SUPREME COURT OF QUEENSLAND

CITATION:	*R v Martens* [2009] QCA 351
PARTIES:	**R** **v** **MARTENS, Frederic Arthur** (petitioner)
FILE NO/S:	CA No 85 of 2009 SC No 83 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	Reference under s 672A Criminal Code
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	13 November 2009
DELIVERED AT:	Brisbane
HEARING DATE:	9 September 2009; 10 September 2009
JUDGES:	Muir, Fraser and Chesterman JJA Separate reasons for judgment of each member of the Court, Muir and Chesterman JJA concurring as to the orders made, Fraser JA dissenting
ORDERS:	**1. Appeal allowed** **2. The conviction is quashed** **3. The order for imprisonment is set aside**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – PARDON, COMMUTATION OF PENALTY, REFERENCE ON PETITION FOR PARDON AND INQUIRY AFTER CONVICTION – REFERENCE TO COURT – where petitioner was convicted in October 2006 of engaging in sexual intercourse with a person who was under 16 years old, whilst outside Australia – where petitioner unsuccessfully appealed against conviction and sentence in April 2007 - where in March 2008 the petitioner applied to the Commonwealth Minister for Home Affairs for a pardon or, alternatively, requested that his case be referred to the Court of Appeal pursuant to s 672A of the *Criminal Code* 1899 (Qld) – where the Minister declined to do so and this decision was challenged by the petitioner in the Federal Court under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) – where initial decision was set aside and remitted for consideration under the law by Federal Court – where the Attorney-General for the Commonwealth referred the matter to the Court of Appeal under s 672A CRIMINAL LAW – APPEAL AND NEW TRIAL –

PARDON, COMMUTATION OF PENALTY, REFERENCE ON PETITION FOR PARDON AND INQUIRY AFTER CONVICTION – where issue arose as to whether the Court of Appeal had the requisite jurisdiction of a reference from the Commonwealth Attorney-General under s 672A of the *Criminal Code* 1899 (Qld) – whether s 68 of the *Judiciary Act* 1903 (Cth) operated to give the Court of Appeal jurisdiction over a referral by the Commonwealth Attorney-General for a Commonwealth offence

CRIMINAL LAW – APPEAL AND NEW TRIAL – PROCEDURE – POWERS OF COURT ON APPEAL – TO CONSIDER FRESH EVIDENCE – where petitioner adduced fresh evidence at reference hearing, which in combination it was alleged by the petitioner had the effect of making the guilty verdict unsafe – whether the verdict at trial was unreasonable

Crimes Act 1914 (Cth), s 50BA, s 87ZR, s 87ZS
Criminal Code 1899 (Qld), s 672A
Judiciary Act 1903 (Cth), s 2, s 68(2)

Allen, Allen and Winter (1910) 5 Cr App Rep 225, cited
Grierson v The King (1938) 60 CLR 431; [1938] HCA 45, cited
Hay v Justices of the Tower Division of London (1890) 24 QBD 561, considered
Mallard v The Queen (2005) 224 CLR 125; [2005] HCA 68, cited
Martens v Commonwealth & Another (2009) 174 FCR 114; [2009] FCA 207, cited
Mickelberg v The Queen (1989) 167 CLR 259; [1989] HCA 35, considered
Peel v The Queen (1971) 125 CLR 447; [1971] HCA 59, applied
Perrier v Kerr, Unreported, Federal Court of Australia, Ryan J, VG 865 of 1995, 23 August 1996, 19 August 1997, cited
R v Cosgrove [1948] Tas SR 99, cited
R v Foster [1985] QB 115, followed
R v Gunn (No 1) (1942) 43 SR (NSW) 23, applied
R v Martens [2007] QCA 137, cited
Ratten v The Queen (1974) 131 CLR 510; [1974] HCA 35, considered
Re Matthews and Ford (1973) VR 199, considered
Re Royal Commission on Thomas Case [1980] 1 NZLR 602, cited
Rohde v Director of Public Prosecutions (1986) 161 CLR 119; [1986] HCA 50, considered
Seaegg v The King (1932) 48 CLR 251; [1932] HCA 47, considered
The Queen v Collie, Unreported, Supreme Court of Victoria Court of Criminal Appeal, Crockett CJ, Fullager and Marks JJ, 190 of 1992, 18 December 1992, cited

The Queen v Gee (2003) 212 CLR 230; [2003] HCA 12, applied
The Queen v Murphy (1985) 158 CLR 596; [1985] HCA 50, cited
Williams v The King [No 2] (1934) 50 CLR 551; [1934] HCA 19, applied

COUNSEL: M Sumner-Potts for the petitioner
J D Henry SC, with S A McLeod, for the respondent

SOLICITORS: Cameron Price Lawyers for the petitioner
Director of Public Prosecution (Cth) for the respondent

[1] **MUIR JA**: I have had the benefit of reading the separate reasons of Fraser JA and Chesterman JA. The reasons of Fraser JA provide cogent support for his conclusion that this Court lacks jurisdiction to entertain the application. However, not without hesitation, I have arrived at the contrary conclusion. I gratefully adopt Chesterman JA's reasons and will add some brief observations of my own.

[2] Section 2 of the *Judiciary Act* 1903 (Cth) ("the Act") gives "appeal" a broad meaning. It is an inclusive definition which encompasses "… any proceeding to review or call in question the proceedings decision or jurisdiction of any Court or Judge."

[3] In *The Queen v Gee & Anor*,[1] Gleeson CJ said at 242 – 243:

> "There is no reason why the reference to appeals in s 68(2) should not be applied with full generality, having regard to the purpose of Div 1 of Pt X of the *Judiciary Act*. …
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> This Court said, in *Owners of 'Shin Kobe Maru' v Empire Shipping Co Inc*:
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> > 'It is quite inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words.' "
> > (footnote deleted)

[4] The "purpose" to which the Chief Justice referred was identified by him as follows:[2]

> "… When State courts hear criminal cases in federal jurisdiction, the general purpose of s 68 of the *Judiciary Act* is to bring about the result that, in the exercise of such jurisdiction, State courts apply the same procedure as when they exercise State jurisdiction. The question is whether that legislative purpose, as expressed in the language of s 68(2), extends to the s 350 procedure.
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> …
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> The word 'appeal' is defined in s 2 of the *Judiciary Act* to include any proceeding to review or call in question the decision of any court or judge. The Full Court correctly held that the stated case procedure under s 350, when invoked in an ordinary case in the exercise of State jurisdiction, involves a proceeding to review or call in question the decision of a primary judge.

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1 (2003) 212 CLR 230.
2 (2003) 212 CLR 230 at 240 – 241.

As was acknowledged by Doyle CJ, who was in the majority in the Full Court, the language of s 68(2) is both general and ambulatory. This is consistent with its purpose, which is to 'assimilate criminal procedure, including remedies by way of appeal, in State and Federal offences'. In *Williams v The King [No 2]* Dixon J, speaking of the reference to appeal procedure, said:

> 'But when this construction is given to the words of the provision, they necessarily extend to all remedies given by State law which fall within the description `appeals arising out of the trial or conviction on indictment or out of any proceedings connected therewith'. This accords with the general policy disclosed by the enactment, namely, to place the administration of the criminal law of the Commonwealth in each State upon the same footing as that of the State and to avoid the establishment of two independent systems of criminal justice.'

That general policy reflects a legislative choice between distinct alternatives: having a procedure for the administration of criminal justice in relation to federal offences that is uniform throughout the Commonwealth; or relying on State courts to administer criminal justice in relation to federal offences and having uniformity within each State as to the procedure for dealing with State and federal offences. The choice was for the latter. The federal legislation enacted to give effect to that choice, therefore, had to accommodate not only differences between State procedures at any given time, but also future changes to procedures in some States that might not be adopted in others. That explains the use of general and ambulatory language, and the desirability of giving that language a construction that enables it to pick up procedural changes and developments as they occur in particular States from time to time." (footnotes deleted) (emphasis added)

[5] The words of the definition of "appeal" are apt to encompass a reference of "the whole [of a] case to the Court [to be] … heard and determined by the Court as in the case of an appeal by a person convicted..." [3]

[6] The expressions "whole case" and "as in the case of an appeal" are explained in the following passage from the reasons of Gummow, Hayne, Callinan and Heydon JJ in *Mallard v The Queen*,[4] which also sheds light on the role of the appellate court in exercising its relevant jurisdiction:

> "… Subject only to what we will say later about the words 'as if it were an appeal' which appear in s 140(1)(a) of the Act, the explicit reference to 'the whole case' conveys no hint of any inhibition upon the jurisdiction of the Court of Criminal Appeal on a reference. Indeed, to the contrary, the words 'the whole case' embrace the whole of the evidence properly admissible, whether 'new', 'fresh' or previously adduced, in the case against, and the case for the appellant. That does not mean that the Court may not, if it think it useful, derive assistance from the way in which a previous appellate

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3 *Criminal Code* 1899 (Qld), s 672A.

4 (2005) 224 CLR 125 at 131.

> court has dealt with some, or all of the matters before it, but under no circumstances can it relieve it of its statutory duty to deal with the whole case. The history, as we have already mentioned, points in the same direction. The inhibitory purpose and effect of the words 'as if it were an appeal' are merely to confine the Court to the making of orders, and the following of procedures apposite to an appeal, and further, and perhaps most relevantly, to require the Court to consider whether the overall strength of the prosecution case requires the Court to apply the proviso contained in s 689(1) of the *Criminal Code*." (footnote deleted)

[7] Does this "appeal" arise out of a trial or conviction or out of any proceedings connected therewith? For convenience, I will use the word "Proceeding" to encompass a trial, a conviction and any proceeding connected therewith. A conventional appeal is brought with a view to remedying a perceived error in the trial or sentencing of the accused. Such an appeal does not "arise out of" a Proceeding by operation or force of any event or thing within the Proceeding itself: it "arises out of" the Proceeding simply because the appeal challenges the verdict, sentence or order given, imposed or made in the Proceeding. On a reference under s 672A(a), the nature and extent of the connection between the reference and the Proceeding is essentially the same as on a conventional appeal. In this reference the petitioner challenges the jury's verdict. Consequently, the subject proceeding "arises out of" the petitioner's trial and/or conviction.

[8] In *R v Gunn (No 1),*[5] Jordan CJ explained how a reference under s 26(a) of the *Criminal Appeal Act* 1912 (NSW) (relevantly identical to s 672A) equated with a conventional appeal:

> "If the matter was *res integra*, I should feel considerable difficulty in finding in clause (a) … any indication of intention on the part of the Legislature to empower the Minister of Justice, in effect, to invest a convicted person, from time to time, with new rights of appeal, in a case in which his statutory right of appeal has already been exercised and exhausted.
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> …
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> The point has never been expressly decided. … in the case of *Davies v. R.*, an appeal had been heard and dismissed by the Supreme Court of Victoria … On an application for special leave to appeal … the High Court itself suggested action under a provision corresponding with s. 26 (a), and, that action having been taken, the Supreme Court of Victoria treated itself as seized of the matter as an appeal and dismissed the appeal. The High Court, upon a further application for special leave to appeal, treated the matter as being properly before it, granted leave, entertained the appeal, allowed it, and directed a new trial, a course which it could have taken only if the statutory provision caused a general reference to invest a convicted person with what was, in effect, a new right of appeal.
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> Having regard … particularly to … *Davies v. R.* … I think that … we should … regard the fact of the Minister's general reference under s. 26 (a) as investing the Court with jurisdiction to deal with the matter as if it were an appeal against conviction duly instituted by the

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5 (1942) 43 SR (NSW) 23 at 25 – 26.

> prisoner himself in the ordinary way, notwithstanding that his ordinary right of appeal has been exercised and exhausted." (footnotes deleted)

[9] The fact that the exercise of power under s 672A(a) is conditioned on the existence of a "petition for the exercise of the pardoning power" and, in that sense, the case for determination by the Court arises out of the petition does not require the conclusion that the "appeal" does not arise out of the petitioner's trial and conviction. A conventional appeal is not regarded for the purposes of s 68 of the Act as arising out of the notice of appeal. The petition and referral, for present purposes, merely constitute the mechanism by which the matter is brought before the Court.

[10] Because s 68(2) operates by analogy, in the case of Commonwealth offences the power given to the "Crown Law Officer" under s 672A to refer a case to the Court, is conferred on the Federal Attorney-General, in this instance, as "The proper officer of the Crown in right of the Commonwealth for representing it in the Courts …".[6]

[11] It does not seem to me that the conclusion that s 68(2) confers jurisdiction on this Court to entertain a referral by the Federal Attorney-General interferes with the prerogative of mercy vested in the Crown in right of the Commonwealth. That remains, as it does in the case of the Crown in right of the State: in the latter case expressly under s 672A.

[12] A referral under s 672A by decision of the Federal Attorney-General, in effect, affords a convicted person a further appeal against his or her conviction and/or sentence. The reference having been made, the petition "passes out of the field of executive action, and falls to be heard and determined by the Court as if it were an appeal, with all the consequences of an appeal."[7] And, importantly, where the subject offence is a Commonwealth offence, the proceeding instituted by the reference is an "appeal" within the meaning of s 68(2) and, by the operation of that provision, this Court has the jurisdiction it would have had if the petitioner had been convicted of an offence against a Queensland law. The purpose of s 68 is thus fulfilled.

[13] I agree with the orders proposed by Chesterman JA.

[14] **FRASER JA**: For the reasons given by Chesterman JA I agree that the orders he proposes should be made if the Court has jurisdiction, but I am respectfully unable to agree that the Court does have jurisdiction. I will explain my reasons for that conclusion after I have first summarised the context in which the jurisdictional question arises.

Background

[15] On 30 October 2006, after a seven day trial before a jury in the Supreme Court at Cairns, Mr Martens was convicted of an offence against s 50BA of the *Crimes Act* 1914 (Cth) that between 10 and 16 September 2001 at Port Moresby in Papua New Guinea he, an Australian citizen, whilst outside Australia, engaged in sexual intercourse with a person who was under 16 years old. For that offence Mr Martens was sentenced to five and a half years imprisonment, with a non-parole period of three years.

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6 *Williams v The King [No 2]* (1934) 50 CLR 551 at 562 per Dixon J.

7 *R v Gunn (No 1)* (1942) 43 SR (NSW) 23 at 25. See also *Re Matthews and Ford* [1973] VR 199 at 200.

[16] On 20 April 2007 this Court dismissed Mr Martens' appeal against conviction and refused his application for leave to appeal against sentence.[8]

[17] In 2008 Mr Martens lodged various documents with Commonwealth authorities, culminating in what was ultimately regarded in the Federal Court[9] as a request to the Commonwealth Minister for Home Affairs either to recommend to the Governor-General the granting of a pardon to Mr Martens or, alternatively, to refer the case to this Court pursuant to s 672A of the *Criminal Code* 1899 (Qld) (the "*Criminal Code*").

[18] On 4 September 2008 the Minister declined that request. Mr Martens sought review of the Minister's decision in the Federal Court under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth). One question raised in those proceedings was whether the Minister, as opposed to the Commonwealth Attorney-General, was the appropriate Minister of State to consider Mr Martens' request. On 6 March 2009 the Federal Court (Logan J) held that it was open to the Minister to decide whether or not to refer Mr Martens' case to this Court for the purposes of s 68 of the *Judiciary Act* 1903 (Cth) (the "*Judiciary Act*") in its application of s 672A of the *Criminal Code*.[10] In the course of so deciding Logan J held that either or both of the Minister and the Commonwealth Attorney-General might make such a decision.

[19] The Commonwealth Attorney-General subsequently purported to refer Mr Martens' case to this Court under s 672A of the *Criminal Code*. In a letter sent to the President of the Court on 9 April 2009 the Commonwealth Attorney-General said:

> "Considering the case as a whole, I believe that evidence has been presented that might raise a significant possibility that Mr Martens would be acquitted by a jury acting reasonably. I have therefore decided to refer Mr Martens's case to the Court of Appeal under section 672A of the Queensland Criminal Code."

[20] In granting bail to Mr Martens on 21 May 2009,[11] this Court (Keane, Fraser JJA and Applegarth J) accepted that it was arguable that the effect of s 68 of the *Judiciary Act* is that the Commonwealth Attorney-General is empowered to enliven this Court's jurisdiction under s 672A(a), but the Court also expressed doubt whether that was the correct conclusion. The Court has now had the benefit of argument on the point. Mr Martens' counsel advocated the view that the Commonwealth Attorney-General possessed the necessary power. Counsel for the Commonwealth Attorney-General helpfully articulated arguments both for and against that proposition.

The jurisdictional question

[21] Section 672A of the *Criminal Code* provides:

> "**672A Pardoning power preserved**
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> Nothing in sections 668 to 672 shall affect the pardoning power of the Governor on behalf of Her Majesty, but the Crown Law Officer, on the consideration of any petition for the exercise of the pardoning power having reference to the

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8 *R v Martens* [2007] QCA 137.

9 *Martens v Commonwealth & Another* (2009) 174 FCR 114 at [4].

10 (2009) 174 FCR 114 at [35] – [40].

11 *R v Martens* [2010] 1 Qd R 564.

> conviction of any person or to any sentence passed on a convicted person, may-
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> (a) refer the whole case to the Court,[12] and the case shall be heard and determined by the Court as in the case of an appeal by a person convicted; or
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> (b) if the Crown Law Officer desires the assistance of the Court on any point arising in the case with a view to the determination of the petition, refer that point to the Court for its opinion thereon, and the Court shall consider the point so referred and furnish the Crown Law Officer with its opinion thereon accordingly."

[22] It is uncontroversial that s 672A does not itself encompass a reference by the Commonwealth Attorney-General. Section 672A is concerned only with a reference by the "Crown Law Officer" (which term is defined in s 1 of the *Criminal Code* to mean the Attorney-General for Queensland or the Queensland Director of Public Prosecutions) in connection with the exercise of the pardoning power which is exercisable by the Governor of Queensland.[13]

[23] Mr Martens was convicted of a Commonwealth offence. The Governor has no power to pardon a conviction of a Commonwealth offence. The pardoning power is conventionally regarded as being one of those prerogatives with respect to which the division of legislative power under the Commonwealth Constitution determines the distribution of the prerogative as between the Commonwealth and the States.[14] In relation to Commonwealth offences, it is therefore an aspect of the executive power of the Commonwealth vested in the Queen and exercisable by the Governor-General as the Queen's representative under s 61 of the Commonwealth Constitution.

[24] If the Court has jurisdiction in this federal matter it must arise under s 68(2) of the *Judiciary Act*. Section 68 is in Division 1 of Part X of the *Judiciary Act*. That Part is headed "Criminal jurisdiction" and Division 1 is headed "Application of laws". Section 68 provides:

> **"68 Jurisdiction of State and Territory courts in criminal cases**
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> (1) The laws of a State or Territory respecting the arrest and custody of offenders or persons charged with offences, and the procedure for:
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> (a) their summary conviction; and
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> (b) their examination and commitment for trial on indictment; and
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> (c) their trial and conviction on indictment; and
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> (d) the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith;

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12 "Court" means the Court of Appeal: *Criminal Code* 1899 (Qld), s 668.

13 See *R v Martens* [2010] 1 Qd R 564 at [7]-[8]; *Martens v Commonwealth & Another* (2009) 174 FCR 114 at [15].

14 See, generally, *Federal Commissioner of Taxation v Official Liquidator of EO Farley Ltd* (1940) 63 CLR 278 per Evatt J at 319-323; *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410 per Gummow J at 464.

> and for holding accused persons to bail, shall, subject to this section, apply and be applied so far as they are applicable to persons who are charged with offences against the laws of the Commonwealth in respect of whom jurisdiction is conferred on the several courts of that State or Territory by this section.
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> (2) The several Courts of a State or Territory exercising jurisdiction with respect to:
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> (a) the summary conviction; or
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> (b) the examination and commitment for trial on indictment; or
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> (c) the trial and conviction on indictment;
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> of offenders or persons charged with offences against the laws of the State or Territory, and with respect to the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith, shall, subject to this section and to section 80 of the Constitution, have the like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth."

[25] Section 2 of the *Judiciary Act* defines “appeal”: unless the contrary intention appears, it includes "an application for a new trial and any proceeding to review or call in question the proceedings decision or jurisdiction of any Court or Judge".

[26] The question for decision is whether s 68(2) of the *Judiciary Act* confers federal jurisdiction like the jurisdiction which is conferred upon the Court in relation to State matters by paragraph (a) of s 672A. (I refer to paragraph (a) rather than s 672A as a whole because I respectfully agree with Chesterman JA that the Commonwealth Attorney-General's letter to the President should be construed as a purported reference of the “whole case” to the Court.)

Discussion

[27] The general terms of s 68 should be construed in a way which gives effect to the important purposes which that provision serves in the federal criminal justice system. In *Martens v Commonwealth*[15] Logan J referred to statements in *The Queen v Murphy*[16] which emphasised the central role of s 68 in ensuring the administration of federal criminal law in each State upon the same footing as State law and avoiding the establishment of two independent systems of justice. Similarly, in *R v Gee & Anor*,[17] in which the High Court found that the word "appeal" in s 68(2) comprehended the reservation of questions of law arising at first instance for consideration by a Full Court, Gleeson CJ said:

> "[6] As was acknowledged by Doyle CJ, who was in the majority in the Full Court, the language of s 68(2) is both general and ambulatory. This is consistent with its purpose, which is to

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15 (2009) 174 FCR 114 at [18].

16 *The Queen v Murphy* (1985) 158 CLR 596 at 617.

17 (2003) 212 CLR 230.

'assimilate criminal procedure, including remedies by way of appeal, in State and Federal offences' [*Williams v The King [No. 2]* (1934) 50 CLR 551 at 558, per Rich J]." (at 240-241). In *Williams v The King [No 2]* Dixon J, speaking of the reference to appeal procedure, said:

> "But when this construction is given to the words of the provision, they necessarily extend to all remedies given by State law which fall within the description 'appeals arising out of the trial or conviction on indictment or out of any proceedings connected therewith'. This accords with the general policy disclosed by the enactment, namely, to place the administration of the criminal law of the Commonwealth in each State upon the same footing as that of the State and to avoid the establishment of two independent systems of criminal justice."

[7] That general policy reflects a legislative choice between distinct alternatives: having a procedure for the administration of criminal justice in relation to federal offences that is uniform throughout the Commonwealth; or relying on State courts to administer criminal justice in relation to federal offences and having uniformity within each State as to the procedure for dealing with State and federal offences. The choice was for the latter. The federal legislation enacted to give effect to that choice, therefore, had to accommodate not only differences between State procedures at any given time, but also future changes to procedures in some States that might not be adopted in others. That explains the use of general and ambulatory language, and the desirability of giving that language a construction that enables it to pick up procedural changes and developments as they occur in particular States from time to time." [18]

[28] In *Martens v Commonwealth*, Logan J referred to the decisions which found that s 68(2) did apply in relation to provisions which are indistinguishable from s 672A:

> [20] *Peel* 125 CLR 447 and a later decision of the High Court in relation to the operation of s 68 of the *Judiciary Act*, *Rohde v Director of Public Prosecutions (Cth)* (1986) 161 CLR 119 (*Rohde*), proved influential in persuading Ryan J in *Perrier v Kerr* (sued in his capacity as Minister for Justice) (unreported, Federal Court of Australia, Ryan J, VG 865 of 1995, 19 August 1997) to accept the correctness of the position adopted by the parties in that case which was that the effect of s 68 of the *Judiciary Act* was to grant to the respondent Commonwealth Minister (notably not the Attorney-General), in the context of an application for a pardon in respect of a federal offence, the discretionary power to refer that application to the then Full Court of the Victorian Supreme Court pursuant to s 584(a) of the

[18] See also per McHugh and Gummow JJ at 248, [38] to [41], Kirby J at 269-271, [113] to [118], 274, [131] and Callinan J at 289, [192], 295 [203].

> *Crimes Act 1958* (Vic) in like manner to the power granted to the Victorian Attorney-General under that provision in respect of a State offence. There was no issue in that case that only the Commonwealth Attorney-General, as opposed to the respondent Minister for Justice, could exercise the power made applicable by the *Judiciary Act*. His Honour also accepted as correct the further position of the parties, which was that the decision of the Minister for Justice not to refer the matter to the Full Court was a reviewable decision for the purposes of the ADJR Act, even though a decision to refuse the granting of a pardon was not.

[29] In the decisions directly on point the courts were denied the benefit afforded to this Court of argument against a finding of jurisdiction. No such argument was advanced in *Perrier v Kerr*[19] or in *Martens v Commonwealth.* In *R v Collie* jurisdiction was assumed to exist.[20] I have therefore thought it necessary to consider the question afresh.

[30] The reference in s 68 to "proceedings connected therewith" can be put to one side. The unilateral and discretionary act of the executive officer who is designated to act in connection with the pardoning power in making the reference is not itself capable of being characterised as "proceedings". The question is whether s 68 is capable of application on the footing that, under s 672A(a), the Court is "exercising jurisdiction with respect to…the hearing and determination of appeals arising out of" Mr Martens' trial or conviction.

[31] The central submission for Mr Martens was that the proceedings under s 672A amounted to an appeal for the purposes of s 68(2). Mr Martens' counsel emphasised the breadth of the definition of "appeal". In particular, and as was submitted for the Attorney-General the word "review" in the definition of "appeal" is capable of bearing a wide meaning.[21]

[32] The term "review" of course takes its meaning from its context.[22] Whilst each term, including the definition of "appeals", must be applied, it is important not to lose sight of the whole text of the provision and the broader context in which it falls to be applied. So far as is presently relevant, s 68(2) relevantly confers federal jurisdiction only upon a court and only when that court is "exercising jurisdiction with respect to…the hearing and determination of appeals arising out of" trial or conviction. The textual context also includes paragraphs (a)-(c) of s 68(2). So far as is directly relevant in this matter, the impression conveyed by the provision when it is read as a whole is that it is directed to the conferral of a jurisdiction which is analogous to the criminal jurisdiction exercised by State and Territory courts in appeals from convictions.

[33] Section 672A itself refers to the provisions of the *Criminal Code* (ss 668 to 672) which confer appellate jurisdiction upon this Court in criminal matters. In relation to Mr Martens' conviction, the Court's appellate jurisdiction was exhausted when it dismissed his appeal. In *Grierson v The King,*[23] the High Court found that the New South Wales Court of Criminal Appeal had no jurisdiction to hear an appeal after an

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19 Unreported, Ryan J, VG 865 of 1995, 23 August 1996, 19 August 1997.

20 *R v Collie*, unreported, Crockett CJ, Fullagar and Marks JJ, 190 of 1992, 18 December 1992.

21 *Bignell v New South Wales Casino Control Authority* (2000) 48 NSWLR 462 at 479-491.

22 See *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 261.

23 (1938) 60 CLR 431.

earlier appeal against conviction had been fully heard and determined. That decision applies with equal force in relation to the similar provisions in the *Criminal Code*.[24] There having been no appeal to the High Court, this Court's dismissal of Mr Martens' appeal fulfilled the essential aim of the judicial process of quelling the controversy between Mr Martens and the Commonwealth.[25] Thereafter such remedy as Mr Martens retained to remedy any injustice in his conviction lay only in a petition of mercy to the Governor-General.

[34] The jurisdiction which s 672A confers at the instance of the Queensland Attorney-General on consideration of a petition to the Governor of Queensland is quite unlike that which is conferred by ss 668 to 672 of the *Criminal Code* and by the similar provisions of the other States and of the Territories. It is not readily recognisable as appellate in nature. It does not confer upon a party dissatisfied with a result in the criminal proceedings a right to seek review of that result; it instead confers a discretionary power upon a designated officer of the State; in this case the jurisdiction is sought to be invoked only after the conclusion of the judicial process which established the guilt of the petitioner; and the designated officer of the State is empowered to invoke the jurisdiction only as an adjunct to the pardoning power.

[35] The relationship between the jurisdiction under s 672A and the pardoning power is of particular significance. The pardoning power is an aspect of one of the ancient prerogatives of the Crown, the Royal prerogative of mercy.[26] It is part of what Lord Diplock described as "a residue of miscellaneous fields of law in which the executive government retains decision-making powers that are not dependent upon any statutory authority".[27] In relation to convictions for offences created by the statute law of Queensland, the *Constitution of Queensland* 2001 expressly allocates the exercise of the pardoning power to the Governor in the name of the Sovereign.[28] The effect of a pardon is regulated by statute.[29]

[36] Although s 18 of the *Criminal Code* provides that nothing in it affects the Royal prerogative of mercy, reference of the whole case made in a petition to the Court for its determination must necessarily preclude the exercise of the pardoning power on

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24 *R v MAM* [2005] QCA 323 at 3-4; *R v Nudd* [2007] QCA 40; *R v Ali* [2008] QCA 39.

25 See *Huddart Parker & Co Proprietary Ltd v Moorehead* (1908) 8 CLR 330 per Griffith CJ at 357; *Elliott v The Queen* (2007) 234 CLR 38 per Gummow, Hayne, Heydon, Crennan and Kiefel JJ at 41 [5].

26 Joseph Chitty, *A treatise on the law of the prerogatives of the Crown: and the relative duties and rights of the subject* (1820), 88-95.

27 *Council of Civil Service Unions v The Minister for the Civil Services* [1985] AC 374 at 409.

28 *Constitution of Queensland* 2001, s 36(2). See *Australia Act* 1986 (Cth), s 7, and *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at [8].

29 Under s 677 of the *Criminal Code* a pardon has the effect of discharging the convicted person "from the consequences of the conviction". Under that provision, which reflects a view of the common law, a pardon leaves intact the conviction itself: *R v Carkeet* [2009] 1 Qd R 190 at [30], referring to *R v Foster* [1985] QB 115 and *Eastman v Director of Public Prosecutions of the Australian Capital Territory & Others* (2003) 214 CLR 318 per Heydon J at 351; cf ATH Smith, 'The Prerogative of Mercy, the Power of Pardon and Criminal Justice' (1983) *Public Law* 398, 417-422. Under ss 85ZR and 85ZS of the *Crimes Act* 1914 (Cth), a free and absolute pardon of a conviction of a Commonwealth offence which is granted because the person was wrongly convicted of the offence has a more beneficial effect than a pardon of an offence against the statute law of Queensland. For example, under s 85ZR such a pardoned person is taken for all purposes never to have been convicted of the offence and, under s 85ZS, such a person is not required by any Commonwealth, State or Territory law to disclose the fact that the person was charged with or convicted of the offence and may lawfully claim, on oath or otherwise, that he or she was not charged with or convicted of the offence.

the same petition. As Jordan CJ observed in *R v Gunn (No 1)*[30] about the indistinguishable provision in s 26(a) of the *Criminal Appeal Act 1912* (NSW), once the matter has been referred to the Court, "it passes out of the field of executive action, and falls to be heard and determined by the Court as if it were an appeal, with all the consequences of an appeal."[31] If the Court's decision is that the conviction should be set aside and a verdict of acquittal entered there will of course be no room for any pardon that otherwise might have been granted. If the Court sets aside the conviction and orders a re-trial the Governor's power to grant a pardon on the petition will again have been abdicated in favour of the Court's decision, although the pardoning power would arise afresh if the petitioner were again convicted. Finally, if the Court determines that the conviction should not be set aside on account of the case made in the petition that must also "determine" the whole case. That is what s 672A(a) contemplates. If it were not so, the Court would act only in an advisory capacity, contrary to the implication arising from the contrast between the words of paragraph (a) with those of paragraph (b) and contrary to Jordan CJ's dictum.

[37] It follows that s 672A necessarily implies that the Crown Law Officer is empowered to invoke the Court's jurisdiction only after a decision has been made, in the course of consideration of the petition presented to the Governor for exercise of the pardoning power, whether to: (1) grant a pardon without any reference to the Court; (2) decline a pardon without any reference to the Court; (3) defer consideration of the exercise of the pardoning power to enable the Crown Law Officer to obtain the advice of the Court on a reference of some point arising in the case made in the petition (s 672A(b)); or (4) abandon consideration of the exercise of the pardoning power in favour of a judicial decision on the whole case made in the petition on a reference by the Crown Law Officer under s 672A(a). It may be debatable whether any such decision must be formally made by the Governor, or whether the Crown Law Officer is implicitly vested with an independent power in this respect;[32] but (as Logan J's judgment in *Martens v The Commonwealth* illustrates) the decision must necessarily be made before the Crown Law Officer commences proceedings by referring a case or point to the Court for decision or advice.

[38] No doubt s 68(2) is not strictly limited to the conferral of federal jurisdiction. In order to meet its objects it must be construed as also conferring power upon the Commonwealth to invoke that federal jurisdiction by commencing proceedings.[33] But for the reasons I have given Mr Martens' contention requires that s 68(2) be construed as extending even further, to the conferral of an executive power to decide to abandon the power vested in the Governor-General to pardon or decline to pardon a conviction in favour of a judicial determination of the whole case presented in the petition for mercy. In my respectful opinion, s 68(2) is not apt to confer such power, even on the most favourable construction of that provision which is fairly open.

[39] That is the main ground upon which I would base my decision, but it is necessary also to consider the particular questions of construction which were agitated in the submissions.

[40] I accept that the term "appeal", if construed in isolation from its context, is capable of comprehending proceedings under s 672A(a), but in my opinion such

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30 (1942) 43 SR (NSW) 23 at 25.

31 See also *R v Young (No 2)* [1969] Qd R 566 (Douglas J, WB Campbell J and Matthews J) at 571.

32 See *Von Einem v Griffin and Olsen* (1998) 72 SASR 110; [1998] SASC 6858 by Prior J (with whose reasons Wicks J agreed) at [12] – [20] and by Lander J at [111] – [121].

33 *Peel v The Queen* (1971) 125 CLR 447.

proceedings are not properly characterised as an "appeal arising out of" trial or conviction. The subject matter of this reference is related to the conviction and the trial, but that does not answer the question posed by s 68. It is the source of the reference, or, more precisely, the case described in the reference, which is relevant, since it is that which s 672A(a) requires the Court to hear and determine. The petition itself must have reference to the conviction (as the introductory words of s 672A describe) and the Court must consider the conviction and any trial, but the case heard and determined by the Court arises out of the petition for mercy rather than out of the conviction or trial.

[41] It is necessary to refer to some cases which are submitted to support a contrary conclusion. In *Williams v The King [No. 2]*[34] the High Court considered the operation of s 68(2) of the *Judiciary Act* upon s 5D of the *Criminal Appeal Act of 1912* (NSW). Section 5D provided:

> "The Attorney-General may appeal to the Court of Criminal Appeal against any sentence pronounced by the Supreme Court or any Court of Quarter Sessions and the Court of Criminal Appeal may in its discretion vary the sentence and impose such sentence as to the said Court may seem proper."

[42] The question was whether s 68(2) operated to confer a like right of appeal on the Attorney-General for the Commonwealth against sentences imposed upon persons convicted of offences against the laws of the Commonwealth. The Court was evenly decided. Gavan Duffy CJ, Evatt and McTiernan JJ held that s 68 did not apply to s 5D in that way. Rich, Starke and Dixon JJ held to the contrary. Because it was Dixon J's view which subsequently prevailed in *Peel v The Queen*[35] it is useful to set out a critical passage in his reasons:

> "The New South Wales section gives the right of appeal against sentence to the Attorney-General of the State. It gives it to him in virtue of his office. He is the proper officer of the Crown in right of the State for representing it in the courts of justice. When sec. 68(2) speaks of the 'like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth', it recognizes that the adoption of State law must proceed by analogy. The proper officer of the Crown in right of the Commonwealth for representing it in the Courts is the Federal Attorney-General. I do not feel any difficulty in deciding that, under the word 'like' in the expression 'like jurisdiction,' the functions under sec. 5D of the State Attorney-General in the case of State offenders fall to the Federal Attorney-General in the case of offenders against the laws of the Commonwealth."[36]

[43] In *Peel v The Queen* the High Court held by majority[37] that s 68(2) applied in relation to s 5D to confer a right of appeal upon the Commonwealth Attorney-General. Menzies J said (at 457):

> "…if [s 68(2)] confers upon a convicted person the right to appeal, both against conviction and sentence – as I think it does – I have found no ground for construing it as not conferring a corresponding

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34 (1934) 50 CLR 551.
35 (1971) 125 CLR 447.
36 (1934) 50 CLR 551 at 561-562.
37 Windeyer J, Owen, Menzies and Gibbs JJ, Barwick CJ, McTiernan and Walsh JJ dissenting.

> right upon the Crown. It is the law of New South Wales that an appeal in a matter of State jurisdiction may be instituted by the Attorney-General of the State…When the appeal is in federal jurisdiction the implicit authority to invoke the jurisdiction that has been granted is, by virtue of the words 'like jurisdiction', given to the Attorney-General for the Commonwealth on behalf of the Crown."

[44] Gibbs J said (at 468 – 469):

> "The third question is whether the right of appeal which s 68(2) confers is given to the Attorney General of the Commonwealth. As Jordan CJ pointed in *R v Williams; R v Somme*, if s. 68(2):
>
> > '... is read as meaning that the jurisdiction is to be restricted to hearing appeals by persons designated by the State Act, it becomes nugatory, because neither persons convicted on New South Wales indictments nor the Attorney-General of New South Wales could have any concern with appeals arising out of trials or convictions for offences against the laws of the Commonwealth.'
>
> This provides a sound reason for concluding that in the application of s 68(2) 'the adoption of State law must proceed by analogy' (*Williams v The King [No.2]* (1934) 50 CLR at 561). Section 5 of the *Criminal Appeal Act,* 1912 (N.S.W) gives a right of appeal to a person convicted upon indictment under State law and s 68(2) in its operation on s. 5 gives a right of appeal to persons convicted upon indictment under the law of the Commonwealth. Section 5D of the *Criminal Appeal Act* gives the Attorney General of the State a right of appeal because he is the proper officer to represent the State; s. 68 (2) in its operation on s. 5D gives a right of appeal to the Attorney General of the Commonwealth as the proper officer to represent the Commonwealth. The functions exercised by the Attorney-General of the Commonwealth are like functions to those of the Attorney-General of the State and the jurisdiction exercised by the Court of Criminal Appeal in hearing and determining an appeal by the Attorney-General of the Commonwealth against a sentence imposed for an offence against Commonwealth law is a like jurisdiction to that exercised by the Court of Criminal Appeal in hearing an appeal by the Attorney-General of the State against a sentence imposed for an offence against the law of the State."

[45] In *Rohde v Director of Public Prosecutions*[38] the High Court applied *Peel v The Queen* in holding that s 68(2) of the *Judiciary Act* applied in relation to a section of the *Crimes Act* 1958 (Vic) which authorised the Victorian Director of Public Prosecutions to bring appeals against sentence. The result was that the Commonwealth Director of Public Prosecutions was empowered to appeal against a sentence imposed in relation to a conviction of a Commonwealth offence.

[46] As Logan J pointed out, Ryan J's decision in *Perrier v Kerr* that federal jurisdiction was conferred by s 68 in proceedings of this character was influenced by the High Court's decisions in *Peel v The Queen*[39] and *Rohde v Director of Public Prosecutions (Cth).*[40] Those decisions concerned the effect of s 68 in relation to

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38 Gibbs CJ, Mason and Wilson JJ at 123-124 and Brennan J at 126-127.

39 (1971) 125 CLR 447.

40 (1986) 161 CLR 119.

rights conferred by State statutes to bring sentence appeals. Those proceedings were readily recognizable as "appeals" which "arise out of" the trial or conviction or out of any proceedings connected therewith. Various reasons for that conclusion were given: the word "conviction" is capable of including sentence and s 68 was evidently designed to give prisoners "the same remedies by way of appeal in the case of Federal offences as exist in the case of State offences";[41] a sentence is sufficiently connected with the preceding trial and conviction;[42] and the sentence itself can be said to arise out of the conviction.[43] In light of the context which I have discussed, in my respectful opinion none of those reasons support the conclusion that the present proceeding should be characterised as an appeal which arises out of the trial or conviction such as to justify the assumption of federal jurisdiction in this matter. There is also no analogy here with the procedure for the reservation of a point of law which was found in *R v Gee & Anor* to amount to an "appeal" for the purposes of s 68(2).

[47] Nor is a proceeding on a reference necessarily to be characterised as an appeal arising out of a conviction or trial for the purposes of s 68 of the *Judiciary Act* merely because provisions in the form of s 672A are a recognized and important part of the criminal justice system,[44] or because s 672A(a) stipulates that the case "shall be heard and determined by the court as in the case of an appeal by a person convicted".

[48] Chesterman JA has referred to *R v Chard*,[45] in which Lord Diplock (with whose speech Lords Scarman, Roskill, Brandon of Oakbrook and Templeman agreed) said that:

> "… the person whose case which resulted in his conviction is the subject matter of the reference is to be treated for all purposes as if he were a person upon whom there is conferred by section 1 of the Criminal Appeal Act 1968 a general right of appeal to the Court of Appeal on any ground which he wishes to rely (whether it be of law or fact or mixed law and fact), without need to obtain the prior leave of that court."

[49] The reason why I think that *R v Chard* does not assist Mr Martens is that it did not involve any question of the character which arises under s 68 of the *Judiciary Act*. The question was whether upon the proper construction of s 17(1)(a) of the *Criminal Appeal Act* 1968 the person whose conviction was in issue was entitled to argue matters which were not connected with the reasons for the reference by the Secretary of State. As appears from an immediately preceding observation by Lord Diplock, the quoted passage simply recorded what was found to be the natural and ordinary meaning, free from any ambiguity, of the statutory words.

[50] Similar questions about the manner of exercise of the reference jurisdiction have arisen in Australia. In a passage in *R v Gunn (No 1)*[46] which has often been cited, Jordan CJ said that the indistinguishable provision in s 26(a) of the *Criminal Appeal Act 1912* (NSW) should be regarded, "as investing the Court with jurisdiction to

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41 *Williams v The King [No 2]* (1934) 50 CLR 551 per Dixon J at 560-561.

42 *Peel v The Queen* (1971) 125 CLR 447 per Menzies J at 457.

43 *Peel v The Queen* (1971) 125 CLR 447 per Gibbs J at 468.

44 *Pepper v Attorney-General* [2008] 2 Qd R 353 per Muir JA, de Jersey CJ and Fraser JA agreeing, at [11] – [12].

45 [1984] AC 279.

46 (1942) 43 SR (NSW) 23 at 25, 26.

deal with the matter as if it were an appeal against conviction duly instituted by the prisoner himself in the ordinary way, notwithstanding that his ordinary right of appeal has been exercised and exhausted." Jordan CJ's phrase "as if it were an appeal" reflected the statutory text "as in the case of an appeal". That requirement imposes a limitation upon the manner in which the Court is to deal with the case after it has been referred to the Court, in that the case is to be determined by "legal principles appropriate to an appeal".[47] As Gummow, Hayne, Callinan and Heydon JJ said in *Mallard v The Queen*[48] the words "as if it were an appeal" have the "inhibitory purpose and effect" of confining the Court "to the making of orders, and the following of procedures apposite to an appeal, and further, and perhaps most relevantly, to require the Court to consider whether the overall strength of the prosecution case requires the Court to apply the proviso". Whilst the manner in which the jurisdiction is exercised and the orders that may be made are assimilated to those in an appeal, that does not convert a case arising out of a petition for mercy to an appeal arising out of the trial or conviction. In my respectful opinion it does not justify the extension of s 68(2) to the conferral of federal executive powers which fall for exercise prior to and as a pre-condition of the commencement of proceedings in the Court.

[51] Counsel for the Commonwealth Attorney-General helpfully responded to the Court's request for information about the history of provisions like s 672A of the *Criminal Code* and s 68 of the *Judiciary Act*. This legislative history is part of the context which may bear upon the construction of s 68(2).[49] The original form of s 68 did not refer to appeals. The original provision was considered in *Seaegg v The King*,[50] in which the High Court held that it did not confer jurisdiction on a State Court of Criminal Appeal to hear an appeal by a person convicted in a State court on an indictment filed by the Commonwealth Attorney-General in respect of an offence against the laws of the Commonwealth. The Commonwealth Parliament subsequently amended s 68 by adding what now appears as paragraph (d) in subsection (1) and the reference to appeals in subsection (2): *Judiciary Act* 1932 (Cth), s 2. Those amendments made it clear that s 68(2) confers the same jurisdiction in respect of appeals against convictions for Commonwealth offences as is conferred by the relevant laws of the States in relation to appeals against convictions for State offences. That this was the sole purpose of the 1932 amendments clearly appears from the Commonwealth Attorney-General's second reading speech for the Bill for the *Judiciary Act* 1932.[51] The Attorney-General referred to the result of *Seaegg v The King* and identified the mischief which the amendment was intended to cure as being the absence in a person convicted of a federal offence of "the same right of appeal as a person convicted under State law". The Attorney-General pointed out that this mischief had arisen because when the *Judiciary Act* 1903 (Cth) was enacted a convicted person did not have a right of appeal in the ordinary sense, but that since then all of the States had conferred such

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47 *Ratten v The Queen* (1974) 131 CLR 510 per Barwick CJ at 514, whose statement to that effect was quoted with approval by Toohey and Gaudron JJ (with whom Brennan J agreed) in *Mickelberg v The Queen* (1989) 167 CLR 259 at 311.

48 (2005) 224 CLR 125 at 131.

49 See *K. & S. Lake Freighters Proprietary Limited v Gordon & Gotch Limited* (1985) 157 CLR 309 per Mason J at 315.

50 (1932) 48 CLR 251.

51 Parliamentary Debates (Hansard), 22 November 1932, pp 2607 – 2608. This material is admissible if the provision is ambiguous: *Acts Interpretation Act* 1901 (Cth), s 15AB.

a right. As I have indicated, s 672A and similar provisions plainly do not confer a right of appeal upon a convicted person.

[52] A precursor of s 672A was by then in force, having been inserted by the *Criminal Code Amendment Act* 1913 (Qld) and similar statutory provisions were also then present in the legislation of the other States.[52] Yet the 1932 amendments did not refer to proceedings of the kind provided for in s 672A and nor did the Commonwealth legislate to regulate the pardoning power exercisable by the Governor-General in the way which is implicit in s 672A.[53]

Conclusion

[53] The reference to appeals in s 68(2) was not designed to adapt to and apply in the federal sphere the adjunct to the pardoning power vested in the State Governor which is enacted in s 672A of the *Criminal Code*. In my opinion the terms of s 68(2) are not apt to achieve that result.

[54] It remains open to the Governor-General to exercise the power to pardon Mr Martens' conviction. In considering whether to exercise that power, it may safely be assumed that the Governor-General would attribute weight to this Court's conclusion that fresh evidence has demonstrated that the conviction is unreasonable. However, in my opinion the Court has no jurisdiction to make any order in favour of Mr Martens.

[55] I would order that a warrant issue for the arrest of Mr Martens, such warrant to lie in the Registry for 21 days pending execution. I would also grant Mr Martens liberty to apply to this Court for any further order concerning the period for execution of that warrant or for further bail.

[56] **CHESTERMAN JA**: The petitioner was charged with an offence against s 50BA of the *Crimes Act* 1914 (Cth). The indictment alleged:

> "Between 10th … September 2001 and the 16th … September 2001 at Port Moresby in … Papua New Guinea Frederick Arthur Martens, an Australian citizen, while outside Australia, engaged in sexual intercourse with a person who was under 16 years old … ."

Section 50BA provides that:

> "(1) A person must not, while outside Australia, engage in sexual intercourse with a person who is under 16."

The maximum penalty is imprisonment for 17 years. Section 50AD limits the operation of s 50BA to Australian citizens and residents.

Background

[57] The charge was tried in the Supreme Court at Cairns in October 2006 before Jones J and a jury. After seven days, on 30 October 2006, the petitioner was convicted and sentenced to a term of imprisonment of five and a half years. The non-parole period was set at three years.

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52 *Criminal Appeal Act* 1912 (NSW), s 26; *Criminal Code Amendment Act* 1913 (WA), s 21; *Criminal Appeal Act* 1924 (SA), s 22; *Criminal Code Act* 1924 (Tas), s 419; *Crimes Act* 1928 (Vic), s 610.

53 I have not found any provision analogous to s 672A in the legislation which currently applies in the Territories. No such provision is in the *Crimes Act* 1900 (ACT), Part 20 ("Inquiries into convictions") or in the *Crimes (Sentence Administration) Act* 2005 (ACT), Part 13.2 ("Remissions and Pardons").

[58] An appeal against the conviction and an application for leave to appeal against the sentence were respectively dismissed and refused on 20 April 2007.[54]

[59] On 19 March 2008 the petitioner applied to the Commonwealth Minister for Home Affairs for a pardon granted as an exercise of the Royal Prerogative of Mercy or, alternatively, requested that his case be referred to the Court of Appeal pursuant to s 672A of the *Criminal Code* (Qld).

[60] Section 672A provides:

> "**Pardoning power preserved**
>
> Nothing in sections 668 to 672 shall affect the pardoning power of the Governor on behalf of Her Majesty, but the Crown Law Officer, on the consideration of any petition for the exercise of the pardoning power having reference to the conviction of any person or to any sentence passed on a convicted person, may –
>
> (a) refer the whole case to the Court, and the case shall be heard and determined by the Court as in the case of an appeal by a person convicted; or
>
> (b) if the Crown Law Officer desires the assistance of the Court on any point arising in the case with a view to the determination of the petition, refer that point to the Court for its opinion thereon, and the Court shall consider the point so referred and furnish the Crown Law Officer with its opinion thereon accordingly."

Sections 668 and 672 of the Code deal with appeals by the Queensland Attorney-General and by convicted persons. The Crown Law Officer is the Attorney-General or Director of Public Prosecutions. Court means the Court of Appeal.

[61] On 4 September 2008 the Minister for Home Affairs declined to refer the application for a pardon to the Court of Appeal and declined to recommend that the Governor-General grant a pardon. The following month the petitioner commenced proceedings in the Federal Court pursuant to the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) seeking a review of the decision to refuse his application. On 6 March 2009 Logan J set aside the decision and ordered that the matter be remitted for further consideration according to law.

[62] On 9 April 2009 the Attorney-General for the Commonwealth wrote to the President of the Court of Appeal. The letter set out the history of the proceedings, referred to the judgment of the Federal Court, and continued:

> "I have reconsidered Mr Martens' application, including information provided since the Federal Court's judgment. Considering the case as a whole, I believe that evidence has been presented that might raise a significant possibility that Mr Martens would be acquitted by a jury acting reasonably. I have therefore decided to refer Mr Martens' case to the Court of Appeal under s 672A of the Queensland Criminal Code."

[63] Although the Attorney's letter did not say so expressly the terms of the reference take it within s 672A(a), not (b). That is the "whole case" has been referred to the

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[54] *R v Martens* [2010] 1 Qd R 564.

Court which must hear and determine it "as in the case of an appeal by a person convicted."

Jurisdiction

[64] The respondent raised the possibility that the Court may not have jurisdiction to entertain the reference. The Court itself expressed considerable doubt about its jurisdiction when determining the petitioner's application for bail.[55] The Court said:

> "[12] It may be accepted that the jurisdiction conferred by s 68(2) should not be understood so narrowly as to be rendered nugatory, but under s 672A, the jurisdiction of this Court to entertain a reference made to it, which is thereupon to be determined as if it were an appeal, is an extraordinary jurisdiction. It is a jurisdiction which is enlivened only by action on the part of the Attorney-General of Queensland.
>
> [13] The only right of appeal against a conviction on indictment is conferred on the person convicted by s 668D(1) of the *Criminal Code*. Once an appeal under this section has been heard and determined by this Court, the jurisdiction of this Court is exhausted and this Court has no jurisdiction to entertain any further appeal. Accordingly, under the *Criminal Code*, absent a reference from the Attorney-General for the State of Queensland, this Court has no jurisdiction at all in respect of the conviction in this case.
>
> [14] Section 68(2) of the *Judiciary Act* does not require or authorise this Court to treat the Attorney-General of the Commonwealth as if he were the Attorney-General for the State of Queensland for the purposes of exercising the power conferred peculiarly on the Attorney-General of Queensland. It is difficult to see how the power conferred by s 672A on a specified person, namely the Attorney-General of Queensland, and on him or her alone, is also conferred on a different person, namely the Attorney-General of the Commonwealth. Certainly s 68(2) of the *Judiciary Act* does not reveal an intention to confer such a power. This difficulty is compounded by the consideration that the extraordinary jurisdiction enlivened by the Attorney-General's reference under s 672A arises as a consequence of the exercise of power under a statutory provision which is an adjunct to the prerogative of mercy of the Crown in right of the State of Queensland."

[65] The Court, however, resolved the application for bail:

> "… on the basis that ... it is at least arguable that the Commonwealth Attorney-General may enliven the jurisdiction of this Court under s 672A".

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55 *R v Martens* [2009] QCA 139.

[66] The critical question is whether s 68(2) of the *Judiciary Act* 1903 (Cth) operates so as to confer (a) the power under s 672A of the Code to refer:

> "the consideration of any petition for the exercise of the pardoning power".

on the Commonwealth Attorney-General; and (b) jurisdiction on the Court to hear a reference from the Commonwealth Attorney-General.

[67] Section 68(2) provides:

> "The several Courts of a State or Territory exercising jurisdiction with respect to:
>
> (a) …
>
> (b) …
>
> (c) the trial and conviction on indictment;
>
> of offenders or persons charged with offences against the laws of the State or Territory, and with respect to the hearing and determination of appeals arising out of any such trial or conviction or out of any proceedings connected therewith, shall, subject to this section and to section 80 of the Constitution, have the like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth."

[68] Appeals are defined in s 2:

> "***Appeal*** includes an application for a new trial and any proceeding to review or call in question the proceedings, decision or jurisdiction of any Court or Judge."

[69] The question whether s 68 operates so as to allow the Commonwealth Attorney-General to refer a petition for a pardon to the Court, depends, I think, upon the nature of the reference. If it could be properly regarded as an appeal arising out of the petitioner's conviction then the subsection should apply and the Court have the "like jurisdiction" as it has in the case of persons convicted of an offence against a law of the State. Appeals are widely defined.

[70] The reference was a proceeding which calls in question the decision of the Supreme Court constituted by Jones J and the jury resulting in the petitioner's conviction and sentence. The plain words of the *Judiciary Act* might lead one to conclude that the reference was an appeal and is within the terms of s 68(2).

[71] Gleeson CJ emphasised the width of the definition in *R v Gee and Anor* (2003) 212 CLR 230 which was concerned with whether the procedure for the reservation of a point of law pursuant to s 350(1)(a) of the *Criminal Law Consolidation Act* 1935 (SA) was made applicable by s 68(2) to proceedings for an offence of defrauding the Commonwealth contrary to the *Crimes Act* 1914 (Cth). Gleeson CJ noted (242):

> "There is no reason why the reference to appeals in s 68(2) should not be applied with full generality … . It would be contrary to the purpose of the legislation to treat Div 3 [of the *Judiciary Act*] as the exclusive source of jurisdiction in relation to appeals by way of case stated. The case stated procedure provided for by s 350 … is a form

> of appeal. It does not further the general policy of placing the administration of the criminal law of the Commonwealth in each State upon the same footing as that of the State to treat the provisions of Div 3 … as, in effect, confining the case stated procedures provided for by the *Judiciary Act* to those of the kind in force at the time of Federation."

[72] A review of the cases reinforces the conclusion. *Mickelberg v The Queen* (1989) 167 CLR 259 was an application for special leave to appeal from a decision of the Court of Criminal Appeal of Western Australia which dismissed a reference to it pursuant to s 21(a) of the (WA *Criminal Code*) which is relevantly identical to s 672A(a). Toohey and Gaudron JJ (with whom Brennan J agreed) said (295):

> "Pursuant to s. 21(a) … the whole case against (Mickelberg) was referred to the Court of Criminal Appeal '[to] be heard and determined … as in the case of an appeal by a person convicted'. It is convenient to refer to the *proceeding thus constituted as an appeal*." (emphasis added).

Their Honours also said (311):

> "Prima facie, the reference of the whole case required the Court of Criminal Appeal to consider the case in its entirety, subject only to the limitation that it 'be heard and determined … as in the case of an appeal by a person convicted'. That limitation necessitates that the matter be determined by 'legal principles appropriate to an appeal': *Ratten* … per Barwick CJ. See also *R v Gunn* … per Jordan CJ and *Allen, Allen and Winter*".

[73] *Ratten v The Queen* (1974) 131 CLR 510 was a case in which, after he was convicted of murder, Ratten petitioned the (Victorian) Attorney-General for a pardon pursuant to s 584 of the *Crimes Act* 1958 which is in the same terms as s 672A. Barwick CJ said (514):

> "As the Full Court was required to treat the reference to it under s. 584 as an appeal, it was bound in dealing with it to act upon legal principles appropriate to an appeal."

[74] According to the head-note in *R v Gunn (No 1)* (1942) 43 SR (NSW) 23 the petitioner:

> "… was convicted and sentenced upon a charge of obtaining property by false pretences… His appeal … was dismissed … and the High Court rejected his application for leave to appeal … He subsequently presented to the Governor a petition for the exercise of the pardoning power… The Minister of Justice referred the whole case to the Court of Criminal Appeal … under s. 26(a) of the Criminal Appeal Act of 1912."

That section was in the same terms as s 672A.

[75] Jordan CJ said (25):

> "It is to be observed that the section is restricted to cases in which there has been a petition for the exercise of the pardoning power; and it contemplates one or other of two courses being taken. Clause (a)

> deals with the case where … the Executive comes to the conclusion that it would be undesirable to dispose of the petition by executive action … and that it is desirable instead that the whole case should be disposed of judicially and by a Court, in strict accordance with the law. If so, the Minister of Justice may refer it to the Court, in which case it passes out of the field of executive action, and falls to be heard and determined by the Court as if it were an appeal, with all the consequences of an appeal."

[76] The Chief Justice went on (25, 26):

> "If the matter were *res integra*, I should feel considerable difficulty in finding in clause (a) … any indication of intention on the part of the Legislature to empower the Minister of Justice, in effect, to invest a convicted person, from time to time, with new rights of appeal, in a case in which his statutory right of appeal has already been exercised and exhausted …
>
> The point has never been expressly decided. … in the case of *Davies v R* (1937) 57 CLR 170 an appeal had been heard and dismissed by the Supreme Court of Victoria. … On an application for special leave to appeal … the High Court itself suggested action under a provision corresponding with s. 26(a), and, that action having been taken, the Supreme Court of Victoria treated itself as seized of the matter as an appeal and dismissed the appeal. The High Court, upon a further application for special leave to appeal, treated the matter as being properly before it, granted leave, entertained the appeal, allowed it, and directed a new trial, a course which it could have taken only if the statutory provision caused a general reference to invest a convicted person with what was, in effect, a new right of appeal.
>
> Having regard … particularly to … *Davies v R* … I think that … we should … regard the fact of the Minister's general reference under s. 26(a) as investing the Court with jurisdiction to deal with the matter as if it were an appeal against conviction duly instituted by the prisoner himself in the ordinary way, notwithstanding that his ordinary right of appeal has been exercised and exhausted."

[77] The third case referred to in *Mickelberg, Allen, Allen and Winter* (1910) 5 Cr App Rep 225 is reported briefly. The "prisoners were convicted at the Chester Assizes … of robbery with violence and were sentenced to … imprisonment with hard labour". There was no appeal but the case was referred to the Court of Criminal Appeal pursuant to s 19(a) of the *Criminal Appeal Act* 1907 (UK). Alverstone LCJ said (227):

> "Cases of this kind are referred to us as if they were appeals, and cannot be treated upon considerations different from those which are applicable in the case of appeals."

Section 19(a) was to the same effect as s 672A(a) of the Code.

[78] The Full Supreme Court of Victoria in *Re Matthews and Ford* [1973] VR 199 considered a reference by the Attorney-General under s 584(a) of the *Crimes Act* 1958 (Vic) the terms of which have already been noted. The Court said (200):

> "The reference by the Attorney-General under s 584(a) … invests this Court with jurisdiction to deal with the matter in the way of an ordinary appeal (see *R v Gunn*) … and empowers this Court to receive fresh evidence on the reference … The functions of the Court on the hearing of the reference … were described by Crisp J in *Aylett v R* [1956] Tas. S.R. 74, at 81, as follows: 'We sit here because, as Jordan, CJ, pointed out in … *Gunn* … an executive decision has been made that the matter should be dealt with judicially and not administratively. We are not a royal commission, a court or board of inquiry with a duty to inquire and report but a judicial tribunal with a duty to hear and determine. … the section … says that the case shall be 'determined' by the court and it will be noted that in all the cases that have been cited it is the court that has decided the action to be taken on the reference, and it does so we think judicially and not administratively. In effect, by action of the executive the matter has been removed to the judicial sphere and there it stays. It does not return. … the royal prerogative of mercy of course remains and is unaffected by these proceedings … but as far as the court is concerned its exercise is a matter of complete executive discretion wholly distinct from these proceedings.'"

[79] One sees from the cases that there has been over the years a difference in opinion as to whether, on a reference under a section such as 672A, the Court is to have regard only to the points referred to it by the Minister or Attorney, or whether the Court should consider the whole case including the evidence and all the points considered at trial and on earlier appeal. That debate has no relevance to the present reference and has been authoritatively settled in favour of the second approach. I mention it only because the authorities next to be referred to were concerned with that debate, but in providing the answer they affirm what has been expressed in the cases already mentioned, that the reference is in the nature of and, indeed, is an appeal.

[80] *Mallard v The Queen* (2005) 224 CLR 125 was another appeal from the determination of the Supreme Court of Western Australia to which had been referred a petition for clemency by a prisoner convicted of murder who had served eight years of his sentence. The Supreme Court held that its jurisdiction was confined to fresh materials and that matters previously dealt with at the trial and on the appeal against conviction could not be reopened. The High Court held that the Supreme Court should have heard the "whole case", all evidence properly admissible. The reference to the Supreme Court was made pursuant to s 140 of the (WA) *Sentencing Act* 1995 which had replaced s 21 of the *Criminal Code* (WA). The terms of s 140 differ slightly from the previous legislation. It provides:

> "(1) A petition for the exercise of the Royal Prerogative of Mercy may be referred … to the Court of Criminal Appeal either –
>
> (a) for the whole case to be heard and determined as if it were an appeal by the offender against the conviction or against the sentence…".

[81] Gummow, Hayne, Callinan and Heydon JJ said (131):

> "Subject only to what we will say later about the words 'as if it were an appeal' … the explicit reference to 'the whole case' … conveys no hint of any inhibition upon the jurisdiction of the Court of Criminal Appeal on a reference. Indeed, to the contrary, the words

> 'the whole case' embrace the whole of the evidence properly admissible, whether 'new', 'fresh', or previously adduced, in the case against, and the case for the appellant … The inhibitory purpose and effect of the words 'as if were an appeal' are merely to confine the Court to the making of orders, and the following of procedures apposite to an appeal, and further, and perhaps most relevantly, to require the Court to consider whether the overall strength of the prosecution case requires the Court to apply the proviso".

[82] Their Honours referred to *Mickelberg*, and importantly to *R v Chard* [1984] AC 279 in which Lord Diplock (with the agreement of Lords Scarman, Roskill, Brandon and Templeman) said (289):

> "… the person whose case which resulted in his conviction is the subject matter of the reference is to be treated for all purposes as if he were a person upon whom there is conferred by section 1 of the Criminal Appeal Act 1968 a general right of appeal to the Court of Appeal on any ground which he wishes to rely".

[83] The reference in Chard's case had been made pursuant to s 17 of the (UK) *Criminal Appeal Act* 1968 which provided:

> "(1) Where a person has been convicted on indictment … the Secretary of State may …
>
> (a) refer the whole case to the Court of Appeal and the case shall then be treated for all purposes as an appeal to the court by that person".

That language is more emphatic and more explicit than appears in s 672A and equivalent provisions but, as I read the judgment of Lord Diplock (292-293) his Lordship had come to the clear opinion that the effect of s 17(a) was identical to that of the earlier provision, which it replaced, s 19(a) of the *Criminal Appeal Act* 1907. This section was in the same terms as s 672A.

[84] This review of authority leads to, indeed compels, the conclusion that the proceeding which follows a reference to the Court pursuant to s 672A is an appeal and is to be determined as an appeal against conviction (or sentence). Accordingly, s 68(2) of the *Judiciary Act* confers the "like jurisdiction" to entertain the reference with respect to those charged with an offence against a law of the Commonwealth as the Court has with respect to persons convicted of an offence against State law.

[85] The first objection made to the applicability of s 68(2) expressed by the Court on the bail application, that the Court has no jurisdiction to entertain another appeal is, I think, answered. The exposition of the nature of a reference by Jordan CJ in *Gunn* is explicit. The hearing of a reference is an appeal.

[86] The second objection, that s 672A confers the power to refer a petition for pardon upon, and specifically only upon, the Attorney-General for the State of Queensland is I think met by the reasoning in *Peel v The Queen* (1971) 125 CLR 447 and *Williams v The King [No. 2]* (1934) 50 CLR 551, in particular the judgment of Dixon J.

[87] In *Peel* Owen J (458) explained that the case:

> "… raises the question whether s. 68(2) of the *Judiciary Act*, when read with the New South Wales *Criminal Appeal Act* and particularly with s. 5D of that Act, operates so as to enable the Attorney-General of the Commonwealth to appeal against a sentence imposed upon a person convicted of an offence against a law of the Commonwealth. That same question came before this Court in *Williams* … and on it the Court was equally divided, Gavan Duffy C.J. and Evatt and McTiernan JJ. being of opinion that no such appeal lay, while Rich, Starke and Dixon JJ. took the contrary view. In the result the judgment of the Court of Criminal Appeal … delivered by Jordan C.J., stood, that Court having held that the Attorney-General of the Commonwealth had a right of appeal".

[88] Section 5D of the *Criminal Appeal Act* 1912 (NSW) gave the (State) Attorney-General a right of appeal against any sentence pronounced by the Supreme Court or a Court of Quarter Sessions. *Peel* held that s 68(2) of the *Judiciary Act* operated on s 5D so as to enable the Commonwealth Attorney-General to appeal against a sentence imposed for an offence against a law of the Commonwealth. Menzies J said (457):

> "It is the law of New South Wales that an appeal in a matter of State jurisdiction may be instituted by the Attorney-General of the State: … s. 5D. When the appeal is in federal jurisdiction the implicit authority to invoke the jurisdiction that has been granted is, by virtue of the words 'like jurisdiction', given to the Attorney-General for the Commonwealth on behalf of the Crown."

[89] Owen J (in *Peel* at 459) quoted with approval what Jordan CJ had said in *Williams* (1934) 34 SR NSW 143 at (152):

> "I think that what s. 68 (2) says is that when you have an offence against a law of the Commonwealth then as regards the person charged therewith this Court has – not the same but – a 'like' appellate jurisdiction as it has in the case of a person charged with an offence against the law of a State. I think that … the person charged may appeal notwithstanding that he does not come within s. 5 (1) because not convicted on a New South Wales indictment; and I think that it also follows that the person concerned on behalf of the Crown with the prosecution of offenders may appeal notwithstanding that he does not come within s. 5D because he is not the New South Wales Attorney-General, I think that by s. 5D the right of appeal is given to the Attorney-General of New South Wales in the character of the person responsible for the indictment; just as the right of appeal is given to the person convicted on the New South Wales indictment in the character of the person damnified by the conviction. I am of the opinion therefore that by virtue of the combined operation of s. 68 (2) … and s … 5D … an appeal may be maintained to this Court … by the parties concerned in the conviction, that is to say by the person convicted … and by the Attorney-General of the Commonwealth as representing the Crown".

[90] Gibbs J said (469):

> "Section 5 of the *Criminal Appeal Act*, 1912 (N.S.W.) gives a right of appeal to a person convicted upon indictment under State law and s. 68 (2) in its operation on s. 5 gives a right of appeal to persons convicted upon indictment under the law of the Commonwealth. Section 5D of the *Criminal Appeal Act* gives the Attorney-General of the State a right of appeal because he is the proper officer to represent the State; s. 68(2) in its operation on s. 5D gives a right of appeal to the Attorney-General of the Commonwealth as the proper officer to represent the Commonwealth. The functions exercised by the Attorney-General of the Commonwealth are like functions to those of the Attorney-General of the State and the jurisdiction exercised by the Court of Criminal Appeal in hearing and determining an appeal by the Attorney-General of the Commonwealth against a sentence imposed for an offence against Commonwealth law is a like jurisdiction to that exercised by the Court of Criminal Appeal in hearing an appeal by the Attorney-General of the State against a sentence imposed for an offence against the law of the State."

[91] The judges who constituted the majority in *Peel* expressed their preference for the judgment of Dixon J in *Williams [No 2]* (1934) 50 CLR 551 (560: 561-2):

> "A provision conferring jurisdiction to hear and determine appeals … may … be … open to an interpretation by which it gives a jurisdiction to review proceedings not hitherto subject to appeal and so creates new remedies by conferring power to administer them. … when this construction is given to the words of the provision, they necessarily extend to all remedies given by State law which fall within the description 'appeals arising out of the trial or conviction on indictment or out of any proceedings connected therewith.' This accords with the general policy disclosed by the enactment, namely, to place the administration of the criminal law of the Commonwealth in each State upon the same footing as that of the State and to avoid the establishment of two independent systems of criminal justice.
>
> ....
>
> The New South Wales section gives the right of appeal against sentence to the Attorney-General of the State. It gives it to him in virtue of his office. He is the proper officer of the Crown in right of the State for representing it in the courts of justice. When sec. 68 (2) speaks of the 'like jurisdiction with respect to persons who are charged with offences against the laws of the Commonwealth,' it recognizes that the adoption of State law must proceed by analogy. The proper officer of the Crown in right of the Commonwealth for representing it in the Courts is the Federal Attorney-General. I do not feel any difficulty in deciding that, under the word 'like' in the expression 'like jurisdiction,' the functions under sec. 5D of the State Attorney-General in the case of State offenders fall to the Federal Attorney-General in the case of offenders against the laws of the Commonwealth."

[92] This exposition of s 68(2) serves to overcome the second objection. The section "operates by analogy". The right to refer a petition for a pardon to the Court pursuant to s 672A may by its terms be conferred exclusively upon the Attorney-

General for the State of Queensland, but that cannot prevent s 68(2) operating according to its terms to confer, by analogy, the same power upon the Commonwealth Attorney-General. The jurisdiction can only be invoked if the Commonwealth Attorney-General can refer a petition. The right which, by analogy, attaches to the Commonwealth Attorney-General allows the Attorney to refer a petition to the Court which has like jurisdiction with respect to persons charged with offences against the laws of the Commonwealth as it has with respect to those charged with laws against the State. Section 68(2) therefore operates on s 672A so as to permit the reference made in this case.

[93] In *Gee* Gleeson CJ described the operation of s 68(2) by reference to what Dixon J had said in *Williams*. The Chief Justice said (241):

> "That general policy reflects a legislative choice between distinct alternatives: having a procedure for the administration of criminal justice in relation to federal offences that is uniform throughout the Commonwealth; or relying on State courts to administer criminal justice in relation to federal offences and having uniformity within each State as to the procedure for dealing with State and federal offences. The choice was for the latter. … That explains the use of general and ambulatory language, and the desirability of giving that language a construction that enables it to pick up procedural changes and developments as they occur in particular States from time to time."

[94] To achieve uniformity within Queensland as to the procedure for dealing with State and Federal offences it is necessary that persons convicted in Queensland courts of an offence against a law of the Commonwealth have the same rights to have their petitions for a pardon referred to the Court pursuant to s 672A as do those convicted of State offences. This requires reading s 68(2) as extending the power to make the reference to the Commonwealth Attorney-General.

[95] It should be noted that the same conclusion was reached in two judgments at first instance although in neither case was the point argued. In *Martens v Commonwealth* (2009) 174 FCR 114, the application to review the refusal of the Minister for Home Affairs to refer the petitioner's petition to the Court of Appeal, Logan J, having discussed authorities including *Peel* and *Williams,* concluded:

> "[40] … it was lawfully possible for the Minister to decide whether or not to refer the case to the Court of Appeal for the purposes of s 68 of the *Judiciary Act* in its application of s 672A of the Queensland Criminal Code."

[96] In *Perrier v Kerr* (VG 865 of 1985, 17 August 1987, unreported) Ryan J determined an application to review the refusal of the Commonwealth Minister for Justice to refer a petition to the Supreme Court of Victoria pursuant to s 584 of the *Crimes Act*. Ryan J said (2):

> "It was the submission of Counsel for the applicant, and not disputed by Counsel for the respondent, that the effect of s68(2) of the Judiciary Act is to vest in the Commonwealth Attorney-General the power referred to in s 584 … . Counsel relied upon … *Peel* … .
>
> I agree … that s584(a) … when read in conjunction with s68(2) … operates to vest the corresponding equivalent discretionary power in the Commonwealth Attorney-General."

Facts

[97] In the exercise of the jurisdiction invoked by the reference the Court must consider "the whole case" and examine all relevant evidence properly admissible whether it be new, fresh, or adduced in the trial, as *Mallard* explains.

[98] At the time of the offence the complainant (to whom I shall refer as "GN") was a 14 year old girl who lived with her family in Morehead, a small village in a remote part of the Western Province of Papua New Guinea ("PNG"), near the border with Indonesia. She turned 14 on 10 September 1987. The petitioner is a man in his 50s who was employed as a commercial pilot flying light aircraft within PNG and between PNG and Australia. At the relevant time the petitioner was employed by the owner of a tourist resort at Bensbach, near Morehead. He flew passengers and cargo between the resort and Port Moresby. The flight was not direct. The aircraft landed on the island of Daru, to take on passengers, or put them down, and/or to refuel.

[99] It will, I think, be helpful to set out a summary of the contentions of both the petitioner and the respondent to assist in understanding the significance of the evidence to which detailed reference will have to be made, and to put the evidence and the arguments in context.

[100] The respondent's case, advanced by the prosecution at the petitioner's trial, was that in 2001 the petitioner flew GN twice from Morehead to Port Moresby. The first flight was in March and was for the purpose of taking GN to the capital to obtain a passport. The second flight occurred between 10 and 16 September, the dates coinciding with those in the indictment. GN went with the petitioner as a result of subterfuge on his part. On arrival in Port Moresby he took her to his home where she spent the night, during which there was an act of non-consensual intercourse. The next day the petitioner drove GN to her uncle's house, where she stayed for a time.

[101] The petitioner denied any act of sexual intimacy with GN. His case was that he flew her from Morehead to Port Moresby, once only, on 10 August 2001, for the purpose of making a passport application. GN remained in Port Moresby for some weeks before returning to Morehead on a commercial flight with Milne Bay Airlines on 21 September 2001. The petitioner specifically denied flying GN to Port Moresby in September 2001. He contends that he flew that route only on 9 September and 16 September. Records recently produced by the Civil Aviation Authority ("CA Authority") of PNG are said to confirm the flights. The records constitute the most important "fresh evidence" on which the application is founded.

[102] It is not in doubt that GN did apply for, and was granted a passport. It issued on 24 August 2001. At trial the petitioner produced a passport photograph of GN in an envelope from a pharmacy part of whose business was passport photography, endorsed with GN's name, and the date 11 August 2001.

[103] It is of marginal relevance but GN had been expelled from her local school for misbehaviour. She admitted to that when questioned during the committal. Her father was a prominent land owner and influential among the people who resided near the resort. There were, at times, disagreements between the local populace and the resort management. The petitioner, who at one stage contemplated buying the resort, was anxious to establish good relations with the inhabitants. It was to that end that he suggested that GN might be educated in Cairns following her expulsion.

That was said by the petitioner to be, and appears to be, the reason for his involvement in obtaining a passport for GN.

[104] The petitioner's case rests on three points:

1. The records of the CA Authority establish that there was no "second" flight described by GN as the occasion for the offence;

2. GN flew to Port Moresby with the petitioner on 10 August 2001 and remained there, living with relatives, until 21 September 2001 when she returned on a commercial flight;

3. There is fresh evidence that GN confessed that her testimony of the rape was a fabrication.

The third point is separate and distinct from the first two which are interrelated. To develop the points and understand what substance they have an examination of the evidence, both on the trial and on the hearing of the reference, is necessary.

[105] GN first gave an account of the offence on 1 December 2003 when she was interviewed by a PNG police officer Kally Pamuan. It is unclear how the offence came to the attention of the police. GN did not mention the event to any of her friends or family members save for an aunt to whom she spoke some time in 2002. She did not, she said, give the aunt a complete account of what had happened, but spoke obliquely.

[106] The statement given to officer Pamuan reads:

> "I can recall that in 2001 I was 14 years old and was doing grade seven at Morehead Primary School. … during … term two holiday … Fred Martin [sic] approached my father and told him that he was going to take me to do my schooling in Australia so he has to take me to Port Moresby to sort out my travel arrangements … .
>
> My father … agreed so I flew with him to Port Moresby from Morehead. Upon arrival in Port Moresby Fred [Martens] then drove me in his car to his … daughter's house … Caroline who lives in Waigani … . The next day … Fred [Martens] … picked up myself and his daughter and we all went to sort out my photo. After that Fred drove us back to … his daughter's house.
>
> The next day … myself and Fred … flew back in the single engine plane. We … flew up to Morehead. He … left me … and … went to Bensbach. That was the first trip I can remember and nothing happened on the first trip.
>
> The second trip I made with Fred [Martens] was in the September 2001 before the Independence, where my father was in Port Moresby that time. That time Fred [Martens] flew up from Bensbach to Morehead and told my mother that my father sent word for me to go to Port Moresby. My mother thought that it was true so she allowed me to travel with Fred [Martens] …
>
> Upon arrival in Jacksons Airport in Port Moresby Fred took me in his car to his daughter's house at Waigani. We … had dinner … and … went out for party…

> I was sitting with his daughter having only coke while Fred was drinking and moving around with his white man friends… . At the party Fred mentioned to me that after the party we would go and drop off Caroline and he would take me to where my relatives were. After the party was over Fred [Martens] then drove to Waigani and left his … daughter there.
>
> From there I could see that instead of going to my cousins place Fred drove all the way to Korobosea where his (other) house was. Fred stopped the car and both of us got out. … Fred said 'We will spend a night together' I then walked up to his house with him. Fred opened the door and went in … Fred then put the TV on where I sat down and watched.
>
> While I was watching TV Fred said 'Okay time to go to bed, put the TV off'. I thought that I was going to go and sleep on my own. While I was walking behind him to one of the rooms Fred [Martens] turned around and grabbed me. When he grabbed me he said 'you are going to be my wife'. I was then trying to free myself but he overpowered me and carried me to the bed.
>
> There Fred threw me on the bed and took my trousers off. He then later on removed my pants. I was lying face up and I saw Fred unzipping his long trousers. After that Fred then touched me on my breast while I was lying down. Fred then went on top of me and spread my legs apart. After that Fred then inserted his penis into my vagina.
>
> At that very moment I felt sharp pains below my abdomen. While he was pushing his penis in and out of my vagina he said to me … 'I am going to be your husband and I will put up a business for you and your daddy.' As he was going to ejaculate his sperm, he rolled over to one side and ejaculated. After all that I had my clothes on and did not sleep until morning as I was embarrassed and confused as this was my first time to have sex with this white man … . It was with Fred [Martens] that I lost my virginity that night."

[107] On 29 April 2004 the complainant was interviewed by an Australian Federal Police officer, Tania Stokes, and gave another statement describing the offence. She said:

> "During my term one school holidays, around March 2001, Fred MARTENS was at Morehead delivering cargo. I travelled with him on his plane to go to Port Moresby. On the flight from Morehead, there was Fred and I and another man a PNG national who we dropped off at Daru. … We then continued to Port Moresby. We arrived at the airport in Port Moresby and Fred had a small white car … there and he drove me to Waigani … to stay with Carol.
>
> The next day Fred picked up Carol and I and took us to a shop in Port Moresby where I got a photograph taken for my visa to go to Australia. We then went to the Customs Office and filled out some forms for the visa. Fred then dropped Carol and I back at Carol's house where I stayed for the rest of the day after Fred left us there.

I can also say that during my stay in Port Moresby and the flights to and from MoreHead Fred did not say … or do anything which made me feel uncomfortable.

The next morning, Fred picked me up from Carol's house and drove me … to the airport. … .

I next saw Fred [Martens] in September 2001 when he flew to Morehead to deliver cargo. I cannot recall the date, however, it was before Independence Day which is on 16 September and it was after my birthday which is on 10 September. That was my fourteenth birthday.

At this time my father was in Port Moresby… My mother told me that Fred had told her that my father had sent word for me to go to Port Moresby… . I did not want to go …

I travelled with Fred in his plane. Fred was the pilot and I was the only passenger. … When we arrived … in the evening … Fred went to the same car … and he drove me to his house in Korobosea … . During the drive … Fred told me that he was going to marry me… I felt worried … . I asked him when he was going to take me to see my father … . Fred did not say anything … .

Fred told me that the house was his. I can describe the house … . There was also a family who were living there who were taking care of the house.

When we arrived at his house Fred told me that he was going to take me to a club in Port Moresby. I had a shower and got changed … . Fred drove me to the club … We ate dinner together… and then he left me sitting alone when he went to talk to his friends. … We left the club and Fred drove me back to his house again … .

We arrived back at Fred's house and he locked the car in a carport. Fred walked up the stairs … and I followed him. We were in the dining room when I asked him where I should sleep. He pointed to the bed and said that we are going to sleep there. It was a double spring bed with a metal frame … .

Fred … got into the bed. He was still wearing his dark blue trousers … . He was not wearing a shirt. I did not get changed … . I sat down on a chair in the dining room. He asked me whether I was going to sit there or whether I was going to sleep. I didn't say anything. I walked into the bedroom and got into the bed on the other side to him. I then went to sleep. While I was asleep he grabbed me and put his arm over my chest. I tried to scream but he put his hand over my mouth. I cannot recall whether he said anything to me. He did not take his trousers off, but he pulled his zipper down. He then took my clothes off … . He put himself on top of me and held me down on my shoulders. He still had his hand over my mouth. He took his penis out from his pants. … he put it into my vagina. I felt sharp pains … . He took his penis out … and released his sperm on the bed facing away from me. I got out of the

> bed and when I was putting my clothes on I saw that there was blood coming from my vagina. I slept on the floor in the bedroom.
>
> The next morning … He did not say anything. He drove me to Waigani where my father was staying …
>
> I did not tell anyone what had happened to me with Fred.
>
> On the next day Fred came back … and picked up my father to take him to Morehead in the plane.
>
> I stayed at this house for three weeks with my cousins. On the Friday I travelled … to Daru … on Milne Bay Airlines."

[108] One notes that in the first statement GN says she was 14 when she went with the petitioner to Port Moresby in September 2001. Her birthday was on 10 September so the flight must have been after that date. In the second statement she said more positively that she went "after my birthday which is on 10 September." It is also to be noted that both accounts are of a rape which occurred on the evening of the day on which GN flew to Port Moresby with the petitioner, was taken by him to a party, and then went back to his house at Korobosea.

[109] In her oral testimony at the trial GN said that "the first time" she flew to Port Moresby with the petitioner was in March when she was in grade 7. It was not in contest that she attended grade 7 in 2001. The second time she flew with the petitioner, she said, was in September. She remembered having her birthday in Morehead before she flew to Port Moresby with the petitioner. She was asked specifically:

> "So you remember having your birthday in Morehead? - Yeah."

[110] GN testified, and it was common ground, that Independence Day for PNG is celebrated on 16 September. GN confirmed that she was in Port Moresby for the celebrations on 16 September 2001. She also confirmed that the offence occurred "between my birth date and Independence Day … ." She explained that the March trip was for the purpose of obtaining passport photographs and a passport. Having arrived she stayed with the petitioner's daughter Caroline at Waigani and "the next day we went to a shop to take a photo for the passport." She "… filled out forms for the passport" and "went to the Customs Office (where) we got the papers and filled them out." She remembered "… staying only two nights and the next day we came back … to … Morehead." Nothing "bad" happened on that trip.

[111] With respect to the September trip GN repeated the account given in the second statement. Having arrived at Port Moresby she drove with the petitioner to his house at Korobosea where she showered before going to the "party place". She then described the rape much as she did in that statement.

[112] It will be observed that the account in the first statement was that after landing at Port Moresby the petitioner drove GN to his daughter Caroline's house where, after an interval the three of them went to a party. In the second statement the account is that the petitioner drove GN, not to Caroline's house at Waigani, but to his house at Korobosea whence they went alone to the party.

[113] The account of the rape is also significantly different. In the first statement the petitioner assaulted and overpowered GN and carried her into the bedroom when he threw her to the bed and undressed her. In the second account she went more or less

voluntarily to the bedroom, lay on the bed beside him and went to sleep. The violation occurred during the night.

[114] The petitioner testified at his trial and adduced evidence from his step-daughter Caroline Martens and a friend, Ian Proctor. Both the petitioner and his step-daughter swore that in September 2001 the public utilities in Port Moresby had disconnected both the water and electricity supply to his house at Korobosea. The petitioner explained that at the time he was in considerable financial difficulty. The PNG Government with which his company had a contract had dishonoured it and refused to make payments. He was involved in litigation but until that was eventually successful he had no, or virtually no income. He could not pay household bills or the mortgage on the house property. The mortgagee took possession and sold the house. Some time earlier power and water had been disconnected.

[115] The petitioner also testified that the house at Korobosea was in fact two connected dwellings, a duplex or two units, in one of which his estranged wife Raina Martens lived with some of her family members. According to the petitioner the relationship between him and his estranged wife was acrimonious and, indeed, violent.

[116] The point of this evidence was twofold. It was meant to demonstrate, firstly, that the petitioner would not have taken GN to a house for the purposes of intercourse in circumstances where his violent, estranged, wife and her equally aggressive relations could observe their presence. Secondly, the absence of power and water falsified GN's account that she showered and watched television at the house.

[117] Caroline Martens' evidence was led to corroborate the petitioner. She confirmed that the Korobosea house had neither water nor electricity at the relevant time. She spoke also of the violent and hostile relationship between Mrs Raina Martens and the petitioner.

[118] Mr Proctor was called to corroborate the fact that the petitioner and GN stayed overnight at his house, but in different rooms.

[119] It should be noted that GN did not accept she was mistaken about the house to which she was taken, nor that her recollection of showering and watching television was wrong. No corroborating evidence was led from the utilities to demonstrate the disconnections.

[120] It is necessary to return to GN's oral evidence. It was that the petitioner took her to her uncle's house on the morning following the offence. The uncle was Dr Tapari, a professor of geography at the University in Port Moresby. He lived in a house at Waigani. GN's father was at the house when the petitioner took her there. GN did not tell him she had been assaulted. She repeated her statement that she stayed three weeks in Port Moresby with Dr Tapari's family and returned to Morehead on Milne Bay Airlines.

[121] GN was interviewed a second time by AFP officer Stokes and made a statement dated 29 July 2009. In it she recalled that the occasion in September 2001 when she flew with the petitioner from Morehead to Port Moresby was:

> "… some time between 10 and 16 September 2001 … it was between these two dates as 10 September is my birthday and 16 September is a national holiday in PNG for Independence Day."

She thought that she had celebrated her 14th birthday in Morehead but she said:

> "… I cannot be sure."

She remember that she was in Port Moresby for Independence Day so the flight:

> "… must have been between those two dates."

[122] GN said also that on the day following the offence the petitioner drove her to Dr Tapari's house at Waigani where her father and some cousins were present. She said her father returned to Morehead in the petitioner's plane but she refused to go with him, staying instead at her uncle's house "for a few weeks", before flying home to Morehead on Milne Bay Airlines. Inconsistently with that time frame she said that her father could not pay her airfare home, but after "a week or so" he arranged the money for the flight. There is a significance to the date of her return to Morehead which will become apparent.

[123] In her oral testimony at the trial GN confirmed that the day on which the petitioner took her to her uncle's following the rape was a Saturday. That, obviously meant the offence occurred on the Friday evening. 14 September 2001 was a Friday.

[124] GN was cross-examined on the hearing of the reference. The first topic concerned the date of her return to Morehead after the offence. It was put to her the date was 21 September but, unsurprisingly, she could not remember. It was, she accepted, after Independence Day and she had by then been in Port Moresby for several weeks. She also accepted that the duration of her stay "would … have been four weeks".

[125] The second topic concerned where she spent her 14th birthday. This was said:

> "Where did you have your birthday on the 10th September 2001? – I was still in Morehead.
>
> … is your memory about that quite clear? – Yes. … I'm sure that I was in Morehead.
>
> There is absolutely no doubt in your mind that on your 14th birthday, which occurred on 10 September 2001 you were in Morehead? – Yes.
>
> No doubt about that at all? – No.
>
> And your memory is equally clear that you were in Port Moresby on 16th September 2001? – Yes."

[126] She was asked about the date of the flight to Port Moresby with the petitioner. This was the exchange:

> "You didn't fly to Port Moresby on that day (10 September)? – No.
>
> Do you remember flying to Port Moresby on the next day? – No.
>
> The day after that? – No.
>
> The day after that? – There is a flight in on Friday.
>
> It was Friday? – Yeah.

> Do you accept that the only Friday between the 10th and the 16th of September was Friday the 14th? – Yes.
>
> So you now say that … (the petitioner) flew you to Port Moresby … on Friday the 14th of September? – Yes.
>
> That is your final word on the subject, is it? – Yes.
>
> … That incident happened on … Friday night.
>
> …
>
> And then you went to Independence Day celebrations on Sunday the 16th? – Yes."

[127] Some other evidence must be referred to briefly. GN's mother ("Mrs N") gave evidence that her daughter flew with the petitioner to Port Moresby on two occasions. On the second the petitioner, who had just flown into Morehead, told her that her husband, GN's father, who was at the time in Port Moresby wanted GN "to go to Port Moresby". GN was then at school. I interpolate to mention that this was the subterfuge which the prosecution alleged was perpetrated upon GN and her mother by the petitioner as a means of taking GN alone with him to Port Moresby. Mrs N said she accepted the petitioner's intimation. She could not verify it because there is no telephonic communication between Morehead and Port Moresby. She called GN out of school, packed some clothes and saw her off on the flight. She said that Edo Ipai, a policeman and a relative, was also on the plane. Mrs N described the aircraft as single engined.

[128] In cross-examination, however, it was suggested to her:

> "… that the only time that (GN) flew to Port Moresby with (the petitioner) you and … your husband were both at the airstrip to see her onto the plane, the both of you, the two parents."

Mrs N answered:

> "Yes."

She was then asked:

> "Do you agree with that? That's right isn't it?"

To which she replied:

> "Yes."

[129] GN's father ("Mr N") gave evidence which, on its face, appears extraordinary. He said that he flew from Morehead to Port Moresby with the petitioner some time in September 2001. In Port Moresby he stayed with Dr Tapari whom he described as "an extended brother", for two weeks. In the second week GN arrived at the house. She was driven there by the petitioner. He did not expect her. He did not know why she had come. He knew nothing of her journey. Despite his surprise at his daughter's unexpected arrival he did not ask the petitioner "what she was doing there" nor did he question his daughter. Instead the petitioner asked Mr N "if (GN) could go with him to (Waigani)." He agreed. GN was reluctant to go alone with the petitioner so Mr N accompanied them.

[130] According to Mr N's account:

> "When we arrived (at Waigani) (the petitioner) took the luggage out of the car and … (GN) … didn't want to stay there, she had to come back with me to Dr Tapari's place. So we got in the car again and went back to Dr Tapari's place with (GN). And he dropped us off there and (the petitioner) drove away."

[131] It will be recalled that GN's account was that she drove alone with the petitioner directly from the airport to Korobosea, not Waigani. If Mr N's evidence is accurate GN did not spend the night of her arrival in Port Moresby with the petitioner, or at his house.

[132] Mr N gave evidence that, during GN's stay in Port Moresby the petitioner expressed an interest in marrying her.

[133] GN's evidence was that on the second flight she flew alone with the petitioner. Her mother, it will be recalled, said differently that the policeman Ipai flew with them. He gave evidence. He identified himself as a Senior Constable living in Morehead. He remembered flying to Port Moresby in September 2001. The petitioner was the pilot. There was another passenger, Pastor Kingsley. The plane was a Cessna 206 single engined aircraft. They arrived in Port Moresby:

> "… late … so (the petitioner) … drove us (to) our location … ."

[134] The petitioner drove first to a suburb where the pastor was let off. They went on to Dr Tapari's house. He was a relative of Mr Ipai's as well and Mr Ipai stayed the night. Although the evidence is not completely intelligible it appears that shortly after Mr Ipai arrived GN, the petitioner, and Mr N left the house together, presumably in the petitioner's car. Mr Ipai next saw GN the following day. He said that she stayed on in Dr Tapari's house "for a period". During her stay the petitioner came to the house and asked GN to return to Morehead with him. She refused.

[135] There was also evidence from another cousin, Nio Hemboko. She was 23 years of age in 2001. In that year she, too, spent some time at Dr Tapari's house. She recalls GN arriving at the house, driven by the petitioner. She thought it was in September. GN stayed at the house for three to four weeks. She recalled Mr N coming to see GN "shortly after she arrived." He came "to tell her to go home to Morehead." GN refused and her father returned without her. Instead she stayed on at Dr Tapari's "for several weeks." She thought the duration of GN's visit was "about four weeks." She could not recall when it was that GN returned to Morehead. Mrs Hemboko also recalled that when the petitioner delivered GN to Dr Tapari's house there was an argument between him and Edo Ipai about an airfare.

[136] One further piece of evidence should be mentioned. GN swore an affidavit in the reference, on 8 September 2009, to which she annexed the record of attendance for pupils in grade 7B of the Morehead Primary School for the year 2001. The parties did not agree upon whether the record of attendance should be admitted into evidence. Counsel for the petitioner objected to it. It was not, of course, properly proved. GN's identification of the records was hearsay. They were not proved to be an official record of the school, or the Department of Education. The teacher, who remained unidentified, had not authenticated the records.

[137] I mention this evidence only to avoid an accusation of oversight. The record of attendance appears to be of no assistance, because on the views of the evidence put

forward by both parties it is erroneous. It was tendered, no doubt, to prove the dates in September 2001 when GN was absent from school, thereby establishing or corroborating her evidence of the second flight. In fact it purports to show that she was at school everyday between 3 and 14 November, inclusive. GN herself gave evidence that she was in Port Moresby for some weeks prior to 16 September. This is also the petitioner's contention. She also gave evidence that she was in Morehead for her birthday on 10 September and flew thereafter, but before 16 September to Port Moresby. The CA Authority records to which I will refer in detail later show that if she flew to Port Moresby with the petitioner in that period it can only have been on 9 September. On any view of the evidence she was not at Morehead Primary School on 10, 11, 12, 13 or 14 September when the attendance record shows her to have been in class.

[138] Of course if the records were in evidence they would disprove the prosecution case. They show that GN was at school every week day from 30 July 2001 to 14 September 2001 with the exception of the 13th and 14th of August. The school attendance record would show, if accepted, that GN did not fly to Port Moresby on any date between 10 and 14 September, or on 9 September. Equally they would prove that she was not in Port Moresby for the extended stay she and her cousins describe.

[139] The petitioner's evidence on the reference was that he:

> "… flew (GN) into Port Moresby on Friday 10 August 2001. She was booked to fly back with (him) from Port Moresby to Morehead on Tuesday 14 August 2001. (GN) refused to return on the flight … as she wanted to stay with her cousins in Port Moresby due to the Independence Day celebrations coming up. When (he) arrived in Morehead late in the afternoon of Tuesday 14 August 2001 (GN's) family … were waiting … . When (they) discovered that (GN) was not on the flight with me they were very upset. The following day, … 15 August 2001, (GN's) father … begged to travel with me … to Port Moresby so he could locate his daughter … . I agreed to fly (Mr N) that … day when I returned to Port Moresby. (Mr N) returned with me … to Morehead on Friday 17 August 2001. …"

[140] In a subsequent affidavit the petitioner swore:

> "The Civil Aviation record now available … confirmed that I flew into Port Moresby on 9 September 2001, did not fly at all on 10th 11th and 12th September, flew from Port Moresby to the western province on 13th September where I remained on 14th and 15th September and flew to Port Moresby on 16th September arriving late in the afternoon.
>
> …
>
> … (GN) flew to Port Moresby with me on only one trip, ever … on Friday 10th August 2001 on this one and only arrival … (GN) stayed the night with Mr Ian Proctor and his family at his residence at … Pearl Street Korobosea … .
>
> …

> Dr Paul Mondia signed (GN's) passport application on the back of four passport photos on … 11th August 2001. Chem Care Pharmacy (Fotofast) … directly opposite Dr Mondia's surgery was where (GN) had her passport photos taken on … 11th August 2001.
>
> …
>
> The … aircraft P2-RHO, is a single engine Cessna 182. It is a four seater owned by Brian Brumley (now deceased) of Bensbach Lodge. I was the only person who flew that aircraft."

[141] At trial the petitioner gave evidence that he flew GN to Port Moresby on 10 August 2001 for the purpose of assisting her to apply for a passport. He had, he said, spoken earlier to her father who raised the possibility that one of his children, obviously GN, might be educated in Australia because she had been expelled from the local school. The conversation occurred in the context of discussions of incentives that might be given in return for local support for the resort, which as I mentioned earlier, the petitioner considered buying.

[142] The arrangement, which was put into effect, was to fly from Morehead to Port Moresby on a Friday, obtain photographs and other necessary documents on the Saturday and return the following Monday or Tuesday. 10 August 2001 was a Friday. When the petitioner left with GN as a passenger both her parents were at the airport and saw her off. There were, in addition to GN, two other passengers. They were the policeman, Edo Ipai and a pastor who flew only as far as Daru. On arrival at Port Moresby Edo Ipai ran off. He had not paid for his fare but had promised the petitioner that he would be met at Port Moresby by someone who would pay it. No one came. The petitioner drove with GN to a suburb where he delivered a parcel, drove on to a restaurant where they had dinner and then continued to Ian Proctor's house at Korobosea where they stayed overnight in separate rooms. GN slept in a room with the woman of the household. He did not take her to Dr Tapari's house because it was in an area where violent crime was prevalent and to go there at night was dangerous.

[143] The next day, 11 August 2001, the petitioner took GN to obtain passport photographs and then drove her to Dr Tapari's house where he left her. As recounted he went back to the house on Monday 13 August to tell her that there was a seat available on the plane the next day. GN said "she didn't want to go."

[144] The petitioner flew to Morehead on 14 August. Mr N was at the airport on arrival. When he learnt that GN had not returned he asked the petitioner to fly him to Port Moresby and they went the next day. The petitioner flew Mr N back to Morehead "on the very next return trip", but GN was not with him.

[145] It was established at the trial through records maintained by the (Commonwealth) Department of Immigration that the petitioner was in Australia between 18 August and 7 September 2001. He entered Australian territory in the aircraft P2RHO landing on Horn Island on that day. He left Australian territory on 7 September, in the same aeroplane, flying from Horn Island.

[146] Records from the PNG CA Authority put into evidence on the reference but not tendered at the petitioner's trial show that on 17 August 2001 the aircraft P2RHO ("the Cessna") flew from Port Moresby to Morehead, and then to Daru. It obviously flew from there to Horn Island on 18 August. The CA Authority records also show that on 7 September 2001 the Cessna left Daru for Morehead at 4.20 pm.

It is, I think obvious, that the Cessna must have flown from Horn Island to Daru earlier that day. The Cessna is next recorded as flying on 9 September from Bensbach to Morehead at 9.02 am. It flew back to Bensbach at 10.15 am and returned to Morehead at 11.45 am. Forty minutes later it left for Daru. It took off at 2.30 pm flying to Port Moresby.

[147] The records show the Cessna flew next on 13 September, departing Port Moresby at 1.00 pm bound for Daru. It left Daru for Bensbach at 5.15pm. The next day, 14 September, it flew to Morehead at 10.55 am and went to Daru at 12.58 pm. It returned to Bensbach at 4.00 pm. It flew on 15 September between Bensbach and Morehead. On 16 September it left Morehead for Daru at 11.10 am and flew on to Port Moresby at 1.00 pm. The next recorded flight is 21 September 2001, flying from Port Moresby to Daru.

[148] The upshot of the records is that the Cessna flew from Morehead to Port Moresby on 9 September, returned on 13 September and flew back to Port Moresby on 16 September. There is no record of a flight from Morehead or Bensbach to Port Moresby between 9 and 16 September, the interval in which GN said she flew on the "second flight".

[149] The CA Authority records are entitled "Aerocharge Invoices Schedule." An officer of the CA Authority certified that the information contained in the records had been "examined, verified and confirmed to be true and correct …". The petitioner explained that the only controlled airspace in that part of PNG in which he flew at the relevant time surrounds Port Moresby Airport. A record of aircraft movements into and from Port Moresby is kept by servants of the CA Authority. When taking off from unmanned aerodromes, such as Bensbach, Morehead and Daru, a pilot is required to make radio contact with air traffic control at Port Moresby to inform the officers of the aircraft movement. The obligation is primarily to ensure safety. A record is kept of where an aircraft is and where it is bound for so that, should it not arrive, a search can be organised. There is a subsidiary reason for the records. The CA Authority charges for the use of its aerodromes so that the record of aircraft movements becomes a basis for raising invoices to charge the aircraft owners. This obviously explains the entitlement of the records.

[150] An aircraft may not take off without flight clearance from officers of the CA Authority in Port Moresby. When a pilot gives radio notice of his aircraft movement an air traffic controller makes a paper note of it. These are called "flight strips". The information on the flight strip includes the aircraft registration number, the name of the pilot, the amount of fuel on board, the number of passengers and the destination of the aircraft. It is kept until radio communication is made informing air traffic control that the aircraft has landed. The flight strips are then sent to the accounts department of the CA Authority to raise an invoice. The flight strips are not ordinarily kept after the details they record have been transferred to the Schedule.

[151] There is no reasonable doubt as to the authenticity of the records. They have long been identified by the petitioner and his lawyers as critical to his case. They have been with the respondent since 2007. Despite the considerable resources deployed in prosecuting the petitioner and resisting the reference no evidence has been adduced which might provide grounds for doubting the accuracy of the CA Authority records. The records describe aircraft movements. They do not identify the pilot of the aircraft making the movement. The records are, however, of the

Cessna which on the evidence was only flown by the petitioner who, at the relevant times, flew no other aircraft. The petitioner's evidence to this effect was not challenged and should be accepted.

[152] There was, it will be recalled, a second category of fresh evidence on which the petitioner relies. This evidence is said to demonstrate that GN's complaint of rape was fabricated. The evidence comes from two of GN's cousins, Diane Tapari and Moi Tapari, children of the late Dr Tapari, and his widow, Tahuni Tapari.

[153] On 20 March 2009 Diane Tapari swore:

> "4. On 10 August of 2001 (GN) came to our … residence at the University of (PNG) with (the petitioner).
>
> 5. (GN) came … that day so that she could stay with us to organize her passport and visa for travel to Australia for studies.
>
> 6. She flew in from … Morehead … as she had been terminated from school.
>
> 9. (GN) stayed with us … for about two weeks following her arrival … and after that she moved out.
>
> 11. On 16 September 2003 my father passed away and on 26 September 2003 we took his body to his home village in the Western Province and buried him.
>
> 12. On our way back to Port Moresby in November 2003, we stayed over at my aunt's house in Daru. … I met GN there … .
>
> 13. I asked (GN) if it was true that (the petitioner) raped her and she said that she had made the story up in order to get some money from him."

[154] On 23 March 2009 Moi Tapari deposed:

> "5. Early in August of 2001, (the petitioner) brought (GN) to our then residence at the University of (PNG) …
>
> 7. It was (GN's) first time to visit Port Moresby so she was brought to us so that we could accommodate her and take her to various places to organize her passport and visa papers.
>
> 9. (GN) stayed with us … for about two weeks or so following her arrival on August 2001 and then she decided to go stay with our aunt at Tokarara so my cousin … and I took her to our aunt's house and left her there.
>
> 14. November of 2003 was the last time I saw (GN). It was at Daru … . My family and I were on our way back to Port Moresby and we stopped over at my aunt's house. … We had been at our father's home village for his funeral and burial and were returning home to Port Moresby."

[155] The next day, 24 March Moi Tapari went again to the solicitor's office and swore a further affidavit. He said:

> "3. Also in November of 2003 when we stopped over in Daru, I recall that there was a lot of talk … and … suspicion about the truth of (GN's) story concerning (the petitioner). This is because (GN) did not maintain one story … . All this was confirmed when I eventually saw her in Daru. The conversation amongst us touched on the topic and she told my sister, a group of my cousins and me that she had made the story up to get money from (the petitioner). I can say that she appeared unconcerned about it because she was looking down to the ground and giggling when she said it."

[156] On 23 January 2008 Tahuni Tapari swore:

> "6. I remember clearly that in August 2001 (GN) came to visit my husband and myself at our house … on the grounds of the University of (PNG) … (the petitioner) dropped (GN) off at the house.
>
> 7. (GN) told me she had flown from Morehead to Port Moresby with (the petitioner). She had two of her uncles with her Sam Dibar and Edo Ipai. They also stayed at my house when (GN) was there.
>
> 9. While (GN) was staying with (the petitioner) came to the house twice. I heard him tell (GN) he had come to take her to the airport to fly back to Morehead, but I heard (GN) tell him that she would not go back and she wanted to stay in Port Moresby for the … Independence celebrations on 16 September. When (the petitioner) came, I heard him also speak to Sam Dibar and Edo Ipai about them not having paid for their airfares. …
>
> 10. After about two weeks (GN) told me she wanted to go to stay with her aunty Koni Kumbuimu who was living at Tokarara in Port Moresby (GN) left the house that day. I saw her leave with my son Moi … .
>
> 11. On 20 September 2001 (GN) came back to my house with her uncles … . The next morning they all left the house ... fly back to Morehead. (GN) told me they were flying on Milne Bay Airlines … . I remember all these dates because it was close to Independence Day 2001."

[157] In her evidence GN denied fabricating the evidence of her complaint against the petitioner and denied telling her cousins that she had invented the offence.

[158] The evidence from Ms Diane Tapari and Mr Moi Tapari that GN confessed to having given perjured evidence cannot be accepted for several reasons.

[159] Mr Moi Tapari's evidence is noteworthy for its initial omission of the vital conversation. Having gone to the solicitors to give a statement of the critical confession he did not do so. It was necessary to return to the office the next day to provide a further affidavit of the conversation he had forgotten the day before.

More significant is the fact that Mr Tapari was interviewed by Chief Sergeant Wangala of the PNG Police on 17 October 2008. In the statement which was taken as part of her investigation into the petitioner's claims that he had been wrongly convicted Mr Tapari did not mention GN's confession. Moreover when asked by Sergeant Wangala whether he had heard rumours that GN had "made up the allegation about (the petitioner)", he said he had not. During cross-examination at the reference Mr Tapari admitted that he made that statement to Sergeant Wangala.

[160] Ms Diane Tapari's evidence does not have the dramatic difficulties of her brother's but it, too, cannot be accepted. Her account of the conversation given in testimony at the reference was critically incomplete. She remembered, she said, saying to GN:

> "I heard that you told the police that … (the petitioner) raped you."

To which GN replied:

> "Oh, yeah, I made it up."

There was no mention of pecuniary motivation for the false accusation, which appears in the affidavit.

[161] Moreover Mrs Tapari acknowledged that she understood that what GN had told her was important. She knew that the petitioner had been accused of raping GN though she did not know he had been convicted and sent to jail until 2008. Nevertheless she did not pass onto any adult the information she had been told and which she understood to be important.

[162] Another feature of the evidence of both deponents is that they assert with confidence and precision the exact dates on which things occurred eight years ago. Mrs Tapari remembers particularly it was 10 August 2001 when GN came to the house. She remembers with equal exactitude that it was 21 September 2001 when she flew back to Morehead. This is impossible to accept unless she made some contemporaneous record of the dates or could fix them by reference to some event the date of which could be fixed. No attempt was made at either. Mr Tapari's memory was almost as good as his sister's: he recalled it was in early August of 2001 that GN arrived, and he, too, remembered that it was 21 September 2001 when she returned home.

[163] In addition to these difficulties there is the fact that the content of the confession which they attribute to GN makes no sense in the absence of evidence that GN, or someone on her behalf, approached the petitioner for money in return for not making the accusation, or withdrawing it. There was no such evidence, or even a hint of it. The petitioner did not say he had been approached in that way.

[164] That leaves for consideration the CA Authority flight records. These are crucial to the petitioner's case. The respondent submits they should be disregarded, or discounted, because they are not fresh evidence. The petitioner could, the respondent argues, have produced them at his trial had he and his solicitors made reasonable efforts to obtain them.

[165] The submission does little credit to the Commonwealth Director of Public Prosecutions. The records are of critical importance. The petitioner, and his advisors, have asserted that fact ever since his arrest in 2004. The evidence, some of which I will mention shortly, indicates that the petitioner has consistently requested the prosecutor to obtain the records which he claimed would exonerate

him by establishing that GN's complaint is unreliable. The prosecutor did not provide the records. Instead it told the petitioner that they did not exist. They were found after the petitioner's conviction as a result of efforts made by his wife.

[166] In April 2005, during the petitioner's committal, officer Stokes was questioned by the petitioner's counsel about the availability of the records. She said that she and another AFP officer had made inquiries of the CA Authority but had been told that records of aircraft movements were not ordinarily kept for more than three months. Her purpose in seeking the records had been to confirm when, between 10 and 16 September 2001, the petitioner flew into Port Moresby from the Western Province. It can be observed that the production of the records should have been important to the prosecution case, as corroborating GN's evidence of a flight on 14 September, or between 10 and 16 September. Ms Stokes was asked by the petitioner's counsel to make further inquiries for the records and undertook to do so, but said she had been told that "every avenue" had already been explored. In her evidence Ms Stokes read an email sent to the AFP from Inspector Ibsagi of the PNG Police. The email read in part:

> "… inquiries with PNG CAA – according to them is not a legal requirement … to keep all the flight records that are undertaken by individual pilots thus they do not have records of (the petitioner) flying any of those aircraft."

[167] In August of 2005 when the committal resumed Ms Stokes was asked about her further investigation. She said that inquiries had been made "yet again" with the CA Authority which "stated that they were unable to locate any record."

[168] Inspector Ibsagi gave a statement on 29 August 2005. In it he said that he had personally made several inquiries of PNG's CA Authority:

> "… regarding (the petitioner's) flying licence, aircraft registered under his name, details of an aircraft, … P2-AWF and record of his employment with airlines in PNG."

The results of the inquiry were that the CA Authority had:

> "… been unable to locate any records but they are not required under PNG law to keep these records and I consider this matter closed."

[169] After his arrest the petitioner was released on bail, a condition of which was that he not leave Australia. It was therefore impossible for him to travel to PNG to conduct his own inquiries of the CA Authority. It was, in any event, eminently reasonable for him to rely upon the resources of the Director of Public Prosecutions and the AFP to obtain the records. They undertook the task and informed the petitioner that the records did not exist.

[170] The records have always existed and have now been produced. It is a poor reflection upon the two organisations that one should have failed to find them, and denied their existence, and the other object to their use in the reference on the ground that the petitioner should have obtained them earlier.

[171] If it matters, and *Mallard* suggests it does not, the records in my opinion satisfy the requirements for fresh evidence.[56] They could not have been obtained, and were

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[56] *Langdale v Danby* [1982] 1 WLR 1123; *Clarke v Japan Machines (Australia) Pty Ltd* [1984] 1 Qd R 404.

not obtained, by reasonable endeavours made before the trial. The evidence is such that it would probably have had an influence on the result of the trial, and it is inherently credible.

[172] The CA records establish that the offence described by GN could not have occurred in the circumstances she recounted, or at the time she recalled. GN said that she was flown from Morehead to Port Moresby by the petitioner on Friday 14 September 2001, and was raped by him that evening in his house at Korobosea. The evidence is of an assault which occurred on a particular occasion, the evening when she flew to Port Moresby with the petitioner. She was adamant that the offence occurred on a Friday night because the next day, the Saturday, she was driven by the petitioner to her uncle's house.

[173] It would not be surprising if the petitioner, then an unsophisticated girl of 14, speaking about the event two years later, might have been mistaken about the date or even the day of the week. The indictment alleged the offence between 10 and 16 September 2001. Proof of the offence any time between those dates would satisfy the charge. Critically, however, the prosecution case was that the flight which provided the occasion for the rape was between those dates. The dates in turn were fixed by GN's evidence that she celebrated her birthday, 10 September, in Morehead and that the offence had occurred by Independence Day, Sunday 16 September.

[174] The records now available show that the petitioner did not fly from Morehead to Port Moresby on 10, 11, 12, 13, 14 or 15 September. He flew on 9 September and on 16 September but on the latter occasion did not arrive till after four in the afternoon. GN's clear testimony was that the offence had been committed before the 16th which she spent with some cousins at the celebrations.

[175] 9 September is also disqualified as a possibility for the date of the flight because of GN's evidence that she was in Morehead for her birthday.

[176] The stark reality is that the fresh evidence proves that she did not fly with the petitioner from Morehead to Port Moresby on any occasion which satisfies her depiction of the circumstances in which she was assaulted.

[177] The flight records have a secondary importance in addition to demonstrating that GN's evidence is, for some reason, unreliable and therefore unacceptable. They operate to corroborate the petitioner's evidence at his trial. He swore, relying upon his own logbook, that he had not flown from Morehead to Port Moresby on any of the relevant dates. The logbook was kept by the petitioner and it contained a handwritten entry of his flights. He noted a description of each flight (place of departure and place of destination), the date, the aircraft flown (in each case the Cessna), the pilot (in each case the petitioner) and the duration of the flight. The logbook was an important part of his case at trial. He relied upon it as proof that he did not fly from Morehead to Port Moresby between 10 and 16 September. The information in the logbook is to the same effect as the CA Authority records.

[178] It was put to the petitioner in plain terms in cross-examination by the prosecutor that his logbook was a fabrication. That accusation is now seen to be wrong. In light of the fresh evidence it should not have been made, but it must have been accepted by the jury which could not have convicted had it entertained a reasonable doubt that the logbook was accurate.

[179] The trial was conducted on the basis that the jury had to resolve the discrepancies in the evidence, and the conflict in testimony, in particular between the petitioner and GN. Aspects of the evidence corroborated both prosecution and defence cases. The critical question whether there was a second flight between 10 and 16 September was left to be assessed as a question of fact by the jury. GN swore to such a flight. The petitioner denied it and pointed to his logbook. If satisfied beyond reasonable doubt that GN's evidence was honest and reliable, and that there was such a flight, despite the petitioner's denial and the evidence of the logbook, the jury was entitled to convict.

[180] That this was how the case was put appears from the reasons for judgment of McMurdo P who delivered the judgment of the Court on the petitioner's appeal. Her Honour said:

> "[51] Her evidence about the timing of her second visit with the appellant to Port Moresby received significant support from the evidence of her parents, her female cousin, N, and police officer Edo Ipai and also, to some extent, Caroline Martens. The complainant's version of these crucial matters also received some support from the evidence of the appellant's statements to others expressing interest in her and even a desire to marry her.
>
> …
>
> [53] Although the appellant's evidence contradicting the complainant received apparent support from the log book, the jury were not compelled to accept that as an accurate and independent record of all his flights in all his planes at the relevant period from the complainant's village in Western Province to Port Moresby. It was a record made by the appellant apparently required to be kept by the Australian, not the Papua New Guinean, government. It commenced on 26 June 1998 and related to a "P.A.-31" aircraft. It contained the note "Rotary wing in separate log book". There was no independent entry until a biennial flight review stamp dated 28 March 2003, long after the disputed September 2001 flight. The log book did not compel the jury to have a doubt about the complainant's evidence that she had sexual intercourse with the appellant in Port Moresby after her 14th birthday on 10 September 2001 but before her country's national day on 16 September 2001.
>
> …
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> [56] After considering the whole of the evidence I am persuaded that the jury were entitled to accept the complainant's evidence that the appellant had sex with her in Port Moresby between 10 and 16 September and to be satisfied of his guilt beyond reasonable doubt."

[181] The fresh evidence shows the conviction to have been unreasonable, or unsupported by the evidence, as s 668E(1) of the Code puts it. At the very least it raises a reasonable doubt about the petitioner's guilt. The occasion of the offence charged

to the indictment is shown to have been impossible. To address the question posed by Mason CJ, Deane, Dawson and Toohey JJ in *M v The Queen* (1994) 181 CLR 487 at 493, had the CA Aviation records been put into evidence at the trial it would not have been open to the jury to be satisfied beyond reasonable doubt that the petitioner was guilty.

[182] There is a further ground for considering the conviction to have been unreasonable. The evidence for it is not as cogent as the ground just discussed but it does, in my opinion, give rise to a reasonable doubt about the conviction. It is the second point identified earlier: that the petitioner flew GN only once to Port Moresby, on 10 August 2001 for the purpose of obtaining a passport.

[183] The inference that there was only one flight comes from the evidence that GN lived with relatives, firstly Dr Tapari and his family and then an aunt, for several weeks before flying back to Morehead on Milne Bay Airlines after Independence Day.

[184] There is no doubt that GN had a prolonged stay in Port Moresby in August/September 2001. She herself said so. Mrs Hemboko gave that evidence, as did Mrs Diane Tapari and Mr Moi Tapari. Their evidence on this point is acceptable despite the rejection of the testimony as to GN's confession. Their evidence is to the same effect as the other witnesses'. Mrs Tahuni Tapari's evidence does not help. It is too general. That apart Mr Moi Tapari appeared to have a good recollection of the detail that he drove GN to the aunt's after she had stayed in the Tapari household for two weeks.

[185] For the evidence to have real value one needs to fix the duration of her stay by reference to its commencement or termination. Both are problematical to some extent, but the likelihood is that the sojourn began on or about 10 August 2001. There is little room for doubt that GN flew with the petitioner to Port Moresby in mid-August to obtain her passport. Mrs Dianne Tapari recalls that the stay commenced when GN came to obtain her passport after she had been expelled from school. It is not credible that Mrs Tapari would recall the precise date when GN arrived but the date can be fixed by reference to other evidence which shows when she went to Port Moresby for the passport.

[186] The duration of GN's stay is fixed only by recollection and is, for that reason, likely to be imprecise. All the witnesses, however, agreed that it was about four weeks. From 10 August that period takes one to 7 September. If GN were in Port Moresby from 10 August until about 7 September the question of how she returned to Morehead must be answered. Her explanation was that she flew back with the petitioner, but she put the flight in March and claimed she stayed in Port Moresby only a day or two. These latter two assertions cannot be accepted.

[187] If, as the preponderance of evidence asserts the petitioner remained in Port Moresby for several weeks after 10 August 2001 the petitioner could not have flown her back to Morehead. He was not in PNG between 17 August and 7 September. GN does not suggest that she flew with Milne Bay Airlines more than once. The first possible date that the petitioner could have flown GN from Port Moresby to Morehead following her stay and his absence in Australia was 13 September. That cannot have happened as the evidence is clear that GN was in Port Moresby for the Independence Day celebrations and the petitioner did not fly back to Port Moresby until late afternoon on 16 September. If GN flew with the petitioner to Morehead on 13 September and back on 16 September the offence could not have happened as she described it.

[188] The evidence of GN's sojourn with relatives following her arrival on 10 August gives rise to the distinct, and indeed, substantial possibility that she was in Port Moresby from 10 August to a date subsequent to Independence Day.

[189] The existence of that possibility means that the prosecution could not have proved its case beyond reasonable doubt. It could not have established, to that standard, that GN was in Morehead and available to be flown from there to Port Moresby with the petitioner in mid-September as she claimed.

[190] It would have been important to fix the date of her return but that was not done as far as I can see from the evidence. It was confidently asserted that the return flight occurred on 21 September but no basis for the assertion was proved. The petitioner's brother, Mr Wheatley, swore in an affidavit of 11 June 2008 that GN flew home on 21 September 2001 but he does not say how he fixes the date. That same date was obviously given to Mrs Diane Tapari and Mr Moi Tapari for their affidavits but the material does not show why that date was picked. It may be that enquiries of Milne Bay Airlines prompted the assertion but there was no evidence of any such inquiry. Although the date of her return is not precisely fixed the tenor of GN's own evidence is that she returned not long after Independence Day.

[191] If it were proved that GN flew home on 21 September after having been in Port Moresby for several weeks it must follow that she was not flown there by the petitioner in mid-September.

[192] The fresh evidence has a further significance. The doubt it casts upon GN's reliability means that the discrepancies and inconsistencies in the prosecution case should be examined with some concern to see whether the evidence can support the conviction. They take on a new significance because of the demonstrated unreliability of her evidence regarding the second flight.

[193] The discrepant accounts of the offence given to officers Pamuan and Stokes raise a real question about the reliability of GN's recollection. The discrepancies are not overcome by the facile explanation that the first statement, taken by Pamuan, was his work and not GN's. For a start she told officer Stokes that what Pamuan wrote down as her statement was true. Secondly officer Pamuan did not suggest he had any difficulty communicating with GN or understanding what she told him.

[194] There was significant corroboration for the petitioner's evidence. It will be recalled that Mrs N admitted that there was only one occasion when the petitioner flew GN to Port Moresby and she and her husband were both at the airport to see her safely off. The date of the flight was very probably 10 August 2001. This supports the petitioner's evidence and is damaging to the prosecution case of a subterfuge by the petitioner to take GN away with him.

[195] Mrs Hemboko's evidence that Mr N came to Port Moresby a day or two after GN arrived and unsuccessfully sought her return with him supports the petitioner's evidence of the flights of 15 and 17 August. Her evidence of an argument between the petitioner and Constable Ipai also corroborates the petitioner.

[196] Mr Ipai's evidence supports the petitioner. His testimony was that GN stayed on at Dr Tapari's house for some time after she flew with him from Morehead. That, too, would seem to fix the flight as occurring in mid-August. Such a conclusion casts doubt upon Mrs N's evidence that there was another flight, in mid-September, on which GN and Mr Ipai flew out of Morehead.

[197] These were points which could have been argued before the jury and on appeal. They do not necessarily establish the petitioner's innocence but they now take on a new significance because the evidence of GN as to the second flight cannot be accepted.

Conclusion

[198] In *Hay v Justices of the Tower Division of London* (1890) 24 QBD 561 Pollock B explained the effect of a pardon (564-565):

> "By the prerogative of the Crown the pardon extends far beyond the mere discharge of the prisoner from any further imprisonment. It is a purging of the offence. The King's pardon, says Hale, 'takes away poenam et culpam' [i e the penalty and the guilt] 2 P C 278. This points to the character, condition and status of the convict. Again, in 2 Hawkins' P.C., s. 48, the author says that the pardon 'does so far clear the party from the infamy and all other consequences of his crime, that he may not only have an action for a scandal in calling him traitor or felon after the time of the pardon, but may also be a good witness … ' So in another text-book of authority, 1 Chitty's Criminal Law, 775, it is said that 'the effect of a pardon … is not merely to prevent the infliction of the punishment denounced by the sentence, but to give to the defendant a new capacity, credit, and character.' Nothing could be more clear."

[199] In *R v Foster* [1985] QB 115 this exposition was thought to overstate the position. Relying upon *R v Cosgrove* [1948] Tas SR 99 and *Re Royal Commission on Thomas Case* [1980] 1 NZLR 602 the Court concluded that (130):

> "… the effect of a free pardon is … to remove from the subject of the pardon, 'all pains penalties and punishments whatsoever that from the said conviction may ensue,' but not to eliminate the conviction itself."

[200] In *Cosgrove* Morris CJ said (105):

> "*Blackstone* states the effect of a pardon … as follows: '4. Lastly, the effect of such pardon … is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to that offence for which he obtains his pardon; and not so much to restore his former, as to give him a new credit and capacity.' … Accordingly, a pardon is in no sense equivalent to an acquittal. It contains no notion that the man to whom the pardon is extended never did in fact commit the crime, but merely from the date of the pardon gives him a new credit and capacity."

[201] In *Thomas* the Full High Court held that the effect of a pardon was to clear the person from all consequences of the offence and from all disqualifications following upon conviction, and to deem him to have been wrongly convicted, but did not give rise to a legal fiction that he had not committed the offence.

[202] As Fraser JA has pointed out the effect of a pardon is now regulated by statute and s 85ZR of the *Crimes Act* 1914 (Cth) expunges the conviction and the person pardoned is taken for all purposes never to have been convicted and may, pursuant to s 85ZS deny he was ever charged with or convicted of the offence.

[203] Although the petitioner petitioned for a pardon, and the Attorney-General referred the "whole case" to the Court, the Court cannot, as I understand the authorities, decree or pronounce a pardon. According to the exposition in the cases the petition has passed "out of the field of executive action and falls to be … determined … as if it were an appeal, with all the consequences of an appeal." (*Gunn*). The "inhibitory" purpose and effect of the words "as if it were an appeal" "… confine the Court to the making of orders … apposite to an appeal." (*Mallard*). The Court deals with the reference "judicially not administratively". The consequence is, I think, that the orders to be made are those which would follow a successful appeal.

[204] Because it has been demonstrated that the petitioner's conviction was unreasonable, and cannot be supported by the evidence, the Court should order that the conviction be quashed and the order for imprisonment be set aside.