of this Part the Court of Appeal shall, if it allows an appeal against conviction, quash the conviction and either direct a judgment and verdict of acquittal to be entered or direct a new trial to be had.

* * * * *

(4) On an appeal against sentence the Court of Appeal shall, if it thinks that a different sentence should have been passed or a different order made, quash the sentence passed at the trial and pass such other sentence or make such other order warranted in law (whether more or less severe) in substitution therefor as it thinks ought to have been passed or made, and in any other case shall dismiss the appeal.

(5) Despite sub-section (4), on an appeal against sentence the Court of Appeal may, if it thinks that it is appropriate and in the interests of justice to do so, quash the sentence passed at the trial and remit the matter to the trial court.

(6) If the Court of Appeal remits a matter to the trial court under sub-section (5) –

(a) it may give any directions that it thinks fit concerning the manner and scope of the further hearing by the trial court, including a direction as to whether that hearing is to be conducted by the same or a different judge; and

(b) the trial court must hear and determine the matter in accordance with law and any such directions.

(7) Where a new trial is directed or a matter is remitted under sub-section (5), the Court of Appeal may make such order as to it seems fit for the safe custody of the appellant or for admitting him or her to bail."

44 The "appeal against conviction" referred to in s.568(1) and (2) is not an application. It is an appeal that has been brought as of right pursuant to s.567(a) or

upon the certificate of the trial judge pursuant to s.567(b)[67] or with the leave of the Court of Appeal granted pursuant to s.567(c). The "appeal against sentence" referred to in s.568(4) and (5) is similarly not an application. It is an appeal brought with the leave of the Court of Appeal granted pursuant to s.567(d).[68] That is why, where an application for leave to appeal against conviction or sentence is heard by the Court of Appeal, as opposed to a single judge of appeal, and succeeds, the opening sentences of the order are:

> "The application for leave to appeal against [conviction or sentence, as the case may be] is granted. The appeal is treated as instituted and heard instanter and is allowed."

Those words satisfy the condition precedent in s.567(c) or (d), as the case may be, and enliven the jurisdiction of the Court to entertain and deal with the appeal pursuant to s.568.

45 Although there are other provisions in Part VI which distinguish between applications for leave to appeal and appeals[69], the distinction is rarely of importance in practice. The Court treats applications for leave to appeal, except those heard by a single judge of appeal pursuant to s.582, as the hearing of an appeal. Where the application fails, even if the grounds were reasonably arguable, our practice is to refuse leave to appeal, frequently expressed as "dismissing the application"[70], rather than to grant leave to appeal but dismiss the appeal. Nevertheless, in some cases the distinction is important. Section 566 defines "sentence" to include, among other things, a restitution order made pursuant to s.84 of the *Sentencing Act* 1991. In *R. v.*

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67 In practice appellants rarely use s.567(a) nowadays and s.567(b) is a dead letter.

68 In either case, s.567(c) or (d), the leave of the Court of Appeal may have been granted by a single judge of appeal pursuant to s.582. The condition precedent in s.567 is satisfied because, as the language of s.582 makes clear, the single judge of appeal exercises the power of the Court of Appeal to give leave.

69 See, for example, ss.576 and 582. In reading Part VI it is important to remember that s.566 defines "appellant" in words wide enough, and intended, to include an applicant for leave to appeal.

70 *R. v. Bolton and Barker* [1998] 1 V.R. 692 at 700 line 2 and fn. 26. Strictly speaking, an application should be "granted" or "refused" and an appeal should be "allowed" or "dismissed".

Nousis[71] the Court exercised its discretion to refuse leave to appeal against a restitution order pursuant to s.567(c) because of the injustice that appellate intervention would have occasioned to a third party which had changed its position in good faith in reliance on the order. Had a single judge of appeal granted leave pursuant to s.582, the Court might have had to rescind that leave[72], for the restitution order had been wrongly made and, on an appeal, the mandatory terms of s.568(4) may have left the Court with no option but to intervene.

46 I do not stay to consider at any length what the position might have been in the absence of authority. It is of limited assistance to say that an appeal, or application for leave to appeal, against conviction or sentence is statutory. All appeals are statutory. When a statute uses expressions such as "leave to appeal" and "appeal" it may be supposed that the legislature intends them in their ordinary sense. On the civil side, there are important legal and practical differences between applications for leave to appeal and appeals.[73] True it is, nevertheless, that, even in the absence of authority, s.584, which is in similar terms to s.19 of the *Criminal Appeal Act* 1914, might have been held to throw light on the meaning and effect of those terms in Part VI.[74] It is unprofitable to consider whether the reference by Dixon, J. to "an appeal *or application for leave to appeal*" in *Grierson v. R.*[75] was obiter. The authorities here and in England compel the conclusion at [25] and [42] above. It should also be said that the result is conducive to the practical administration of criminal justice.

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71 [2004] VSCA 107.

72 It could have done so because a single judge of appeal, unlike a judge at first instance, exercises the powers of the Court of Appeal. Compare *Sanofi v. Parke Davis Pty. Ltd. [No. 1]* (1982) 149 C.L.R. 147 at 153 and *Coles Myer Ltd. v. Bowman* [1996] 1 V.R. 457 at 460.

73 Both the grant of leave and the refusal of leave are usually interlocutory. See *Lamac Developments Pty. Ltd. v. Devaugh Pty. Ltd.* (2002) 27 W.A.R. 287 at [32], [56]-[57], [70]-[72] and [121]-[128].

74 *R. v. Edwards (No.2)* [1931] S.A.S.R. 376 at 380; *R. v. Grierson* (1937) 54 W.N.(N.S.W.) 144; *Grierson v. R.* (1938) 60 C.L.R. 431 at 434 and 437; *R. v. Grantham* [1969] 2 Q.B. 574 at 580.

75 At 435.

EAMES, J.A.:

47 I agree that the application for an extension of time to file an application for leave to appeal should be refused, for the reasons stated by the learned President.