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## The Law Around a Miscarriage of Justice in Queensland

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# The Law Around a Miscarriage of Justice in Queensland

## **Abstract**

This article examines the judicial test expounded by the High Court in *M v The Queen* (1994) 181 CLR 487, which intermediate appeal courts in Australia considering an application for a miscarriage of justice are currently governed by. It argues that the High Court in fact created two separate tests which can yield different results when applied to the same set of facts. In doing so, this article discusses the historical development of the judicial test, and its context within the statutory requirements of s668E of the Criminal Code Act 1899 (Qld). Using both judicial commentary and academic interpretation, this article then goes on to scrutinise the formulation of the judicial test from *M v The Queen*. Finally, the judicial test will be considered in the context of a petition for the exercise of the Royal Prerogative brought on behalf of Graham Stuart Stafford on the ground that there had been a miscarriage of justice, illustrating the two distinct outcomes of the test.

## **Keywords**

miscarriage, justice, queensland, australia, law

## **Cover Page Footnote**

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# THE LAW AROUND A MISCARRIAGE OF JUSTICE IN QUEENSLAND

DYLAN WILTERMUTH

## Introduction

[i] When an appeal is lodged on grounds that there has been a miscarriage of justice, the issue facing the appellant is what must be shown to demonstrate that a miscarriage of justice has occurred. Currently intermediate appeal courts in Australia considering an application for a miscarriage of justice are governed by the propositions expounded by the High Court in *M v The Queen*.<sup>1</sup> It will be argued that the High Court in stating this judicial test (the judicial test) in fact created two separate tests which can, and in certain circumstances do, yield different results when applied to the same set of facts. The issue facing an appellant court with two governing tests is which test should be applied if each test produces a different result. This paper will first discuss the development of the judicial test, starting from the test's historical roots in the English Common Law and look at the evolution of judicial interpretation of the statute in this area of law. Secondly, in Queensland this judicial test is to be understood within the statutory requirements of s668E of the *Criminal Code Act 1899* (Qld) (the statutory provision). This paper will look at the statutory provision which governs the criminal law in Queensland to provide a general understanding of the judicial test and how it is used in an example case. Thirdly, the current judicial test formulation from *M v The Queen*<sup>2</sup> that sought to unify the law will be scrutinized using both judicial commentary and academic interpretation. Finally, the two results from this examination of the judicial interpretation of the statute will be considered in the context of a petition for the exercise of the Royal Prerogative brought on behalf of Graham Stuart Stafford (the 1997 petition) on the grounds that there had been a miscarriage of justice. After a brief examination of the material facts of the case the two distinct outcomes of the judicial test will become elucidated.

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<sup>1</sup> (1994) 181 CLR 487, 494.

<sup>2</sup> Ibid.

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### A Brief History and Original Test Formulations

[1] The Common Law surrounding a miscarriage of justice application is the judicial interpretation of various statutory provisions. The three grounds for a miscarriage of justice stated in the common form of statutory provisions in Australia, exemplified by the *Criminal Code Act 1899* (Qld), are very similar in their wording, presumably making the principle which underlies each provision's existence the same.<sup>3</sup> The similarities in wording were comparable to s4 of the *Criminal Appeal Act 1907* (UK), which has since had its wording amended. This similarity in the wording allowed Australian courts to use the English interpretation of the similar statute as a statement of the former's law.

[2] The definition of what constitutes a miscarriage of justice, as will be discussed, is embodied in the words of a statute, not the Common Law.<sup>4</sup> The original judicial test formulation seems to be traced back to an interpretation of the English statutory phraseology found in the *Criminal Appeal Act 1907* (UK). The statute enacted post-conviction examination of both the conduct of the trial and the subsequent outcomes. The *Criminal Code Act 1899* (Qld) already had a provision of similar nature in s668E ahead of the English Statute and Common Law. Both the English and Australian legislation made reference to the "unreasonableness" of the verdict or that the verdict "cannot be supported having reference to the evidence".<sup>5</sup> It was this similarity which allowed judges to look beyond their jurisdiction's borders for elaborations on the relevant provision's meaning.

[3] In *Gipp v The Queen*,<sup>6</sup> Kirby J was curious as to why the Common Law of Australia had historically developed to follow a judicial interpretation of the English statute.<sup>7</sup> His Honour, during his consideration of the Queensland provision s668E, highlighted the English court's encroachment on the Australian interpretation. "Unjust or unsafe" was first used to describe

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<sup>3</sup> *Gipp v The Queen* (1998) 194 CLR 106, 147.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Criminal Appeal Act 1907* (UK) s4(1); *Criminal Code Act 1899* (Qld) s668E.

<sup>6</sup> (1998) 194 CLR 106.

<sup>7</sup> *Criminal Appeal Act 1907* (UK) s4(1); *Criminal Code Act 1899* (Qld) s668E.

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when a verdict was in need of an appellant court's intervention in 1937.<sup>8</sup> This phrase was followed by "dangerous or unsafe"<sup>9</sup> and later by "unsafe or unsatisfactory".<sup>10</sup>

[4] In 1966 the English legislature changed their statutory expression to reflect the English judicial test by changing the wording of the statute to "unsafe or unsatisfactory".<sup>11</sup> This amendment was not mirrored in Australian jurisdictions, including Queensland, where the statute still requires an element of "unreasonableness".<sup>12</sup> Nevertheless, it was the usage of English authority in criminal appeal cases that led the Australian judiciary to begin to use the phrase of "unsafe or unsatisfactory". The persuasive nature of English obiter caused the Common Law relating to miscarriages of justice in Australia to develop in a similar manner to that of England despite the statutory provisions being dissimilar since the 1966 amendment.

### *The function of an appellant court*

[5] When it is within the appellant court's function to allow an appeal an application that a miscarriage of justice has occurred is a ground for appeal. On this point there is some diversion between the Australian and English Authority.

[6] The 1966 English amendment was interpreted as significantly broadening the functions of an appellant court. For example Lord Justice Widgery in *Reg v Cooper* stated his interpretation of how s4(1) of the *Criminal Appeal Act 1907* compared with the 1966 amendment by saying:

However, now our powers are somewhat different, and we are indeed charge to allow an appeal against conviction if we think that the verdict of the jury should be set aside on the ground that under all the circumstances of the case is unsafe or unsatisfactory. That means that in cases of this kind the court must in the end ask itself a subjective question, whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which make us wonder whether an injustice had been done.

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<sup>8</sup> *Davis and Codt v The King* (1937) 57 CLR 170, 180.

<sup>9</sup> *Ratten v The Queen* (1974) 131 CLR 515, 515.

<sup>10</sup> *Criminal Appeal Act 1966* (UK) s4(1); which amended the *Criminal Appeal Act 1907* (UK).

<sup>11</sup> *Criminal Appeal Act 1966* (UK) s4(1). Section 4 of the *Criminal Appeal Act 1907* (UK) was later re-enacted as s2(1)(a) of the *Criminal Appeal Act 1968* (UK).

<sup>12</sup> *Criminal Code Act 1899* (Qld) s668E.

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This is a reaction which may not be based strictly on the evidence as such; it is a reaction which can be produced by the general feel of the case as the court experiences it.<sup>13</sup> (Emphasis added)

[7] The widening of the English scope would allow the court a greater ambit in its appellate function whereas before it was almost unheard of for an appellate court to interfere.<sup>14</sup> A doubt giving rise to a miscarriage of justice might arise in an English court notwithstanding the advantages enjoyed by the jury over the appellate court.<sup>15</sup> These advantages are part of the deference principle which will be looked at later in this paper. However, this broadening of an appellate court's function through statutory reform did not take place in Australia. The High Court expressed its view in *Whitehorn v The Queen* as to the limitations of the powers of a court of appeal based on Australian legislation:

Wide as the powers of an Australian court of criminal appeal are, they do not, under the legislation which prevails in this country, empower a court to set aside a verdict upon speculative or intuitive basis.<sup>16</sup> (Emphasis added)

[8] The scope of an appellate courts' function is an important consideration to be taken in conjunction with the deference principle to aid in determining when an appeal on grounds that there has been a miscarriage of justice will be allowed. In short, English authority allows appeals on grounds dissimilar to those of Australian jurisdictions, namely that a conviction was "unsafe or unsatisfactory" which extended the powers of an English court of appeal further than those of their Australian counterparts.

### ***"Unsafe or Unsatisfactory"***

[9] Even though the common form of the legislative provision in Australia was different to the now amended legislation from England, a judicial practice developed in Australia of referring to the question of whether a miscarriage of justice has occurred as being whether the convicting verdict was "unsafe or unsatisfactory".<sup>17</sup> This expression of "unsafe or unsatisfactory" as the

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<sup>13</sup> 1969 1 QB 267, 271.

<sup>14</sup> *R v Cooper (Sean)* [1969] 1 QB 267, 271.

<sup>15</sup> *Gipp v The Queen* (1998) 194 CLR 106, 148.

<sup>16</sup> (1983) 152 CLR 657, 688-689.

<sup>17</sup> *Gipp v The Queen* (1998) 194 CLR 106, 148.

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judicial test was used<sup>18</sup> and is sometimes still used.<sup>19</sup> In *M v The Queen*<sup>20</sup> the High Court noted that this phrase did not appear in s6 of the *Criminal Appeal Act 1912* (NSW), a provision virtually identical to s668E in Queensland.

[10] In *Gipp v The Queen* Kirby J noted that a short phraseology had an undeniable convenience, but he felt that continuing to use the English phrase was not proper for Australian law.<sup>21</sup> His Honour argued that an expression of the verdict as “unsafe or unsatisfactory” was inferior for three reasons:<sup>22</sup>

1. The phrase has no source in Australian legislation;
2. There is a danger that the former English statutory formula may mislead; and
3. The duty of any court is to affirm that jurisdiction’s legislative charter.

These points require further investigation to flesh out what Kirby J was expressing.

[11] In relation to the first point, the uncritical adoption of the English understanding of the function of an appellant court was not well received by Kirby J. His Honour emphasised this point by stating that earlier Australian legislation, which was in common form throughout the nation, had been expressed differently for the better part of the century from its English counterpart.<sup>23</sup> In summary, His Honour noted that Australian jurisdictions possess their own legislative provision on what constitutes a miscarriage of justice and it is these Australian provisions that should be guiding the domestic law, not a foreign interpretation of a foreign law.<sup>24</sup>

[12] Kirby J’s second point postulates that to express the requirement for a miscarriage of justice as “unsafe or unsatisfactory” seems to engulf all three grounds of appeal into a single

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<sup>18</sup> *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521, 531; *Morris v The Queen* (1987) 163 CLR 454, 473; *Chidiac v The Queen* (1991) 171 CLR 432, 451; *Knight v The Queen* (1992) 175 CLR 495, 503, 511.

<sup>19</sup> *TKWJ v The Queen* [2002] HCA 46, 69, 72; *Palmer v The Queen* (1998) 193 CLR 1, 33.

<sup>20</sup> (1994) 181 CLR 487, 492.

<sup>21</sup> (1998) 194 CLR 106, 149.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

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test.<sup>25</sup> This is best demonstrated by reference to the English amendment<sup>26</sup> which amalgamated the different grounds of appeal into a single avenue of appeal.<sup>27</sup> For example, the three separate grounds for miscarriages of justice prescribed by s668E need to be kept distinct. The first ground is geared to deal with questions of fact, the second a question of law, and the third is the ‘catch all’ arm.

[13] The third point of argument seems to draw on the end of his first point which sought to refocus the intention of future judicial statements to elaborate on the law of the land.<sup>28</sup> This approach had been taken in *MFA v The Queen*<sup>29</sup> previous to Kirby J’s judgement in *Gipp v The Queen*. The court in *MFA* stated:

In recent years...this court has insisted upon close attention to the language of applicable legislation in preference to other formulations derived from pre-statutory expositions...explanations and in this case the language of foreign legislation.<sup>30</sup>

In effect, this returned the proper phraseology of the test to one based on “unreasonableness” in Queensland. Kirby J took the view in *Gipp* that any judicial test of a disputed verdict should be based on the actual language of the statute instead of judicially contrived synonyms.<sup>31</sup>

[14] When the Court in *MFA* examined s6 of the *Criminal Appeal Act 1912* (NSW), a similar provision to s668E in Queensland, the court was of the opinion that the intention of the legislature was to confer a wide power of review, but that this power was qualified in two ways by the context of the provision:

- The use of the phrase “verdict of the jury”;<sup>32</sup> and

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<sup>25</sup> *Gipp v The Queen* (1998) 194 CLR 106, 149.

<sup>26</sup> *Criminal Appeal Act 1995* (UK) s2(1).

<sup>27</sup> *Gipp v The Queen* (1998) 194 CLR 106, 149.

<sup>28</sup> *Ibid.*

<sup>29</sup> (2002) 213 CLR 606.

<sup>30</sup> *Ibid* 620.

<sup>31</sup> *Gipp v The Queen* (1998) 194 CLR 106, 149.

<sup>32</sup> *MFA v The Queen* (2002) 213 CLR 606, 621.

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- The inclusion of the third arm in the provision containing the words “on any grounds whatsoever” there was a “miscarriage of justice”.<sup>33</sup>

[15] The first qualification restated that appeal courts have to have deference to the verdict of the jury, which will be discussed later in this paper.

[16] The second qualification appears to suggest the “unreasonableness” of the verdict, or a verdict that “cannot be supported having regard to the evidence” still leaves the court an ability to find, notwithstanding the verdict, there has been a “miscarriage of justice”. This overall miscarriage of justice approach appears to have gained favour during the recent decision in *Nudd v The Queen*<sup>34</sup> when the High Court was dealing with the similar Queensland provision.

[17] In conclusion, the contextual restraints and statutory provisions have affected courts attempting to articulate the proper measure of resolve to observe when taking the important step of usurping the finality of a verdict based on a decision of a jury.<sup>35</sup> It is important to reiterate that courts are not dealing with questions on law relating to whether there is evidence to support the conviction<sup>36</sup> under the first arm of s668E. A court is dealing with a question of fact and a decision will be based on an independent assessment of the evidence by that particular court.<sup>37</sup> A question of law falls under one of the other arms of the provision. It was perhaps predictable that appellant courts would place a judicial stamp on the legislative provision through judicial statements reflecting the position of the law.

### General Overview of s668E

[18] Section 668E of the *Criminal Code Act 1899* (Qld) identifies three specific grounds when a court of appeal may quash a conviction on indictment. These grounds are:

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<sup>33</sup> *MFA v The Queen* (2002) 213 CLR 606, 621.

<sup>34</sup> [2006] HCA 9.

<sup>35</sup> *Chidiac v The Queen* (1991) 171 CLR 432, 443.

<sup>36</sup> *Plomp v The Queen* (1963) 110 CLR 234, 246, 250.

<sup>37</sup> *Morris v The Queen* (1987) 163 CLR 454.

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1. That the verdict is unreasonable, or cannot be supported having regard to the evidence; or
2. That the trial judge made a wrong decision on any question of law; or
3. That on any ground what so ever there was a miscarriage of justice.

The focus of this paper will be on the usage of the first ground of appeal. To generally understand this provision a brief overview of the other two grounds for appeal will be considered.

[19] The second ground relates to a wrong decision on a question of law such as the wrongful admittance of evidence, whether or not the accused has discharged the evidentiary burden relating to a defence, or a necessary element of an offence is misdescribed by the judge in his summary to the jury.

[20] The third category is that there was a miscarriage of justice on any grounds. As a matter of statutory interpretation, this category has been used as a residual category which will capture the defects in a criminal prosecution which do not fall within the other two arms. It has been used to appeal various defects in the trial process, including, but not limited to:

- Errors in permitting joinder of counts of offences;<sup>38</sup>
- Joinder of defendants;
- Errors or bias in summing up by the trial judge to the jury;<sup>39</sup>
- Errors by defence council;<sup>40</sup>
- Defence council not objecting to the admission of suspect evidence;<sup>41</sup>
- Inadequate warning against prejudicial publicity;<sup>42</sup> and
- Failure to disclosure a personal relationship between defence council and the prosecution.<sup>43</sup>

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<sup>38</sup> *Chami and Sheikh* (2002) 128 A Crim R 428 (NSWCCA).

<sup>39</sup> *Bentley (deceased)* [1998] EWCA 2516.

<sup>40</sup> *R v Paddon* [1998] QCA 248.

<sup>41</sup> *R v Carter* [2002] QCA 431.

<sup>42</sup> *R v Long; ex parte A-G (Qld)* [2003] QCA 77.

<sup>43</sup> *R v Szabo* [2000] QCA 194.

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### ***First arm of s668E of the Criminal Code Act 1899 (Qld)***

[21] For the purposes of this paper only the first arm of s668E will now be discussed. This provision is the starting point for the articulation of the judicial test which represents the standard of evidence required to quash a conviction. Section 668E relevantly reads:

*Criminal Code Act 1899 (Qld)*

668E Determination of appeal in ordinary cases

(1) The Court on any such appeal against conviction shall allow the appeal if it is of opinion 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 of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal. (Emphasis added)

[22] A literal reading of the first arm indicates that the test will not be a question of law but rather one of fact<sup>44</sup> concerned with the strength of the evidence that was adduced at trial. Questions of law are dealt with in the second arm of s668E which was previously discussed. The first arm of s668E prescribes that a court will examine if the verdict is “unreasonable” having regard to the evidence presented at trial. It was this arm that was in question during the 1997 petition.

[23] The interpretation of s668E in case law has been an area of potential contention for some time which has attracted little attention, as demonstrated by the historical development.<sup>45</sup> Various cases have attempted to capture the principle to be applied from the provision,<sup>46</sup> and the leading cases will be examined in this paper.

### **The Significant Possibility Test**

[24] The High Court settled on the proper approach to interpreting questions of whether a miscarriage of justice occurred when Mason CJ, Deane, Dawson, and Toohey JJ in *M v The*

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<sup>44</sup> *Plomp v The Queen* (1963) 110 CLR 234, 246, 250.

<sup>45</sup> *MFA v The Queen* (2002) 213 CLR 606, 622; *M v The Queen* (1994) 181 CLR 487, 493; *R v MFA* [2001] NSWCCA 71, 11.

<sup>46</sup> *Davis and Codt v The King* (1937) 57 CLR 170, 180; *Ratten v The Queen* (1974) 131 CLR 515, 515; *Chidiac v The Queen* (1991) 171 CLR 432, 451; *Knight v The Queen* (1992) 175 CLR 495, 503, 511.

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*Queen*<sup>47</sup> delivered the majority judgement. The court sought to concisely express the law in the area to clarify the expression of the seemingly singular idea which had persisted during the historical development. The significant possibility test elucidated the underlying principle of the statutes in the various jurisdictions. This statement from the court provides an authoritative basis to guide an appellate court when they are confronted with a question of a miscarriage of justice relating to the “unreasonableness” of a verdict. The significant possibility test was expressed as:<sup>48</sup>

In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury’s advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred.

That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced.

If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lack probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted [Significant possibility test], then the court is bound to act and to set aside a verdict based upon that evidence.<sup>49</sup>

In doing so, the court is not substituting trial by a court of appeal for trial by jury, for the ultimate question must always be whether the court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty [Reasonably open test].<sup>50</sup> (Emphasis added)

[25] *Jones v The Queen*<sup>51</sup> and *MFA v The Queen*<sup>52</sup> affirmed this position in the High Court. This should be understood as a distinct question from whether the judge at trial ought to have

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<sup>47</sup> (1994) 181 CLR 487.

<sup>48</sup> Ibid 493.

<sup>49</sup> *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521, 618-619; *Chidiac v The Queen* (1997) 191 CLR 439, 443-444.

<sup>50</sup> *Chidiac v The Queen* (1991) 171 CLR 432, 443, 451, 458, 461-462.

<sup>51</sup> (1997) 191 CLR 439.

<sup>52</sup> (2002) 213 CLR 606.

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directed a verdict of not guilty be entered. The opening words of the passage in *M v The Queen*<sup>53</sup> separate these two distinct functions of the court.<sup>54</sup>

### The Reasonably Open Test

[26] Brennan J proposed this test in 1988 during his judgment in *Carr v The Queen* by stating:

An appellate court must itself consider the evidence in order to determine whether it was open to the jury to convict, but the appellate court does not substitute its assessment of the significance and weight of the evidence for the assessment which the jury, properly appreciating its function, was entitled to make.<sup>55</sup>

[27] His Honour held true to his line of reasoning on numerous occasions. He expressed a view that the true test to be applied was stated three years before *M v The Queen* by Dawson J in *Chidiac v The Queen*:

If upon the whole of the evidence a jury, acting reasonably, was *bound* to have a reasonable doubt, then a verdict of guilt will be unsafe and unsatisfactory.<sup>56</sup> (Emphasis added)

[28] In *Knight v The Queen*, Brennan J, with Gaudron in agreement, applied the reasonably open test in a manner which fleshed out the crux of his argument more fully by stating:

The deference which is due to a jury's verdict, both by reason of the jury's presence at the trial and by reason of its function as the constitutional arbiter of the facts, precludes an appellant court from simply substituting its view of the evidence for the view formed by the jury under proper direction. It is only when the appellant court, giving the verdict appropriate deference, concludes that it was not open to the jury to convict that it is right to set aside a verdict of guilty.<sup>57</sup>

Despite a lack of reference to this wording of the test, the majority, consisting of Mason CJ, Dawson, Toohey JJ, seem to have accepted it as correct during this case.<sup>58</sup>

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<sup>53</sup> (1994) 181 CLR 487.

<sup>54</sup> *MFA v The Queen* [2002] HCA 53, [26].

<sup>55</sup> (1988) 165 CLR 314, 331.

<sup>56</sup> (1991) 171 CLR 432, 451.

<sup>57</sup> (1992) 175 CLR 495, 511.

<sup>58</sup> *Ibid* 504-505.

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[29] The majority in *M v The Queen* included Mason CJ, Dawson, and Toohey JJ, leaving Brennan J in the minority. Brennan J still expressed his opinion as to the proper construction of the reasonably open test as:

For both constitutional and practical reasons, an appellant court can seldom interfere with the verdict of a jury merely on the ground that the verdict is unsafe or unsatisfactory where there is evidence to support to verdict.<sup>59</sup>

[30] In the subsequent decision in *Jones v The Queen*,<sup>60</sup> Brennan CJ further affirmed his inability to recognise the view of the reasonably open test proposed by the majority, Mason CJ, Deane, Dawson, Toohey JJ, from *M v The Queen*.<sup>61</sup>

### *Similarities between the two tests*

[31] The result of the cases canvassed above and s668E<sup>62</sup> is that until the Queensland parliament amends the wording of the section, or the High Court re-expresses their interpretation of this or a similar section, the Queensland Court of Appeal should follow the leading expression adopted by the majority in *M v The Queen*.<sup>63</sup> It appears to be the purpose of s668E that the general public is provided with a protective provision, even if only for policy reasons, to the effect that an innocent person should not be convicted of a crime on unreasonable and/or unsupportable evidence.<sup>64</sup> This legislative protection provides a similar starting point the judicial reasoning in the area.

[32] A chance for unification of the two tests presented itself in *MFA v The Queen* when an appeal from a NSWCCA<sup>65</sup> decision went before the High Court. Smart JA, stated during *R v MFA* in the NSWCCA, when delivering his interpretation of s6(1) of the *Criminal Appeal Act 1912* (NSW), a provision almost identical to s668E, that, '*I am of the opinion that it was it reasonable reasonably open to the jury to be satisfied beyond reasonable doubt as to the guilt of*

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<sup>59</sup> (1994) 181 CLR 487, 502.

<sup>60</sup> [1997] 98 A Crim R 107, 108.

<sup>61</sup> (1994) 181 CLR 487, 494.

<sup>62</sup> *Criminal Code Act 1899* (Qld).

<sup>63</sup> (1994) 181 CLR 487.

<sup>64</sup> *Hargan v The King* (1919) 27 CLR 13, 23.

<sup>65</sup> New South Wales Criminal Court of Appeal.

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*the appellant*'.<sup>66</sup> This statement by Smart JA was appealed on the grounds that it did not accurately reflect the position of the court from *M v The Queen*.<sup>67</sup>

[33] Only three of the six judges in *MFA*<sup>68</sup> engaged in an analysis of this wording used by Smart JA during their reasons for judgement. McHugh, Gummow, and Kirby JJ were of the opinion that the formulation proposed by Dawson J in *Chidiac v The Queen*<sup>69</sup> represented a common formula that amounted to “strong position” and should not be followed.<sup>70</sup>

[34] However, McHugh, Gummow and Kirby JJ in *MFA* were of the opinion that Smart JA did not err in his statement of the position of the law. They concluded the wording used by Smart JA accurately reflected the position of the majority of the High Court in *M v The Queen*<sup>71</sup> which had been confirmed in *Jones v The Queen*.<sup>72</sup> In *MFA*, their Honours’ distinguished the statement by Smart JA from that of Dawson JA in *Chidiac*<sup>73</sup> on the grounds that Smart JA did not use the words *must* or *bound to* when referencing the jury’s experience of a reasonable doubt. These words raise some contention about the amount of deference to be given to a jury’s verdict<sup>74</sup> and will be discussed later. It can be deduced from their choice of distinguishing factor that McHugh, Gummow and Kirby JJ were of the opinion that a court should be given more freedom to determine when a reasonable jury ought to have experienced a doubt, thus reducing a stringent application of the deference principle.

### ***Differences between the two tests***

[35] After examining the different approaches and various interpretations towards the first ground for a miscarriage of justice in s668E there are two main differences between the significant possibility and the reasonably open tests from *M v The Queen*:

1. How much deference should be given to the verdict given by the jury; and

<sup>66</sup> [2001] NSWCCA 71, 11 cited in *MFA v The Queen* (2002) 213 CLR 606, 624.

<sup>67</sup> *MFA v The Queen* (2002) 213 CLR 606.

<sup>68</sup> Ibid.

<sup>69</sup> (1991) 171 CLR 432, 451; See Note 56 in text for the full quote.

<sup>70</sup> *MFA v The Queen* (2002) 213 CLR 606, 622.

<sup>71</sup> (1994) 181 CLR 487.

<sup>72</sup> [1997] 98 A Crim R 107.

<sup>73</sup> *Chidiac v The Queen* (1991) 171 CLR 432, 451.

<sup>74</sup> *M v The Queen* (1994) 181 CLR 487, 494; *Jones v The Queen* (1997) 98 A Crim R 107, 108-109.

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2. Putting the deference debate aside (giving all of the deference required) do the words for the two different constructions, on a literal interpretation, mean the same thing?

[36] The first identified difference focuses on the words used by Dawson J in *Chidiac v The Queen*<sup>75</sup> and Brennan J in his lead up to<sup>76</sup> and during his reasons in *M v The Queen*<sup>77</sup> as opposed to those words of the majority, including Dawson J, in that case.<sup>78</sup> This position taken by Brennan J,<sup>79</sup> and later as Chief Justice,<sup>80</sup> was also opposed by Smart JA in the NSWCCA<sup>81</sup> and by a majority of the High Court in *MFA v The Queen*.<sup>82</sup> Brennan J questions the fundamental underpinning of the reasonably open test by asking *when* is it reasonably open to the jury to convict?<sup>83</sup> By asking this question Brennan J is arguing that there needs to be a fixed standard of deference to be applied, not a discretionary amount.<sup>84</sup> It is in this regard that His Honour's argument is persuasive despite other Judges leaving agreement with him to join the majority in *M v The Queen*.

### **Deference**

[37] When dealing with questions of fact on appeal, an important concept to be remembered is that the subsequent court should give deference to the outcome of a trial.<sup>85</sup> This principle of deference means that an appeal court should be reluctant to substitute an opinion of its own in place of an opinion developed by the jury from the proceedings at trial.<sup>86</sup> Traditionally, the jury has been described as the "constitutional tribunal for decided contested facts".<sup>87</sup> Chief Justice Mason elaborated in *Chidiac v The Queen*:

<sup>75</sup> (1991) 171 CLR 432, 451.

<sup>76</sup> *Whitehorn v The Queen* (1983) 152 CLR 657, 600, 687.

<sup>77</sup> (1994) 181 CLR 487, 502.

<sup>78</sup> *Ibid* 494.

<sup>79</sup> *Whitehorn v The Queen* (1983) 152 CLR 657, 600, 687; *M v The Queen* (1994) 181 CLR 487, 502.

<sup>80</sup> *Jones v The Queen* (1997) 98 A Crim R 107, 108.

<sup>81</sup> *R v MFA* [2001] NSWCCA 71, 11.

<sup>82</sup> (2002) 213 CLR 606.

<sup>83</sup> *M v The Queen* (1994) 181 CLR 487, 502.

<sup>84</sup> *Jones v The Queen* (1997) 98 A Crim R 107, 110.

<sup>85</sup> *M v The Queen* (1994) 181 CLR 487.

<sup>86</sup> *Ibid* 493.

<sup>87</sup> *Naxakis v Western General Hospital* (1999) 197 CLR 269, 287 [53]; *Hocking v Bell* (1945) 71 CLR 430, 440.

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The constitutional responsibility of the jury to decide upon the verdict and the advantage which the jury enjoys in deciding questions of credibility by virtue of seeing and hearing the witnesses impose some restraints upon the exercise of an appellate court's power to pronounce that a verdict is unsafe.<sup>88</sup>

[38] A substitution of an appellate court's opinion for that of a jury would defeat the purpose of having a trial by jury and effectively exchange it for a trial by court of appeal. To avoid this predicament a court of appeal should act upon that view of the facts which a jury was entitled to take, having seen and heard the adduction of the evidence from the witness(es).<sup>89</sup>

[39] This principle is grounded in the idea that courts, acting in their appellate function, will not have the benefit of seeing the evidence, the manner in which the evidence is presented, or hear a witness' testimony. Appellate courts are instead invited to consider a record of what occurred at the trial proceedings and hear counsel's submissions about this record. Dawson J acknowledged in *Whitehorn v The Queen*:

In particular, a court of appeal does not usually have the opportunity to assess the worth of a witness's evidence by seeing and hearing the evidence given. Moreover, the jury performs its function within the atmosphere of the particular trial which it may not be possible to reproduce on appeal. These considerations point to the important differences between the functions of a jury and those of a court of appeal. A jury is able, and is required, to evaluate the evidence in a manner in which a court of appeal can not.<sup>90</sup>

[40] A majority of the High Court in *M v The Queen* stated while discussing the need for deference to a jury's verdict:

In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's disadvantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice has occurred.<sup>91</sup>

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<sup>88</sup> (1991) 171 CLR 432, 443.

<sup>89</sup> *M v The Queen* (1994) 181 CLR 487, 501.

<sup>90</sup> (1983) 152 CLR 657, 688.

<sup>91</sup> (1994) 181 CLR 487, 493.

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[41] It was recognised that the deference given to a decision of the jury at trial must form part of the test for an “unreasonable” verdict.<sup>92</sup> This has been done to varying degrees throughout the case law. Appellant courts have sought to pay full regard to the considerations of the jury and their findings in light of the jury’s advantages at trial.

[42] Some judicial comments discussing deference include a reference to the Australian Constitution<sup>93</sup> as shown above. Any Constitutional limitations would only apply to federal criminal offences and will not be traversed in this paper.

### *The Deference Debate*

[43] The difference between the reasonably open and significant possibility tests may not be readily evident in practice, but is better understood as a difference in fundamental approach to the amount of deference underlying each test.<sup>94</sup> The majority in *M v The Queen* favored a statement of law which affords appellant courts a measure of discretion as to the amount of deference to be had in relation to the verdict of a jury.<sup>95</sup> Brennan J, with a view formerly shared with Dawson J, opposes the undefined amount of discretion prescribed by the reasonably open test as defined in *M v The Queen*.<sup>96</sup>

[44] The approach of the majority in *M v The Queen* follows the statement of Barwick CJ in *Ratten v The Queen*.<sup>97</sup> The case was the leading authority on deference when he said:

It is the reasonable doubt in the mind of the court which is the operative factor. It is of no practical consequence whether this is expressed as a doubt entertained by the court itself, or as a doubt which the court decides that any reasonable jury ought to entertain. If the court has a doubt, a reasonable jury should be of a like mind. But I see no need for any circumlocution; as I have said it is the doubt in the court’s mind upon its review and assessment of the evidence which is the operative consideration.<sup>98</sup> (Emphasis added)

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<sup>92</sup> *MFA v The Queen* (2002) 213 CLR 606, 621-622.

<sup>93</sup> *Chidiac v The Queen* (1991) 171 CLR 432.

<sup>94</sup> *Jones v The Queen* (1997) 98 A Crim R 107, 108-109.

<sup>95</sup> (1994) 181 CLR 487, 494.

<sup>96</sup> (1994) 181 CLR 487, 502.

<sup>97</sup> (1974) 131 CLR 510.

<sup>98</sup> *Ibid* 516.

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[45] The opening paragraph of the current leading authority, *M v The Queen*, makes clear that a court of appeal should adhere to the principle of deference when considering a jury's verdict.<sup>99</sup> It was conceded by the majority in *M v The Queen* that there was only a narrow distinction to be drawn between the jury's advantages of observing the witness' demeanour and a court of appeal examining the record of the proceedings at trial.<sup>100</sup> However, the majority in *M v The Queen* agreed with Barwick CJ's statement in that a doubt that will usually be held by a court will be a doubt that should have been possessed by the jury.<sup>101</sup> The same majority in *M v The Queen* created an exception to this general rule of doubt agreement:

It is only where a jury's advantage of seeing and hearing the evidence is capable of resolving a doubt experienced by a court of appeal that a court may conclude that no miscarriage of justice has occurred.<sup>102</sup>

[46] Brennan J attacked this approach during his reasons for judgement in *M v The Queen* because of the potential for a court to offer their opinion in place of the jury's in situations where there "ought to have been" doubt experienced.<sup>103</sup> His Honour advocated for Dawson J's<sup>104</sup> approach during his judgement in *M v The Queen*,<sup>105</sup> in which his reasoning pushed for a greater level of deference to be observed. Brennan J used the opportunity to explain that in his view the reasonably open test stated by the majority in *M v The Queen* conceals an underlying controversy as to *when* it is "open to the jury" to be satisfied that the doubt ought to have been experienced. His Honour's discussion returned him to the reasonably open test of Dawson J in *Chidiac v The Queen* which answered the *when* question by reasoning, '*was the jury upon the whole of the evidence...bound to have a reasonable doubt?*'<sup>106</sup> His Honour thought the answer to Dawson J's question defined the function of a court of appeal and the limit of such a court's jurisdiction. Brennan J further elaborated by saying:

The appellant court's function is to make its own assessment of the evidence not for the purposes of concluding whether that court entertains a doubt about the guilt of the person convicted but for the purpose

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<sup>99</sup> (1994) 181 CLR 487, 493.

<sup>100</sup> Ibid 494.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid.

<sup>103</sup> Ibid.

<sup>104</sup> *Chidiac v The Queen* (1991) 171 CLR 432, 451.

<sup>105</sup> (1994) 181 CLR 487, 502.

<sup>106</sup> (1991) 171 CLR 432, 451.

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of determining whether the jury, acting reasonably, must have entertained a reasonable doubt as to the guilt of the accused.<sup>107</sup> (Emphasis added)

[47] In *Whitehorn v The Queen*, Dawson J, with whom Gibbs CJ and Brennan J agreed, believe that Barwick's CJ reasoning in *Ratten v The Queen*<sup>108</sup> should be rejected. During his judgement Dawson J stated:

With the greatest of respect for the view expressed by his Honour (a reference to Barwick CJ), it does not appear to me to be a circumlocution to speak in terms of a doubt which ought to have been entertained by any reasonable jury rather than in terms of a doubt which the court has.

In many cases it may be unnecessary to make such a distinction because a doubt experienced by an appellant court will be a doubt which a reasonable jury ought also to have experienced. But the evidence before the appellant court will seldom, if ever, be in the same form as the evidence before the jury... Moreover, the jury performs its function within the atmosphere of the particular trial which it may not be possible to reproduce upon appeal. These considerations point to important differences between the functions of a jury and those of a court of (criminal) appeal. A jury is able, and is required, to evaluate the evidence in a manner in which a court of appeal can not.<sup>109</sup>

[48] In *Jones v The Queen*<sup>110</sup> Brennan CJ agreed with his own reasoning from *Whitehorn* that a court of appeal derives its function and authority from statute and should act only when it ought to or is bound to do so in the interests of justice. In his opinion, the statute was constructed on the basis that a jury, not a court, is the arbiter of guilt. In His Honour's analysis of Chief Justice Barwick's statement in *Ratten v The Queen*,<sup>111</sup> he drew attention to two perceived flaws in reasoning. First, a court's ability to evaluate the cogency of a witness' evidence and second was the fact that the wisdom and experience of a court and a jury are not equal. These collective "skills" of the court, as Brennan CJ referred to them,<sup>112</sup> might, in certain circumstances lead a court to experience a doubt which a reasonable jury might not have

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<sup>107</sup> (1991) 181 CLR 487, 494.

<sup>108</sup> (1971) 131 CLR 510, 516.

<sup>109</sup> *Whitehorn v The Queen* (1983) 152 CLR 657, 600, 687.

<sup>110</sup> (1997) 98 A Crim R 107, 107.

<sup>111</sup> (1974) 131 CLR 510, 516.

<sup>112</sup> *Jones v The Queen* (1997) 98 A Crim R 107, 109.

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entertained. A court's ability to use these skills effectively creates two different standards of doubt; that of the reasonable jury and that of a wise and experienced court.

[49] To illustrate the point Brennan CJ discussed that greater importance is given to these judicial skills when a court issues a warning to the jury based on judicial experience to alter a jury's collective experience.<sup>113</sup> It was noted that this is an exception to the general principle of deference.<sup>114</sup> Traditionally, it is assumed that a jury will have the requisite skills to make a decision. When a jury's skills are coupled with the advantages of being in the trial atmosphere, a jury will be able to reach a verdict that is proper in all of the circumstances. Brennan CJ concluded that, '*any contrary approach denies the importance of trial by jury and is inconsistent with the constitutional function which the jury performs*'.<sup>115</sup>

[50] It is noteworthy that in *M v The Queen* Justice McHugh stated the reasonably open test was inappropriate because it was '*perilously close to applying the test for determining whether there was a sufficiency of evidence to convict the accused*'.<sup>116</sup> This reasoning does accord with a strong principle of deference. Once it is accepted that a jury has the responsibility of determining the facts in a criminal trial, and that there should be no undue intrusion on this responsibility, a different conclusion made on sufficient evidence to support the jury's conviction could rarely be justified only because the court of appeal has a different view or appreciation of the facts.<sup>117</sup> On Brennan CJ's interpretation of the reasonably open test stated in *M v The Queen*<sup>118</sup> the weight of deference is reduced from the previous position of Dawson J in *Chidiac*.<sup>119</sup>

[51] In *M v The Queen*, Dawson J concurred with the majority statement of the reasonably open test.<sup>120</sup> This position allows the court a greater degree of discretion in relation to the deference to be applied to a jury's verdict as it does not contain the words must or bound to, as it

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<sup>113</sup> *Jones v The Queen* (1997) 98 A Crim R 107, 109.

<sup>114</sup> *Ibid.*

<sup>115</sup> *Ibid.*

<sup>116</sup> (1994) 181 CLR 487, 525.

<sup>117</sup> *Jones v The Queen* (1997) 98 A Crim R 107, 110.

<sup>118</sup> (1994) 181 CLR 487, 493.

<sup>119</sup> *Chidiac v The Queen* (1991) 171 CLR 432, 451.

<sup>120</sup> (1994) 181 CLR 487, 494.

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does on Brennan J's construction of the test.<sup>121</sup> It is the judicial discretion to have deference which contrasts the positions of Brennan J and Dawson J prior to his judgement in *M v The Queen*. A lack of an undefined judicial discretion separated the position under Australian statute historically from that of the English.<sup>122</sup>

### ***Verdicts of guilty and not guilty are both reasonable from the record***

[52] The second difference identified between the significant possibility and reasonably open tests, found in *M v The Queen*,<sup>123</sup> comes from academia.<sup>124</sup> It is suggested that there may be an impending argument about how a court of appeal should approach a miscarriage of justice application in borderline cases where both verdicts, guilty and not guilty, might appear reasonable based on an examination of the record from trial. The basis for this argument is a literal interpretation of the words used in the statement by the majority in *M v The Queen*.<sup>125</sup>

[53] An appeal court using the reasonably open test might suggest a deferential stance to the conviction as the court is concerned only with the determination of guilt and not the loss of innocence. This application is concerned with the objective reasonableness of the jury's verdict. So long as the verdict is reasonable a conviction would be allowed to stand on this application of the test formed in *M v The Queen*.<sup>126</sup>

[54] Alternatively, it could be more favourable to the appellant to apply the significant possibility test. This test from *M v The Queen* seems to compel a court of appeal to look at the chance lost by the accused at trial. The word significant is used to bring public policy and deference factors into the decision of an appeal court on a miscarriage of justice application.

[55] The true crux of this argument is that it may well be reasonably open to a jury to be satisfied of guilt and have a significant possibility that an innocent person was convicted at the

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<sup>121</sup> *MFA v The Queen* (2002) 213 CLR 606, 622.

<sup>122</sup> *Whitehorn v The Queen* (1983) 152 CLR 657, 688-689.

<sup>123</sup> (1994) 181 CLR 487, 494.

<sup>124</sup> Eric Colvin, Suzie Linden and John McKechnie, *Criminal Law in Queensland and Western Australia* (4<sup>th</sup> ed, 2005).

<sup>125</sup> (1994) 181 CLR 487, 494.

<sup>126</sup> *Ibid.*

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same time.<sup>127</sup> The 1997 petition exemplifies such a borderline case to raise the problem with both verdicts being reasonable. An examination of a few of the faults from the trial and the judicial approach on appeal demonstrate this point.

### Stafford Case

[56] The following is a brief outline of the facts the Crown case put forth against Graham Stafford at his trial in 1991. The facts provide an introduction to the Stafford case and background to the argument that there are two separate tests. The 1997 petition will be used as an example to show the potential problems in the current judicial tests for a miscarriage of justice.

[57] On or about Monday 23 September 1991, Leanne Sarah Holland, a 12 year old girl, went missing from her home at 70A Alice Street in Goodna, an outer western suburb of Brisbane in Queensland, Australia.<sup>128</sup> Her body was found, three days after her disappearance, dumped on a track in the bush at Redbank plains.<sup>129</sup> The Redbank track was ten kilometres from her home in Goodna.<sup>130</sup> She had been beaten to death.<sup>131</sup> Sexual interference was not considered likely, but there were other wounds, both pre and post mortem, on her body.<sup>132</sup>

[58] Graham Stafford was in a de-facto relationship with Melissa Holland.<sup>133</sup> The latter was the older sister of Leanne.<sup>134</sup> The couple shared a house in Goodna with Leanne and her father, Terry Holland.

[59] The joint judgment of the court during the 1992 appeal set out the evidence relied on by the crown that lead to the conviction.<sup>135</sup> This summary was reproduced by the court of appeal as providing background for their judgements during the 1997 petition:<sup>136</sup>

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<sup>127</sup> *The Queen v Stafford* [1997] QCA 333.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*

<sup>135</sup> *The Queen v Stafford* CA No 122 of 1992, unreported 25 August 1992, page 7-8.

<sup>136</sup> *The Queen v Stafford* CA No 40 of 1997, Davies page 2, Fitzgerald page 2.

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1. On 23<sup>rd</sup> September 1991 the day on which, on the crown case, Leanne was murdered, Leanne and Graham had been left alone in the home in which they both lived with Leanne's father and sister, the latter of who was in a de facto relationship with the Graham Stafford;
2. Blood was found on a number of items in the boot of Graham's car; the blood was shown to be of the same type as Leanne's, a type which was found in only 11/2 of the Australian population;
3. Also found in the boot was a strand of hair similar in length, colour and texture to that of Leanne's and a maggot of the type and age found on Leanne's dead body. Furthermore, swabs taken from inside the boot lid and lip had human blood on them which could not be grouped;
4. Blood consistent with that of Leanne's was found in a number of places in the house;
5. Car tracks of the same type as those on Graham's Holden Gemini were found on the track which led to the body; however tyres of this kind were not uncommon;
6. A hammer which was kept at Graham's bedside on his table was missing; such an instrument was consistent with having caused the injuries to Leanne's head;
7. Graham told lies while being interviewed by the police; and
8. A fold up chair usually kept in the boot of Graham's car was found in the spare room in the house. Graham claimed that he had put it there after cleaning the car on the 23<sup>rd</sup> September.<sup>137</sup>

[60] The crown advanced the case that Graham had murdered Leanne sometime between 8am and 4:30pm on Monday 23 September in the house at Alice Street.<sup>138</sup> The crown relied on entirely circumstantial evidence alleging Graham had placed the deceased body of Leanne in the boot of his car before driving out and dumping it at Redbank Plains early in the morning Wednesday 25 September.<sup>139</sup> The crown was unable to produce an eye witness, obtain a confession, or secure a motive.<sup>140</sup>

[61] The case from trial was appealed on grounds that the trial judge erred in law during his directions to the jury and in admitting evidence. The first appeal was unsuccessful in the Court of Appeal on 25 August 1992 (the first appeal). An application for Special Leave to the High Court was refused on 4 March 1993. Pursuant to s674A of the *Criminal Code Act 1899* (Qld) the 1997 petition was brought on behalf of Mr Stafford on 18 September 1996. The Attorney General remitted the whole of the matter to the Court of Appeal with the conviction being upheld. An application for Special Leave to the High Court was refused. The evidence that has

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<sup>137</sup> *The Queen v Stafford* CA No 122 of 1992, unreported 25 August 1992, page 9-10.

<sup>138</sup> *The Queen v Stafford* CA No 40 of 1997, Davies page 2, Fitzgerald page 1-2.

<sup>139</sup> *Ibid.*

<sup>140</sup> *Ibid.*

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been available since the trial, despite the upholding of the conviction, will be discussed in the context of the 1997 petition.

### **The 1997 Petition**

[62] The circumstantial evidence relied on by the Crown to prove their case has been previously outlined. By the time the 1997 petition was complete a substantial amount of new or fresh evidence was available for the court to consider with the original trial evidence. This new or fresh evidence will be outlined briefly. After this outline, the Stafford case, consisting of both the evidence from trial and the 1997 petition, will be put through the judicial tests outlined above and the results analysed.

### *New or fresh evidence available*

[63] The evidence that was available and/or called to the courts attention during the 1997 petition was as follows:

1. The Crown contended Graham Stafford had opportunity to commit the murder in the afternoon before 4:45pm on the 23<sup>rd</sup> September 1991 or he could not have been the murderer.<sup>141</sup> However, police had details of Graham's movements that afternoon and did not lead the evidence at trial. Specifically, a visit to a friend's house for ½ to ¾ of an hour at 1:20pm,<sup>142</sup> a Franklin's docket showing the time at 2:18pm,<sup>143</sup> a car wash receipt from 2:59pm,<sup>144</sup> a store manager who saw Graham between 2-3pm,<sup>145</sup> and a phone call from Melissa at 3-3:30pm before she arrived home at 4:30-4:45pm.<sup>146</sup>

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<sup>141</sup> 1997 Appeal Transcript, page 2 line 18-23.

<sup>142</sup> Evidence of Arthur Power, Trial Transcript, page 165 lines 16-31, Binder 2 page 0643.

<sup>143</sup> Exhibit 6, Committal Transcript, pages 4 and 34, Binder 1 pages 0392 and 0422; Exhibit 65, Trial Transcript, page 106 lines 48- 60, pages 107-108 lines 1-60, page 116 lines 24-37, Binder 2 pages 584-586, 594 and page 343 lines 8-10, Binder 3 page 0827; see also Police Interview, 26 September 1991, page 13, Binder 1 page 0238, Affidavit of Richard Carew, 13 June 1997, paragraphs 6-8 Exhibits RWC 9-RWC 11.

<sup>144</sup> Exhibit 59, Trial Transcript, page 47 lines 22-30, Binder 2 page 525; see also Interview with Graham Stafford, 28 September 1991, page 28, Binder 1 page 0295, and Interview with Melissa Holland, 29 September 1991, page 6, Binder 1 page 0326.

<sup>145</sup> Job Log 91/128, Binder 1 page 0137, Damien White identified the Petitioner as having entered the store between 2-3pm on Monday 23 September 1991.

<sup>146</sup> Interview with Melissa Holland, 29 September 1991, page 3, Binder 1 page 0323; Trial Transcript, page 102 line 60, Binder 2 page 0580; Interview with Melissa Holland, 29 September 1991, page 4, Binder 1 page 0324.

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2. While blood on 3 of the items in the boot of Graham's car was consistent with that of Leanne's, another item with a blood spot on it was in dispute. Experts were of the opinion the blood evidence was inconsistent with the Crown's case of the deceased body being in the boot due to the lack of a substantial amount of blood in the boot or a foul smell stemming from the boot.<sup>147</sup> The information about the smell was not disclosed to the defence at the time of trial.<sup>148</sup>
3. The hair on the sponge was not found by the officer taking evidence<sup>149</sup> but instead during the lab examination after the sponge had been on the floor.<sup>150</sup> Police abandoned a dyed hair theory early<sup>151</sup> but subsequent courts mistakenly revived the issue.<sup>152</sup>
4. No note of the discovery of the maggots was made even though photographs and videos were being made of the other evidence gathered at the house that day.<sup>153</sup> No corroborating evidence was offered by the Crown at trial to support the finding of the maggot in the boot of the car. The time of death based on the maggot's development has been changed to Tuesday morning from the original Monday evening estimate.<sup>154</sup>
5. 8 of the 17 swabs taken of the blood like substance during the house investigation were put to Graham during police interviews.<sup>155</sup> These interviews were offered for the jury to consider with no scientific witness to establish that all of the swabs from the interviews had turned out to be negative for blood.<sup>156</sup> During the summary the trial judge referred to "large quantities of blood" in "unusual places" around the house,<sup>157</sup> inconsistent with the extremely small amount of blood actually found in the bathroom in a manner consistent with the ordinary use of the household facilities.<sup>158</sup>

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<sup>147</sup> Statutory Declaration of Leo Charles Freney, paragraph 30; Statutory Declaration of Dr Anthony Joseph Ansford, paragraphs 13-19.

<sup>148</sup> Affidavit of David Littleton Bullock, 23 April 1997; Statutory Declaration of Richard William Thomas Carew, 17 September 1996.

<sup>149</sup> Committal Transcript, page 52 lines 54-55.

<sup>150</sup> Trial Transcript, page 298 lines 13-15.

<sup>151</sup> Committal Transcript, page 11.

<sup>152</sup> 1997 Appeal Transcript, pages 20, 47-49.

<sup>153</sup> Committal Transcript, pages 62-64, 67.

<sup>154</sup> Bettyl Morris letters to Graham Crowley with the new weather station information.

<sup>155</sup> Interview with Graham Stafford 26, September 1991, 28 September 1991.

<sup>156</sup> Statement from Kristine Bentley, page 8.

<sup>157</sup> Trial Transcript (summing up), page 487.

<sup>158</sup> Statutory Declaration of Leo Charles Freney, paragraphs 15-21.

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6. The investigating officer compared the tire tracks to an enlarged photograph, not the inked impressions as would be suggested by the court.<sup>159</sup> The Crown also knew that Bridgestone was not the only manufacturer of a tread pattern similar to Graham's but this information was not conveyed to the defence or elicited during the trial.<sup>160</sup>
7. The Crown relied heavily on the missing hammer as evidence against Graham.<sup>161</sup> The hammer in contention was present at the committal hearing<sup>162</sup> despite two police officers claiming to have never seen it during the trial.<sup>163</sup> The hammer, the alleged murder weapon on the Crown's case, went missing before the trial despite being in police custody after the committal hearing.<sup>164</sup> Further the trial judge during his summing up referred to the existence of two hammers.<sup>165</sup>
8. The supposed lies by Graham about the hammer and what was said in a phone call in no way advanced his case for an acquittal making the statements, at law, not lies.<sup>166</sup> The alleged lie about the Doctor's appointment being on Tuesday and not Monday as originally stated by Graham, equally was not material to Graham's defence as his movements on Monday afternoon were already fairly well accounted for.<sup>167</sup>

### Applying the Tests From *M v The Queen*

[64] Fitzgerald P, Davies and McPherson JJA sat for the reference of the 1997 petition to the Court of Appeal. Davies JA, with whom McPherson JA concurred, formed the majority. All three judges were in agreement that it was reasonably open to the jury to convict Graham on the evidence before them. However, when Fitzgerald P used the significant possibility test, an irreconcilable result appeared when compared to the result of the reasonably open test.

[65] Davies JA stated that the judge at trial had made it clear that the prosecution case, while being circumstantial, was not restricted to a particular scenario<sup>168</sup> and discussed other possible

<sup>159</sup> Trial Transcript, page 253, lines 13-16; Cf *The Queen v Stafford* CA No 40 of 1997, page 10.

<sup>160</sup> Statutory Declaration of Rodney Henry Thomas, 10 May 1995, paragraph 3.

<sup>161</sup> Trial Transcript (summing up), page 487.

<sup>162</sup> Exhibit 9, Committal Transcript, page 4.

<sup>163</sup> Trial Transcript, page 71 lines 32-36; Trial Transcript, page 79 lines 55-56.

<sup>164</sup> Committal Transcript, page 83.

<sup>165</sup> Trial Transcript (summing up), page 487.

<sup>166</sup> *Edwards v R* (1993) 187 CLR 193, 215.

<sup>167</sup> See section 1 of new or fresh evidence available for the 1997 pardon petition.

<sup>168</sup> *The Queen v Stafford* [1997] QCA 333, 368.

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scenarios which were not raised at trial at some length during his reasons.<sup>169</sup> His honour thought that despite the Crown being unable to establish exactly how or when the murder took place that, on the circumstantial evidence, it was open for the jury to be satisfied beyond a reasonable doubt that Graham had committed the murder<sup>170</sup> even if the new or fresh evidence had been admitted at trial.<sup>171</sup> A reasonable jury, faced with the blood and opportunity on the Crown's case, would still allow a jury, acting reasonably, to convict on the evidence placed before them.

[66] McPherson JA joined Davies JA with an opinion that the Crown had opened up more than one possible theory explaining the murder and that, on the circumstantial evidence, it was possible for a reasonable jury to be convinced beyond a reasonable doubt as to the guilt of Graham.<sup>172</sup>

[67] The approaches taken by Davies and McPherson JJA stick rigorously close to the reasonably open test from *M v The Queen*.<sup>173</sup> On this approach the lack of concern shown by the judges about the effect that the new evidence had on the petitioner's chances of conviction is apparent. The test is focused only on the actions of the jury and nothing more.

[68] Fitzgerald P, in dissent, concluded that the Crown case put to the jury at trial was about proving a particular scenario and to argue otherwise was to confuse the manner in which the Crown had conducted itself during the trial.<sup>174</sup> This position separated His Honour from Davies and McPherson JJA. Importantly, Fitzgerald outlined that very problem to which academics and this paper have canvassed when he stated the conflicting positions of the tests. His Honour first outlined that it was reasonably open to the jury to convict Stafford on the evidence by saying:

There is no doubt in my mind that, even with the additional evidence, there is ample evidence against the appellant [Stafford] upon which a reasonable jury, acting reasonably, could convict the appellant.<sup>175</sup>

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<sup>169</sup> *The Queen v Stafford* [1997] QCA 333, 371.

<sup>170</sup> *Ibid.*

<sup>171</sup> *The Queen v Stafford* [1997] QCA 333, 372, 382.

<sup>172</sup> *The Queen v Stafford* [1997] QCA 333, 384.

<sup>173</sup> (1994) 181 CLR 187, 494.

<sup>174</sup> *The Queen v Stafford* [1997] QCA 333, 356.

<sup>175</sup> *The Queen v Stafford* [1997] QCA 333, 357.

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[69] But when Fitzgerald P applied the significant possibility test from *M v The Queen*<sup>176</sup> he found that:

The prosecution case against the appellant [Stafford] on all of the evidence is not so strong as to make his conviction inevitable or to eliminate the possibility that the appellant lost a chance of being acquitted that was fairly open to him.<sup>177</sup>

[70] On Fitzgerald P's analysis Stafford had lost a chance of acquittal despite it being reasonably open to the jury to convict. This was inconsistent with His Honour's interpretation of the law from *M v The Queen*.<sup>178</sup> Accordingly Fitzgerald P dissented in the case and would have allowed the appeal.

[71] This outcome raises the academic argument in borderline cases. The Stafford case had offered such a borderline situation where the two tests, if applied individually, would yield two conflicting results. As exemplified in the 1997 petition, the more favorable test for the accused is the significant possibility test. Fitzgerald P considered the significant possibility test as a separate condition to a miscarriage of justice with an additional requirement that a conviction should be reasonably open to the jury. It can be deduced from this conclusion that a failure on either of the requirements proposed would result in a miscarriage of justice.

[72] To reiterate, the significant possibility test is concerned with the affect the evidence would have had on the petitioner's chance of an acquittal, separate from the effect the evidence would have had on the reasonableness of the jury's verdict. It is good policy to give the accused the benefit of the doubt until proven guilty beyond a reasonable doubt. This line of reasoning would prefer the use of the significant possibility test when there is a clash between the two tests. The position of the criminal justice system would be reversed if once convicted an accused is denied the opportunity at a miscarriage of justice appeal, despite the fact they may have lost a significant chance at an acquittal, because the verdict of the jury was reasonable.

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<sup>176</sup> (1994) 181 CLR 487, 494.

<sup>177</sup> *The Queen v Stafford* [1997] QCA 333, 364.

<sup>178</sup> *Ibid.*

## The Law Around a Miscarriage of Justice in Queensland

### Conclusions

[73] In summary there are two areas of contention facing an appellant court relating to a miscarriage of justice application under the first arm of s668E:<sup>179</sup>

1. How much deference should be given to the verdict of the jury; and
2. Are the two judicial wordings of the test interchangeable?

[74] It has been argued that the first identified problem was concealed during the High Court's expounding of the position of the law in *M v The Queen*. The majority of that court preferred a construction of the reasonably open test which allows for a measure of discretion to be exercised by an appellant court.<sup>180</sup> Brennan J opposed an allowance of an undefined amount of discretion to the deference to be had towards a verdict of the jury both pre and post *M v The Queen*.<sup>181</sup>

[75] In relation to the second dispute identified above, it was argued that the statement of the law in *M v The Queen* created the problem as the court arguably laid out both the significant possibility and the reasonably open tests. The 1997 petition example exposes the weakness in the current position of the law. Until the High Court clarifies the approach which should be taken in borderline cases, such as the 1997 petition, State Courts of Appeal are able to choose how they interpret the statement of law in *M v The Queen*. Currently by a two to one majority in Queensland, borderline cases use the reasonably open to the jury test as the dominant consideration.

### *Future pardon petitions*

[76] Currently a second petition for a pardon (the impending petition) is being prepared on behalf of Graham Stafford. Should the Attorney General remit the case to the judicature, the Court of Appeal will get a second chance to clarify the approach they will take in borderline cases. With the retirement of Davies and McPherson JJA there is optimism that Fitzgerald P's line of reasoning may find favour. For the policy reasons outlined above the significant possibility test would be the best choice for the court. Even if as Fitzgerald P conceded the

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<sup>179</sup> *Criminal Code 1899* (Qld).

<sup>180</sup> *M v The Queen* (1994) 181 CLR 487, 494.

<sup>181</sup> *Whitehorn v The Queen* (1983) 152 CLR 657, 687; *Jones v The Queen* (1997) 98 A Crim R 107, 109.

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accused would lose on retrial anyways,<sup>182</sup> the procedural fairness of the criminal justice system needs to be protected despite the cost to tax payers for more re-trials.

[77] If the significant possibility becomes the leading expression in an application for a miscarriage of justice in Queensland, the impending petition will have a better chance of at least a retrial, if not an acquittal. Whereas if the reasonably open test approach is taken during the impending petition's remittance the lack of an exonerating defence will likely cause the impending petition to fail as it did in 1997.

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<sup>182</sup> *The Queen v Stafford* [1997] QCA 333, 357.