SUPREME COURT OF QUEENSLAND

CITATION:	*R v Stanley* [2014] QCA 116
PARTIES:	**R** **v** **STANLEY, Ian Charles** (applicant)
FILE NO/S:	CA No 286 of 2013 SC No 8 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension (Conviction)
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 May 2014
DELIVERED AT:	Brisbane
HEARING DATE:	6 February 2014
JUDGES:	Fraser and Morrison JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for extension of time refused.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – NOTICE OF APPEAL – TIME FOR APPEAL AND EXTENSION THEREOF – where in March 2003 the applicant was convicted after trial of murder and sentenced to life imprisonment – where in November 2003 this Court refused the applicant's appeal against conviction – where the applicant applies for an extension of time to appeal against conviction – where the applicant contents that a Crime and Misconduct Commission ("CMC") investigation and an expert report bear upon whether he was properly convicted – where the applicant contends that the CMC investigation demonstrates that certain police officers fabricated evidence against him – where the applicant contends that the expert report places the applicant outside of the area where the victim was killed at the time of the offence – where s 668D of the *Criminal Code* confers the right of appeal to this Court – where according to *Grierson v The King* (1938) 60 CLR 431 once an appeal has been decided on merits the right of appeal conferred by s 668D is exhausted – whether this Court has jurisdiction to entertain a further appeal where the applicant contends his conviction was tainted by fabricated evidence *Constitution of Queensland* 2001 (Qld), s 58 *Criminal Code* 1899 (Qld), Ch 67, s 668, s 668D, s 672A

Criminal Code 1983 (NT), s 407, s 431, s 433
Supreme Court of Queensland Act 1991 (Qld), s 5, s 28, s 29, s 45
Supreme Court of Queensland Act 1991 (Qld), s 8 (repealed)

Bailey v Marinoff (1971) 125 CLR 529; [1971] HCA 49, cited
Burrell v The Queen (2008) 238 CLR 218; [2008] HCA 34, cited
DJL v Central Authority (2000) 201 CLR 226; [2000] HCA 17, considered
Director of Public Prosecutions v Moseley (2013) 275 FLR 140; [2013] NTSC 8, cited
Elliott v The Queen (2007) 234 CLR 38; [2007] HCA 51, considered
Flower v Lloyd (1879) 10 Ch D 327, cited
Grierson v The King (1938) 60 CLR 431; [1938] HCA 45, followed
Harrison v Schipp (2002) 54 NSWLR 612; [2002] NSWCA 78, cited
Hip Foong Hong v H Neotia & Co [1918] AC 888; [1918] UKPC 65, cited
In re St Nazaire Co (1879) 12 Ch D 88, cited
Jensen v Conarroe [1935] 2 WWR 465, cited
Jones v The Queen (1989) 166 CLR 409; [1989] HCA 16, cited
Jonesco v Beard [1930] AC 298, cited
McDonald v McDonald (1965) 113 CLR 529; [1965] HCA 45, cited
Mickelberg v The Queen (1989) 167 CLR 259; [1989] HCA 35, cited
Moseley v The Queen [2012] NTCCA 11, cited
Pantorno v The Queen (1989) 166 CLR 466; [1989] HCA 18, cited
Postiglione v The Queen (1997) 189 CLR 295; [1997] HCA 26, cited
R v Aboud; R v Stanley [2003] QCA 499, related
R v Ali [2008] QCA 39, cited
R v AN (No 2) (2006) 66 NSWLR 523; [2006] NSWCCA 218, cited
R v Andrews [2005] SASC 107, cited
R v Brain (1999) 74 SASR 92; [1999] SASC 358, cited
R v Edwards (No 2) (1931) SASR 376; [1931] SAStRp 59, cited
R v GAM (No 2) (2004) 9 VR 640; [2004] VSCA 117, cited
R v Keogh (2007) 175 A Crim R 153; [2007] SASC 226, cited
R v Lapa (No 2) (1995) 80 A Crim R 398, cited
R v Lowrie [1998] 2 Qd R 579; [1997] QCA 434, cited
R v Lumley [2009] QCA 172, cited
R v MAM [2005] QCA 323, cited
R v MBO (No 2) [2012] QCA 289, cited
R v McGrane [2012] QCA 221, cited
R v McNamara (No 2) [1997] 1 VR 257; [1996] VICSC 46, cited
R v Nudd [2007] QCA 40, cited

R v Reardon (No 2) (2004) 60 NSWLR 454; [2004] NSWCCA 197, cited
R v Saxon (1998) 101 A Crim R 71, cited
Ronald v Harper (1913) VLR 311; [1913] VicLawRp 80, cited
Seddon v Commercial Salt Co Ltd [1925] Ch 187, cited
SZFDE v Minister for Immigration and Citizenship (2007) 232 CLR 189; [2007] HCA 35, cited

COUNSEL: The applicant appeared on his own behalf
B J Merrin for the respondent

SOLICITORS: The applicant appeared on his own behalf
Director of Public Prosecutions (Queensland) for the respondent

[1] **FRASER JA:** An earlier appeal by the applicant against conviction was dismissed on its merits. *Grierson v The King*[1] and numerous decisions applying that decision in this jurisdiction establish that, where an appeal against conviction has been decided on its merits, the right of appeal created by s 668D of the *Criminal Code* is exhausted and this Court has no jurisdiction to entertain a further appeal. On that ground I agree with the order proposed by Morrison JA.

[2] I gratefully acknowledge Morrison JA's thorough analysis of *Director of Public Prosecutions v Moseley*.[2] In that case the Court of Criminal Appeal of the Northern Territory considered whether the Supreme Court of the Northern Territory possessed an equitable jurisdiction to set aside a judgment of the Court of Criminal Appeal on the ground that it had been procured by fraud. That is not this case. As Morrison JA points out, the Court of Criminal Appeal acknowledged that it lacked power on appeal to set aside or re-open an earlier appellate judgment after it had been perfected. That is the effect of what the applicant invites this Court to do in a second appeal.

[3] It is unnecessary to answer the questions whether the conclusions reached in *Director of Public Prosecutions v Moseley* are correct, whether they are applicable in the context of the Queensland statutory provisions, and whether they should be applied on the facts of this case. It should not be assumed that I have concluded that Morrison JA's answers to any of those questions are wrong, but I would respectfully leave such questions for a case in which it is necessary to answer them. If it ever does become necessary to answer such questions it might be thought appropriate to convene a Court of five judges.

[4] **MORRISON JA:** On 7 March 2003 the applicant was convicted, upon the verdict of a jury, of murder. He was sentenced to life imprisonment on the same day.

[5] The applicant appealed to this Court in respect of his conviction. The appeal was heard on 15 October 2003. On 14 November 2003 this Court refused the appeal against conviction.[3]

[6] Nearly 10 years later, on 11 November 2013, the applicant filed an application for an extension of time in which to appeal against his conviction. The grounds of the

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1 (1938) 60 CLR 431.
2 (2013) 275 FLR 140.
3 *R v Aboud; R v Stanley* [2003] QCA 499.

application are that two subsequent investigations have been carried into matters which, the applicant contends, will bear upon whether he was properly convicted or should have been acquitted.

[7] The first of those is an investigation by the Crime and Misconduct Commission into the conduct of certain of the police officers involved in the investigation and prosecution of the applicant. In short terms the applicant seeks to adduce evidence of that investigation to show that certain police officers fabricated evidence against him, or induced certain admissions in a record of interview in an impermissible way.

[8] The second concerns an expert report dated 6 May 2012. By that report the applicant seeks to demonstrate that evidence given at his trial by an Optus employee, concerning the likely location of the applicant's mobile telephone at the time of certain critical telephone calls, was incorrect. The purpose of the report is to show that the applicant could not have been in the area where the victim was killed, at the time that the offence occurred.

[9] An application has been filed seeking leave to adduce new evidence in respect of the two investigations.

[10] The right of appeal to this Court from a conviction following the verdict of a jury is conferred by s 668D of the *Criminal Code*. It has been long established and accepted, in a line of authority commencing with the High Court decision in *Grierson v The King*[4], that where an appeal has been decided on the merits, the right conferred by s 668D is exhausted and this Court has no jurisdiction to entertain a further appeal. The applicant's appeal heard in 2003 was an appeal on the merits. Even though it is implicit in the applicant's submissions that he did not have an appeal heard on its merits because the evidence on which the trial was conducted, and therefore the appeal, was improperly produced, that contention cannot succeed. The reference to an appeal heard on its merits is to the distinction between, one the one hand, an appeal that has been heard, and, on the other hand, one which has been abandoned.[5]

[11] *Grierson* has been affirmed by the High Court on more than one occasion.[6] Not surprisingly there is an extended line of authority in Queensland following it.[7]

[12] There is no general jurisdiction, whether inherent or otherwise, that would permit this Court to intervene at any time in the interests of justice.[8] The right of appeal, and the obligation to hear the appeal, are creatures of statute, and therefore the extent of the rights and obligations are to be determined from the terms of the statute, in this case s 668D of the Criminal Code.[9]

[13] The possible exceptions to the principle expressed in *Grierson* are very few, and there are differing authorities in respect of them. It suffices to mention them briefly.

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4 *Grierson v The King* (1938) 60 CLR 431 ("***Grierson***").

5 *R v Keogh* [2007] SASC 226 ("***Keogh***"), at [56].

6 *Postiglione v The Queen* (1997) 189 CLR 295 ("***Postiglione***"); *Elliott v The Queen* (2007) 234 CLR 38; *DJL v Central Authority* (2000) 201 CLR 226 ("***DJL***"); *Burrell v The Queen* (2008) 238 CLR 218 ("***Burrell***"), at 225 [24].

7 See, for example, *R v Lumley* [2009] QCA 172; *R v Nudd* [2007] QCA 40; *R v MAM* [2005] QCA 323, at 3-4; *R v Ali* [2008] QCA 39; *R v McGrane* [2012] QCA 221; and *Mickelberg v The Queen* (1989) 167 CLR 259, at 287.

8 *Grierson* at 435; *R v Edwards (No 2)* (1931) SASR 376, at 380; *R v Saxon* (1998) 101 A Crim R 71, at 76; *R v Brain* (1999) 74 SASR 92, at 100.

9 *Grierson* at 434; *DHL*; *Burrell*.

One is where there has been a denial of procedural fairness, for example by failing to deal with an argument raised on appeal.[10] Another is where there is power of an intermediate court of appeal to use the slip rule to correct an order which, through error or mistake, incorrectly records the order the court made.[11] Yet another is where there is a 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.[12] None of those possible exceptions would apply here, therefore there is no need to explore them further.

[14] In *Reardon*[13], Hodgson JA (with whom the other members of the Court agreed) said that the *Grierson* principle was "subject to ... the possibility of separate proceedings to set aside orders obtained by fraud".[14] A similar conclusion was reached by the Supreme Court of Victoria in *R v McNamara (No 2)*[15]. However, in this context, the reference to fraud is to be understood as referring to fraud, in relation to the matter at first instance, enabling the abandonment of an appeal to be withdrawn and the appeal to be re-opened.[16] In *Keogh* it was held that if such fraud was to be a basis for setting aside a perfected order, it must be something more than was alleged in that case, namely a deliberate withholding of evidence.[17] This case does not involve the abandonment of an appeal.

[15] Where all that is sought to be shown is that the witness was, as later events showed, incompetent, unreliable, or in error, that is not enough to enliven any prospect of a second appeal contrary to the established position in *Grierson*.[18]

[16] There have been a number of cases where allegations have been raised that evidence at the trial was false, compromised or fabricated. They include:

1. in South Australia: *R v Keogh*,[19] where it was sought to show that a medical expert had not revealed that he had withheld evidence, with the consequence that the jury was misled, and the conviction was obtained by reliance on false and misleading evidence, and therefore something akin to fraud;

2. in Victoria: *R v GAM (No 2)*,[20] where the complainant in a sexual offence trial recanted her complaints and swore that they were false; it was contended that the convictions had thereby been obtained by a fraudulent process, and the appellate process had been tainted by the same fraud;[21] and

3. in Queensland: *R v Lumley*,[22] where the applicant sought to assert that the case against him was fabricated; and *R v MBO (No 2)*,[23] where the applicant's

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10 *Jones v The Queen* (1989) 166 CLR 409, at 414-415; *Pantorno v The Queen* (1989) 166 CLR 466, at 474, 484; *Postiglione* at 300; *R v Lapa (No 2)* (1995) 80 A Crim R 398; *R v Reardon* [2004] NSWCCA 197, at [41]; *R v McNamara (No 2)* [1997] 1 VR 257; *Keogh* at [72], [79].

11 *Keogh* at [78]; *AN (No 2) v R* [2006] NSWCCA 218, at [41]-[42].

12 *Grierson* at 437 per Dixon J; *R v Cartwright* (1989) 17 NSWLR 243, at 246; *R v Andrews* [2005] SASC 107, at [14].

13 *R v Reardon* [2004] NSWCCA 197 ("***Reardon***").

14 *Reardon* at [41].

15 *R v McNamara (No 2)* [1997] 1 VR 257 ("***McNamara (No 2)***"), at 268.

16 *R v GAM (No 2)* [2004] VSCA 117, at [12]-[21] per Winneke P; *Keogh*, at [89]-[90]; cf *Director of Public v Moseley* [2013] NTSC 8.

17 *Keogh* at [90].

18 *GAM (No 2)* at [21]; *R v Andrews* [2005] SASC 107.

19 See [39].

20 *R v GAM (No 2)* [2004] VSCA 117 ("***GAM (No 2)***").

21 *GAM (No 2)* at [8].

22 *R v Lumley* [2009] QCA 172 ("***Lumley***").

23 *R v MBO (No 2)* [2012] QCA 289, at [3].

case included that evidence had been given falsely because of witness collaboration.

[17] In all of those cases the court held that a second appeal could not be entertained, on the basis of the line of authority stemming from *Grierson*.

[18] The authorities therefore establish that this Court has no jurisdiction to entertain a further appeal in this case. It would, therefore, be futile to grant an application for an extension of time to institute an appeal which this Court has no lawful authority to entertain.

[19] Further, where a statutory right of appeal has been exhausted, there are strong policy reasons to discourage attempts to revisit the merits of a conviction.[24]

[20] The applicant's contentions are that the trial was conducted on the basis that false evidence was put to the jury; specifically insofar as it concerns evidence adduced from the police officers impugned in the Crime and Misconduct Commission investigation, and in respect of the evidence concerning the location of his mobile phone at the relevant time. There is no point in this Court examining the merits of those contentions because of the lack of jurisdiction to entertain another appeal. Further, it would be inappropriate to do so given that there are other possible avenues available to the applicant, if his contentions are valid. It may be that he could seek a pardon, in which case the matter may be referred to this Court under s 672A of the *Criminal Code* 1899 (Qld).

[21] These comments are not to be taken as suggesting that there is necessarily merit in the applicant's contentions, nor as to the availability or prospects of any future avenue that the applicant might pursue, whether it be on a petition for a pardon or a reference under s 672A of the *Criminal Code*. They are merely to indicate why this Court has not descended to an assessment of the validity of what is contended.

The decision in *Director of Public Prosecutions v Moseley*

[22] Subsequent to the hearing of the application the Court drew the attention of the parties to a decision of the Court of Criminal Appeal in the Northern Territory, *Director of Public Prosecutions v Moseley*.[25] The Court of Criminal Appeal held that the Northern Territory Supreme Court had equitable jurisdiction to set aside a judgment of the Court of Criminal Appeal, in circumstances where that judgment was actuated by fraud.

[23] The parties were invited to file supplementary submissions concerning the correctness and applicability of *Moseley*. Both parties have done so.

[24] In *Moseley* the defendant was convicted of aggravated robbery, alleged to have been committed in the company of one Tippett. A central issue at trial was whether the prosecution had proved that Moseley was one of the two robbers. Part of the evidence consisted of alleged admissions made by Moseley to a man called Holden, a friend of Moseley and Tippett. Holden's evidence at the trial was inconsistent with the statements he had given to the police. Holden admitted making the statements to the police, but said that the part involving the alleged admissions by Moseley was not truthful.

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24 *R v Nudd* [2007] QCA 40 ("***Nudd***"), at p 5.

25 *Director of Public Prosecutions v Moseley* [2013] NTSC 8 ("***Moseley***").

[25] Tippett did not give evidence at the trial. Both he and Moseley were found guilty of the charges.

[26] Subsequently, a prisoner at the Darwin Correctional Centre, Da Silva, confessed in a statutory declaration that **he** was the person who accompanied Tippett during the robbery. Tippett corroborated that version.

[27] Moseley swore an affidavit asserting that certain evidence given by him at the trial was false, including that on the night of the robbery he had lent his car to a person called Phillips. Moseley now said that he had, in fact, lent it to Tippett.

[28] Moseley instituted an appeal against his conviction, to the Court of Criminal Appeal. The ground of the appeal was that there had been a miscarriage of justice resulting from the absence at the trial of the new and/or fresh evidence. At the appeal hearing Da Silva and Tippett both gave evidence to the effect that Da Silva was the person who had accompanied Tippett during the commission of the robbery. Moseley also gave evidence that he had not been involved in the robbery, but had innocently loaned the vehicle to Tippett.

[29] The Court of Criminal Appeal quashed the conviction and ordered a new trial. It was evident that Da Silva's evidence was a determinative factor in the Court of Criminal Appeal's decision.

[30] Da Silva was subsequently interviewed by police. He recanted his confession that he was the person who had accompanied Tippett during the robbery. He told police that Moseley had persuaded him to falsely "put his hand up" for the robbery, by the inducement that, after Moseley was released, he would pay Da Silva about $200,000 from compensation monies he expected to receive. Da Silva said that Moseley had admitted that he (Moseley) had committed the robbery, but that the only thing that could get him an acquittal was if some other person claimed responsibility.

[31] If that information was correct, then Moseley's appeal was predicated upon a fabrication.[26]

[32] By originating motion filed by the DPP,[27] an order was sought setting aside the judgment of the Court of Criminal Appeal, on the basis that the judgment had been actuated by fraud on the part of Moseley, Tippett and Da Silva. The motion came before Riley CJ, who referred two questions of law to the Full Court, namely:[28]

1. Does the Supreme Court have jurisdiction and power to grant the relief sought in the Originating Motion or otherwise to enjoin the defendant from taking the benefit of the judgment of the Court of Criminal Appeal?[29]?

2. If yes, should the Supreme Court decline to entertain the proceedings commenced by the Originating Motion on the basis that a retrial is an appropriate forum in which to determine the truth of the fact pleaded in the Originating Motion?

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26 *Moseley* at [33].

27 Returnable in the Supreme Court in its trial division, not in the Court of Criminal Appeal. That was so as the Director of Public Prosecutions had applied to a single judge of the Trial Division, who referred questions to the Full Court.

28 *Moseley* at [35].

29 *Moseley v The Queen* [2012] NTCCA 11.

[33] Those questions were eventually determined "Yes" as to first, and "No" as to the second. It is only the first which needs to be addressed by this Court.

[34] The Full Court held that the Supreme Court, exercising equitable jurisdiction, may set aside a judgment obtained by fraud, and that it could set aside such a judgment even when made by the Court of Criminal Appeal. The steps by which that conclusion was reached seemed to be as follows:

(a) the Full Court accepted that the Court of Criminal Appeal has a statutory jurisdiction, and there are no provisions in the *Criminal Code* (NT) which would permit the Court of Criminal Appeal to set aside or re-open a judgment on appeal, after the judgment has been perfected; nor is there any inherent jurisdiction to do so;[30]

(b) the Supreme Court's equitable jurisdiction to set aside a judgment obtained by fraud was a remedy described by Dixon J in *Grierson* as being an "independent proceeding equitable in its origin and nature", which had survived the *Judicature Act* reforms; the passage relied upon in the judgment of Dixon J "contemplates the application of the fraud exception to judgments on appeal in criminal matters";[31]

(c) there was an established equitable jurisdiction in civil proceedings to set aside a judgment procured by fraud, which could be invoked by proceedings separate from those in which the fraudulent order had been obtained;[32]

(d) there was no reason in principle or otherwise why the Supreme Court's equitable jurisdiction would not extend to or include the jurisdiction to set aside an appeal judgment on the grounds of fraud;[33]

(e) because the Court of Criminal Appeal was a statutory emanation of the Supreme Court, created by the *Criminal Code* (NT), and therefore there was only one Court, there was no valid reason based on Court hierarchy for the Supreme Court to lack jurisdiction to rescind or set aside the order of the Court of Criminal Appeal;[34]

(f) the potential of fraud to corrupt and bring into disrepute the system of justice administered by the Courts meant that, if the fraud in that particular case was proven, "it would be extraordinary if the Supreme Court lacked jurisdiction to grant relief for the reason that an appeal court, and not a trial court, had been deceived…";[35] and

(g) the absence of any other remedy for the alleged fraud was a compelling reason for the Supreme Court "to utilize the former Chancery remedy to restore the position between the parties to that which existed before the institution of the defendant's appeal to the Court of Criminal Appeal on the basis of the (now impugned) fresh evidence".[36]

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30 *Moseley* at [37].

31 *Moseley* at [49], referring to *Grierson* at 436, and *Burrell* at [98] per Kirby J.

32 *Moseley* at [38]-[41]; citing *Grierson*, *Harrison v Schipp* (2002) 54 NSWLR 612 ("***Harrison***"), at [18], [19], [66] and [139], and *DJL* at [37].

33 *Moseley* at [47].

34 *Moseley* at [48].

35 *Moseley* at [52].

36 *Moseley* at [53], citing *Hip Foong Hong v H Neotia & Co* [1918] AC 888, at 894.

[35] The Court in *Moseley* recognised that there was no power in the Court of Criminal Appeal, whether statutory or inherent, to set aside or re-open a judgment on appeal after the judgment had been perfected.[37] The same is the case for this Court. Its jurisdiction in criminal appeals is conferred by Ch 67 of the *Criminal Code* (Qld). Chapter 67 makes complete provision for that jurisdiction.[38] Those provisions exclude any equitable jurisdiction in this Court to reopen perfected judgments in criminal matters. Indeed, suggestions that the appeal jurisdiction of this Court might have been enlarged by s 58 of the *Constitution of Queensland* 2001[39] were dismissed in *R v Lowrie*.[40]

[36] Given that the Court of Criminal Appeal in *Moseley* did not hold that **that Court** had power to re-open a perfected judgment on appeal, even if a single judge of the Supreme Court did, *Moseley* does not stand as authority that this Court does. For reasons which will appear *Moseley* is inapplicable to the present case. However, the applicant's supplementary submissions urged that this Court should follow *Moseley*, and the respondent's supplementary submissions addressed whether *Moseley* was correctly decided. Therefore, though this Court is not bound to follow *Moseley* in this case, it is appropriate to address some aspects of that decision which cast doubt on its correctness.

Reliance on *Grierson*

[37] *Grierson* was a case where the conviction was appealed and special leave to appeal to the High Court was refused. Subsequently, representations were made to the Minister for Justice for an inquiry on the basis that certain material facts had become known respecting the evidence of one of the material witnesses at the trial. The Minister decided he would not recommend an inquiry. Grierson then appeared in person before the Court of Criminal Appeal on an application for leave to appeal against his conviction and sentence. The Court of Criminal Appeal held it had no jurisdiction to entertain his application. Against this refusal, Grierson applied for special leave to appeal to the High Court, and in turn the High Court refused his application in the decision of *Grierson*. The case did not concern the jurisdiction or procedure of any other court.

[38] Dixon J said, with respect to the jurisdiction of the Court of Criminal Appeal under the provisions of the *Criminal Appeal Act* 1912 (NSW)[41]:

> "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 of* 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 kind of convictions and sentences from which they may appeal and lays down the

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37 *Moseley* at [37].

38 *DJL* at [40] and [43]; *Burrell* at [22]-[24].

39 Providing that the Court has "all jurisdiction necessary for the administration of justice in Queensland", and "unlimited jurisdiction at law, in equity and otherwise".

40 *R v Lowrie* [1998] 2 Qd R 579. This case considers s 58 of the *Constitution of Queensland* 2001 in its previous form, namely s 8 of the *Supreme Court of Queensland Act* 1991.

41 Relevantly the analogue of Ch 67 of the *Criminal Code* (Qld).

> conditions on which they may appeal as of right and by leave and the procedure which they must observe. …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. Appeal is not a common-law remedy, and proceedings at law are only subject to that remedy by statute…"[42]

[39] The Court in *Moseley* quoted a passage from *Grierson* which follows shortly after that referred to above.[43] However, the full passage does not, in my view, support the conclusion that Dixon J contemplated the application of a fraud exception to judgments on appeal in criminal matters. His reasons went on immediately following the passage cited above:

> "A second writ of error could not, it would seem, be brought upon the same record after an affirmance upon the first…
>
> In Chancery, rehearings, that is, appeals, were no longer admitted after enrolment of the decree, although an independent bill of review might be filed based upon error apparent or on facts newly discovered (*Sidney Smith's Chancery Practice*, 7th ed. (1862), vol.1, p.809 et seq). Under the Judicature system an action may be brought to set aside a judgment obtained by fraud, but it is an independent proceeding equitable in its origin and nature (*Ronald v. Harper*[44], per *Cussen* J.; *Halsbury's Laws of England*, 2nd ed., vol. 19, p. 266, and the cases there collected, particularly *Jonesco v Beard*[45]). But under that system no court has authority to review its own decision pronounced upon a hearing *inter partes* after the decision has passed into a judgment formally drawn up (*In re St. Nazaire Co*.[46]). 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."[47]

[40] I do not understand Dixon J to have been suggesting that the equitable jurisdiction to set aside judgments obtained by fraud was applicable to criminal proceedings. His Honour explained why the Court of Criminal Appeal had no jurisdiction to entertain a second appeal, after the first had been heard and determined. Then his Honour turned to the position in certain civil appeals, where there were also limitations on what might be done by an appeal court, once an appeal was finalised and a judgment had been drawn up. Thus, appeals in Chancery were limited, and under the Judicature system no court could review its own decision once the judgment had been formally drawn up, even in the case of fraud. In that context his Honour mentioned that if a civil judgment was obtained by fraud the remedy did not lie with the appeal court, but with an independent proceeding.

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42 *Grierson* at 435-436.
43 *Moseley* at [38].
44 (1913) VLR 311, at p 318.
45 [1930] AC 298.
46 (1879) 12 Ch D 88.
47 *Grierson* at 436-437.

[41] It is notable that the authorities referred to by Dixon J in support of that proposition were all concerned with civil proceedings. There is nothing in *Sidney Smith's Chancery Practice* that suggests that the bill of review procedure extended to criminal proceedings such as these. *Ronald v Harper*[48] was a civil case where it was contended that perjured evidence was given in the course of a defamation action. Nothing said by Cussen J (at 318) touched on criminal proceedings. *Jonesco v Beard*[49] was a civil suit for moneys due under an agreement. The action was dismissed at trial, and the plaintiff appealed. Evidence was presented to the Court of Appeal that suggested fraud in relation to one aspect of the case, and which, if proved would have vitiated the judgment. The Court of Appeal set aside the judgment and ordered a new trial. The House of Lords[50] held there was no fraud, and therefore restored the decision of the trial judge. Whilst the House of Lords said that the Court of Appeal's procedure was irregular, in that the correct procedure to impeach a completed judgment on the ground of fraud was by way of action,[51] nothing in the judgment touched in any way upon criminal proceedings. Finally, all of the cases cited in the paragraph referred to from *Halsbury's Laws of England*[52] were civil cases.

[42] Indeed, Dixon J's only reference to a matter in the criminal sphere was the example where a prisoner had abandoned his appeal, in which case the Court could allow that abandonment to be withdrawn, but only because the abandonment did not mean that there had been a determination by the Court.

[43] Even if Dixon J's reference to the fraud exception could be read as referring in some way to criminal proceedings, it received no support from the other members of the High Court. Starke J agreed with what Jordan CJ said in the Court of Criminal Appeal, namely:

> "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 a prisoner's innocence is discovered after his appeal has been finally disposed of. In such a case recourse may be had to sec. 26 of the *Criminal Appeal Act of* 1912, or to sec. 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."[53]

[44] Rich J,[54] referred to the same two sections that had been referred to by Jordan CJ,[55] and then said:

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48 *Ronald v Harper* (1913) VLR 311, at 318.

49 *Jonesco v Beard* [1930] AC 298 ("***Jonesco***").

50 Lord Buckmaster giving judgment for the Court.

51 *Jonesco* at 300-301.

52 *Halsbury's Laws of England*, 2nd ed, vol 19, Meyer HG, JUDGMENTS AND ORDERS [564].

53 *Grierson* at 432-433, 435.

54 With whom McTiernan J concurred.

55 Section 475 of the *Crimes Act* 1900 provided for an enquiry to be held after conviction; s 26 of the *Criminal Appeal Act* of 1912 preserved the pardoning power of the Governor, and enabled the Minister of Justice to refer any petition for the exercise of that power to the Court of Criminal Appeal.

> "In making the remedies provided by sec. 475 of the *Crimes Act* 1900 and sec. 26 of the *Criminal Appeal Act* of 1912 available to a prisoner after conviction the legislature has, I think, recognized 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."[56]

[45] The Court of Criminal Appeal in *Moseley*[57] referred to the reasons of Kirby J in *Burrell*,[58] drawing support for the proposition that Dixon J's fraud exception applied to appeals in criminal matters. I do not consider that much support can be drawn from what was said by Kirby J. His Honour identified Dixon J's comment in *Grierson* as being an exception available under the Judicature system, but there was no analysis of Dixon J's judgment in that respect, nor the underlying authorities, nor was that comment supported by any other member of the Court.

[46] In *Burrell* the Court of Criminal Appeal in New South Wales had published its reasons for decision, and pronounced orders dismissing an appeal against conviction and sentence. After the orders had been formally recorded, the Court discovered that its reasons contained substantial factual errors. The question was whether the Court of Criminal Appeal could reopen the appeals and reconsider the orders. The High Court held that it did not have power to re-open its appeals. *Grierson* was not reargued and the Court referred to the fact that it had been followed on a number of occasions, most recently in *Elliott v The Queen.*[59] At [26] the plurality said:

> "It is not necessary to consider whether some forms of denial of procedural fairness could warrant grafting some exception upon the general rule stated in *Grierson*. Nor it is necessary to examine what was said in either *Pantorno* or *Postiglione* about these matters. Neither case decided that the general rule in *Grierson* should be qualified according to whether there had been a denial of procedural fairness. It is therefore not necessary to consider what root could be found in the *Criminal Appeal Act* for such a proposition, and as both *Grierson* and *DJL* make abundantly plain, it is there that the source of any such exception must be found."

Equitable jurisdiction abolished

[47] When one has regard to the terms in which both *Grierson* and *Burrell* refer to the re-opening of a criminal matter dealt with on appeal, there seems to me to be considerable support for the proposition, advanced by the respondent to this Court,[60] that the provisions in Ch 67 of the *Criminal Code* (Qld) impliedly abolish any equitable jurisdiction to reopen a perfected judgment on appeal. This Court's jurisdiction in respect of criminal appeals derives wholly from the statute, and it is there that the source of any exception to the rule in *Grierson* must be found.[61] The statute makes exhaustive provision for the hearing and determination of criminal appeals, at the same time preserving the prerogative of mercy in the form of a petition for pardon, and the ability to refer a case to this Court for consideration, as if on appeal.[62]

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56 *Grierson* at 434.
57 *Moseley* at [49] footnote 33.
58 *Burrell* at [98].
59 *Elliot v The Queen* (2007) 82 ALJR 82, at 85.
60 Respondent's Further Supplementary Outline of Submissions, dated 7 March 2014, para 2.
61 *DJL* at 246 [40]; *Burrell* at 225 [22].
62 *Criminal Code* (Qld), s 672A.

[48] As the equitable jurisdiction for this Court is abolished in respect of perfected judgments, as a matter of principle it cannot be said that the same equitable jurisdiction still endures in the Supreme Court in the Trial Division.

[49] Further, the existence of the provisions governing a petition for pardon, and a referral to this Court are replicated in the Northern Territory *Criminal Code*.[63] The Court in *Moseley* did not advert to what the High Court in *Grierson* held in relation to the impact of those provisions on the question of whether a finalised appeal could be reopened.[64]

Court hierarchy – the NT Supreme Court is the Court of Criminal Appeal

[50] The court in *Moseley* drew support for its decision from the fact that s 407 of the *Criminal Code* (NT) provided that "The Supreme Court shall be the Court of Criminal Appeal …". This led to the conclusion that the "Court of Criminal Appeal is a statutory emanation of the Supreme Court created by the *Criminal Code*",[65] and that:

> "Since there is only one court – the Supreme Court – there would be no valid reason, based on court hierarchy, for the Supreme Court to lack jurisdiction to rescind or set aside the order of the Court of Criminal Appeal."[66]

[51] The position is not the same in Queensland. The Court of Appeal is constituted under the *Supreme Court of Queensland Act* 1991 as a separate division of the Supreme Court.[67] By statute its composition does not include the trial division judges[68] just as the composition of the trial division does not include the judges of appeal.[69]

[52] Thus there is no provision equivalent to s 407 of the *Criminal Code* (NT). When the *Criminal Code* (Qld), s 668, defines the "Court", it refers to the Court of Appeal as constituted under the *Supreme Court of Queensland Act* 1991. Appeals from the trial division in both civil and criminal cases go to the Court of Appeal,[70] and the decisions of the Court of Appeal are binding on a single judge of the Trial Division.

[53] Thus there are reasons why the Queensland court hierarchy would suggest that the Supreme Court trial division lacks jurisdiction to set aside an order of the Court of Appeal.[71]

Other authority

[54] *Moseley* referred to *Bailey v Marinoff*[72] and *Harrison v Schipp*,[73] and what was said in those cases about the principles and jurisdiction as to setting aside judgments

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63 Schedule 1 of the *Criminal Code Act* 1983 (NT), ss 431 and 433.

64 *Grierson* at 434 per Rich J (Mc Tiernan J concurring) and at 435 per Starke J.

65 *Moseley* at [37].

66 *Moseley* at [48].

67 *Supreme Court of Queensland Act* 1991 (Qld), s 5. Trial division judges are routinely requested to sit on appeals heard by the Court of Appeal, but that does not mean they are judges of appeal.

68 *Supreme Court of Queensland Act* 1991 (Qld), s 28. A judge of appeal requires the consent of the Chief Justice to sit in the trial division.

69 *Supreme Court of Queensland Act* 1991 (Qld), s 45.

70 For Civil see s 29 of the *Supreme Court of Queensland Act* 1991, and for criminal see s 668D of the *Criminal Code* (Qld).

71 cf *In re St Nazaire Co* (1879) 12 Ch D 88, at 96-97.

72 *Bailey v Marinoff* (1971) 125 CLR 529 ("***Bailey***"); see *Moseley* at [36].

73 *Harrison*; see *Moseley* at [39]-[40].

generally,[74] and the applicability of the former Chancery procedure of an original bill and its survival as a means by which judgments tainted by fraud could be impeached.[75]

[55] However, neither case dealt with a criminal proceeding, nor proffered any comment about the applicability of the jurisdiction, principles or procedure to criminal proceedings.

[56] So far as I am aware, there has been no case in Australia which has gone as far as *Moseley*. In terms of authority, there is no real support for the proposition that one exception to *Grierson* is the setting aside of orders in criminal proceedings where they are obtained by fraud. The Court in *Moseley* was referred to the decisions in *Reardon* and *Keogh*, which were said to contain references "to the applicability of the jurisdiction" to set aside judgments on appeal in criminal matters on the basis of fraud.[76] However, when one examines *Reardon* and *Keogh*, no real support is found.

[57] *Reardon* was not a case of fraud in any sense. It was a case where the court dismissed an appeal against conviction, dealing with all issues raised in the grounds of appeal. Subsequently it was suggested that the judgment did not deal with a particular matter raised on Reardon's behalf. Reardon applied to reopen the appeal against conviction on the ground that he was denied procedural fairness, as one of his arguments had not been dealt with. In the course of reviewing the authorities as to whether a Court of Criminal Appeal could reopen a case after its orders had been perfected, Hodgson JA referred to the decisions in *Jones*,[77] *Pantorno*,[78] and *Postiglione*[79] and then said:

> "In my opinion, what was said in *Jones*, *Pantorno* and *Postiglione* is insufficient to displace the binding authority of *Grierson* to the effect, once an appeal has been heard and determined and the order perfected, there is no jurisdiction to re-open the appeal. This is subject to the slip rule, and the possibility of separate proceedings to set aside orders obtained by fraud."[80]

[58] No analysis accompanied the reference to a fraud exception, and it was inapplicable in that case in any event.

[59] The inclusion referred to by Hodgson JA in *Reardon* was not accepted by the South Australian Court of Criminal Appeal in *Keogh*.[81] That was a case where an appeal against conviction had been dismissed, and then subsequently an application was made to reopen on the basis of fresh evidence. That application was dismissed, and an application for special leave was refused. Many years later an application was made to reopen the original conviction, on the basis that relevant evidence was not disclosed at the trial. That included evidence that an autopsy had been carried out incompetently and other forensic evidence was incompetent. The submission was "that the conviction was obtained by relying on false and misleading evidence, and so is akin to a conviction obtained by fraud".[82]

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74 *Bailey* at 530.
75 *Harrison* at 618[18]-[19], 626[66] and 630[139].
76 Department of Public Prosecution's Outline of Submissions, in *Moseley*, dated 26 October 2012, para 52.
77 *Jones v The Queen* (1989) 166 CLR 409.
78 *Pantorno v The Queen* (1989) 166 CLR 466.
79 *Postiglione v The Queen* (1997) 189 CLR 295.
80 *Reardon* at [41].
81 *Keogh* at [90].
82 *Keogh* at [39].

[60] Having referred to the passage from Hodgson JA in *Reardon*,[83] Doyle CJ referred to the decision in *R v GAM (No 2)* where the Court of Appeal in Victoria[84] held that the relevant fraud giving rise to the possible exception to the principle of finality referred only to "fraud or a fundamental procedural mistake enabling the abandonment of an appeal to be withdrawn and the appeal to be re-opened".[85] *GAM (No 2)* considered that if the court in *R v McNamara (No 2)*[86] meant to go further when referring to fraud as a basis for entertaining a further appeal, it "may have overstated the principle".[87] Doyle CJ went on:

> "I respectfully share the doubt held by Winneke P, and to that extent do not necessarily agree with the opinion of Hodgson JA in *Reardon*. If fraud is a basis for setting aside a perfected order, it must be something more than is alleged here by Mr Game – a deliberate withholding of evidence."[88]

[61] *GAM (No 2)* concerned an application to reopen an appeal in circumstances where it was said that the conviction at trial, and the dismissal of the appeal, were procured by fraud, in the form of false evidence. *Grierson* was discussed at length, but there was no suggestion of the course taken in *Moseley*. The alternative course open, since the appeal could not be reopened, was an application for clemency under the prerogative of mercy.[89]

[62] Thus it can be seen that there is no authority prior to *Moseley* which holds that there is an equitable jurisdiction which may be exercised by a court other than the Court of Appeal, and which enables a criminal conviction to be set aside on the basis of fraud. That may be a reflection of the limits on the place of fraud in the framework of the general law. The High Court had this to say in *SZFDE v Minister for Immigration and Citizenship*:[90]

> "**In the fields of law just discussed,[91] the common law, equity and statute are concerned principally with the creation and protection of personal and proprietary rights in inter partes litigation, rather than with what might today be identified as public law.** This appeal concerns public law, in particular the due administration of the provisions of the Act respecting protection visas and procedures for review by the Tribunal of decisions on visa applications.
>
> …
>
> The vitiating effect of fraud is not universal throughout the law. The equitable doctrine protecting bona fide purchases for value and without notice is an important exception. Further, particular

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83 *Reardon* at [84].

84 Winneke P at [8] and [12], Calloway JA and Eames JA concurring.

85 *Keogh* at [89].

86 At 268.

87 *Keogh* at [89].

88 *Keogh* at [90]; *McNamara (No 2)* at [21].

89 *GAM (No 2)* at [7], [11], [22] and [35].

90 *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189, at 194 [11], 196 [16] and [17] (emphasis added) (internal citations omitted).

91 At [9] these were referred to: criminal law where the offence was a director fraudulently taking property or a benefit; the tort of deceit; registered designs law; law of agency; statutes of limitation; and dealings in Torrens title land.

> principles, or at least practices, have been developed with respect to collateral attacks in later litigation upon the outcome in earlier litigation where this was alleged to have been vitiated by fraud. It has been said in this Court that, except in very exceptional cases, fraud constituted by perjury by a witness or witnesses acting in concert is not a sufficient ground for setting aside a judgment. The precept engaged here has been identified as that favouring the finality of litigation.
>
> **The authorities in this field concern adjudication of civil actions and suits.** A rather different trend has appeared in public law, particularly respecting the administration by superior courts of certiorari to supervise the exercise of jurisdiction by inferior courts and tribunals."

Did equity extend to criminal proceedings?

[63] Historically speaking equity has never developed or maintained a lasting jurisdiction in relation to criminal matters. In the very early days of the development of equity, when the Chancery came into existence, there was a period when Chancery was used to preserve peace and prevent crime, but that jurisdiction almost ceased towards the end of the 15th century.[92]

[64] Equity's excursion into criminal law occurred because of two particular reasons: the first was that local magistrates at the time of King Richard II were easily impressed by wealthy land owners, and therefore penurious plaintiffs did not receive justice against affluent defendants.[93] The second reason was that there was widespread lawlessness and rampant violence prevalent throughout the country.[94] As a matter of history the role of the chancellor[95] expanded, particularly in the person of Cardinal Wolsey under the reign of Henry VIII. Chancery emerged as a force in parallel to the Court of Star Chamber, particularly during the period in English history surrounding the Reformation; the former being concerned with ordinary equity, and the latter with "criminal equity".[96]

[65] That jurisdiction, however, was considered as temporary and following the abolition of the Court of Star Chamber, there was no criminal jurisdiction of equity.[97] After the Tudor period in English Law, equity became clearly defined as a court of civil remedies complementary to the common law.[98] It was not until the 18th century that the Chancery Court became firmly established, and then made no more attempt at all to enforce criminal laws. From this history the maxims finally developed that equity would not enforce the criminal law, and equity would not enjoin the commission of crimes.[99] Indeed, in 1818, equity refused to take criminal

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92 Shabaz C, 'The Historical Development of Equity Courts Power to Enjoin Nuisances' (1926) 11 Marquette Law Review 32-38 at 32, referring to Mack ES, 'Revival of Criminal Equity' (1903) 16 Harvard Law Review 389-403 at 391.

93 'Injunction Versus Indictment' (1939) 8 Fordham Law Review 237-52 at 238.

94 'Injunction Versus Injunction' at 238, referring to Mack at 390, 391.

95 Referred to as the "Keeper of the Queen's Conscience" or the "King's Conscience".

96 'Chapter 1: Introduction – the nature of equity' in Hudson, *Equity and Trusts*, 6th ed, at 16 referring to Maitland FW, Brunyate J (rev.), *Equity*, Cambridge University Press, Great Britain, 1936, at 19.

97 'Injunction Versus Indictment' at 239, referring to Mack at 391 and Maitland at 19.

98 'Injunction Versus Indictment' at 239, referring to Holdsworth, *A History of English Law*, 3rd ed, 1922, at 405.

99 'Injunction Versus Indictment' at 239.

jurisdiction, Lord Eldon saying in that year: "The publication of a libel is a crime; and I have no jurisdiction to prevent the commission of crimes."[100] Upon this decision equity based her refusal to resume jurisdiction in criminal matters.[101] Since that time the only substantive area in which equity subsequently extended into criminal matters was to restrain a threatened public nuisance, which if committed would be a crime.[102]

[66] It is notable that if one examines *Pomeroy*[103] one can not find any support for an equitable jurisdiction such as is suggested in *Moseley*. With a limited exception, *Pomeroy* even suggests that criminal proceedings will not be enjoined.[104] Further, in the section dealing with judgments that might be affected by fraud, no mention whatever is made of decisions in the criminal sphere.[105]

[67] One does not find any support for the extension of the jurisdiction to set aside judgments for fraud, into the criminal area, in *Halsbury's Laws of England*,[106] nor in *Halsbury's Laws of Australia*.[107] Nor is there any support for that proposition in the article by D M Gordon, referred to in the judgment in *Moseley*.[108] Whilst that article sets out a deal of the history and survival of an action of review, based on fraud, it does not suggest its applicability in the criminal law.

Significance of an alternative remedy available?

[68] One of the maxims of equity is that it will not suffer a wrong to be without a remedy. That principle is at the very heart of equity, and where the common law statutes do not provide for the remedying of a wrong, it is equity which intercedes to ensure that a fair result is reached.[109] So it is said that equity will intervene in circumstances in which there is no apparent remedy, but where the court is of the view that justice demands that there be some remedy made available to the complainant.[110]

[69] Application of that maxim would not suggest the extension of jurisdiction as adopted in *Moseley*. The *Criminal Code*[111] expressly preserves the power of pardon, and the procedure by petition to secure that result. That procedure also envisages that the matter might be referred to this Court in order to establish whether grounds exist to remedy the alleged wrong. Thus, there is an apparent remedy available for the perceived wrong. As that is the case, in my view it is doubtful that equity would intervene. That, of course, assumes some residual area for the operation of equity at all, and that the statute has not abolished any equitable jurisdiction.

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100 Shabaz at 32, referring to *Gee v Pritchard* [1818] 2 SWANS 408 at 413.

101 Shabaz at 32.

102 Shabaz at 32-33.

103 *Pomeroy's Equity Jurisprudence*, 5th ed.

104 *Pomeroy's Equity Jurisprudence*, 5th ed, vol 4, ACTUAL FRAUD – JURISDICTION OF EQUITY [1361b].

105 *Pomeroy's Equity Jurisprudence*, 5th ed, vol 3, ACTUAL FRAUD – JURISDICTION OF EQUITY [919a] and [919b].

106 *Halsbury's Laws of England*, 5th ed, vol 12, JUDGMENTS AND ORDERS [1143] and [1204]. Nor in any of the references in paragraph [1204] to the English and Empire Digest.

107 *Halsbury's Laws of Australia*, vol 20, updated by Moshinsky N, JUDGMENT AND EXECUTION [325-9130].

108 Gordon DM, 'Fraud or New Evidence as Grounds for Actions to Set Aside Judgments – I' (1961) 77 *The Law Quarterly Review* 358-81 ("**Gordon I**"); Gordon DM, 'Fraud or New Evidence as Grounds for Actions to Set Aside Judgments – II' (1961) 77 *The Law Quarterly Review* 533-59 ("**Gordon II**").

109 For example, *Saunders v Saunders* (1881) 19 Ch D 373, at 381.

110 *Seddon v Commercial Salt Co Ltd* [1925] Ch 187.

111 Both in the Northern Territory and in Queensland.

Conclusion as to *Moseley*

[70] For the reasons above, were it necessary to decide the matter, in my respectful view *Moseley* was incorrectly decided and should not be followed.

***Moseley* Inapplicable**

[71] However, even if *Moseley* was correctly decided, it is inapplicable to this particular case. In *Moseley* the form of the "fraud" consisted of collusion between various witnesses, and in effect a bribe being offered by one to another to give false evidence. Moseley offered Tippett a percentage of money which was allegedly due to come to him at a later time, if Tippett falsified his evidence.

[72] There is nothing of that in the present case. All the applicant points to is that there was some misconduct by the investigating police officers, unconnected with his case, and one or other of the police officers gave false evidence in the sense that words were attributed to the applicant, which he did not say.[112] More specifically, the applicant's material identifies the following in respect of the alleged misconduct of the police officers:

(a) one of the investigating officers was charged with offences relating to his inducing prisoners to give false statements; however that conduct was not at all connected with the applicant's case;

(b) an investigating officer made a false statement in his evidence concerning his reason for targeting the applicant during the investigation in respect of this matter; this seems to turn on the assertion that the applicant was said to have been targeted because of something said by other witnesses in their statements to police, when those statements were made after the police interviewed the applicant;[113] this was an issue explored at the trial, as the applicant's material reveals;[114]

(c) the officers were alleged to have obtained an invalid extension to the applicant's detention; this seems to turn on issues as to: whether particular statements in the application for extension, and attributed to the applicant, were actually said by him; and when the magistrate was telephoned or otherwise approached to grant an extension to the applicant's detention, and what the magistrate was told as to when the applicant was first detained;[115]

(d) there is an allegation that one of the investigating officers attributed words to the applicant which he did not use, in a police statement; this related to whether the applicant had said that he was dropped off at the edge of a road to perform a task as a lookout; the issue seems to turn on whether the applicant actually said that he was a "lookout", as opposed to using some other form of words which could be construed as meaning that;[116] however, not only did the

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112 I put aside the suggestion that the telecommunications expert gave false evidence. There is no suggestion of fraud involved in that respect, merely that a subsequent expert can give more knowledgeable evidence.

113 Exhibit A to the Affidavit of I C Stanley, sworn 5 November 2013 ("**Applicant's Affidavit**").

114 Exhibit A to the Applicant's Affidavit, p 79.

115 Exhibit A to the Applicant's Affidavit, p 79.

116 Exhibit A to the Applicant's Affidavit. The applicant's own version, recorded on his appeal, was that he had been dropped off some distance from the shed where the victim was found, with instructions to keep a lookout for a particular vehicle and to call if he saw it: *R v Stanley* [2003] QCA 499, at [23].

> applicant confirm in his record of interview that he was dropped off to perform a lookout task,[117] this was an issue explored at the trial, at which the relevant officer admitted that the applicant had used one form of words and the officer had construed that he was acting as a "lookout".[118]

[73] None of those matters constitute conduct of the sort that was the subject of *Moseley*.

[74] As Gordon shows in his article,[119] one important factor in actions of review is whether the fraud set up is extrinsic, or it is merely false evidence that produced the judgment. Extrinsic fraud would include things such as bribery of a solicitor, counsel or witnesses.[120] That is different from intrinsic fraud, which basically refers to the giving of perjured evidence and obtaining a judgment in that way. While measures are put in place within trials to deal with intrinsic fraud, this is not so with extrinsic fraud. That is, a judge (in most civil matters) or jury (in most criminal matters) is charged with determining whether or not a witness is trustworthy.

[75] Whilst *Moseley* involved extrinsic fraud, that is not the case in the present application. Even if the misconduct of the police officers could be established, it does not necessarily follow that the conviction would be overturned. The High Court has said that, except in very exceptional cases, fraud constituted by perjury by a witness or witnesses acting in concert is not a sufficient ground for setting aside a judgment.[121] As Gordon[122] said in his article, in relation to an action of review based on extrinsic fraud, particularly perjury:

> "As James L.J. has pointed out, in most contested actions a certain amount of perjury goes on,[123] perhaps on both sides, the judge knowing that some person or persons must be lying; and because on review some particular piece of evidence on the first trial appears to have been false, it does not follow that the judgment should be presumed to have been produced by it."[124]

[76] That highlights the difficulty for the applicant in this case. If all that can be shown is that there was some reason to doubt the honesty of the police officers, that will not necessarily indicate that the jury would have taken a different course at the trial.

[77] Therefore, I do not consider that *Moseley* would apply, even if correctly decided.

Disposition

[78] For the reasons above I would refuse the application for an extension of time.

[79] **MULLINS J:** On the authority of *Grierson v The King* (1938) 60 CLR 431, I agree with Fraser and Morrison JJA that this Court has no jurisdiction to hear a second appeal by the appellant against his conviction. I therefore agree that the appeal should be refused.

[80] It is therefore unnecessary to consider the correctness of the decision in *DPP v Moseley* [2013] NTSC 8 or its applicability in Queensland.

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117 Exhibit A to the Applicant's Affidavit, p 80.
118 Exhibit A to the Applicant's Affidavit, p 80.
119 Gordon II at 555-556.
120 Gordon II at 556.
121 *McDonald v McDonald* (1965) 113 CLR 529, at 544 per Windeyer J, citing *Cabassi v Vila* (1940) 64 CLR 130, at 147-148; *SZFDE* at 196.
122 Gordon II at 556.
123 *Flower v Lloyd* (1879) 10 Ch D 327, at 333.
124 See the striking decision in *Jensen v Conarroe* [1935] 2 WWR 465.