

The Problematic Proviso: The Vice of *Weiss*

Phillip Priest QC*

IN his retirement speech on 22 February 2007, Justice Callaway made it plain that one of the factors motivating his decision to retire from the Court of Appeal was the High Court's judgment in *Weiss v The Queen* (2005) 80 ALJR 444; 223 ALR 662; [2005] HCA 81.

He is not alone in his expressed dismay. *Weiss* caused a shockwave to sweep through the ranks of criminal appellate lawyers and judges. The High Court radically altered the ambit of the proviso, sweeping away decades of accepted wisdom.

It is argued in this article that in reaching its conclusions in *Weiss* the High Court ignored many decisions of authority. Doubtful implications were drawn from the historical roots of the statutory formula. Indeed, the main premise underpinning the High Court's decision is dubious.

The unfortunate result is that the application of the proviso is now fraught with unnecessary difficulty. For the sake of intermediate appellate courts the High Court urgently needs to rethink *Weiss*.

Before turning to the decision itself, it is necessary to examine the legislative and historical context in which the case fell to be decided.

THE WORDS OF THE PROVISO

Weiss was concerned with the proviso (venerably so called) found in s.568(1) of the *Crimes Act 1958* (Vic.), which provides:

- (1) The Court of Appeal on any such appeal against conviction shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set

*With thanks to Sarah Leighfield of the Victorian Bar.



Phillip Priest QC.

aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice and in any other case shall dismiss the appeal:

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

The origins of the proviso in s.568(1) can be found in s.4(1) of the *Criminal Appeal Act 1907* (UK). Its equivalent is to be found in the criminal appeal statutes of nearly all Australian States and Territories.¹ There is a New Zealand² and a Canadian³ equivalent.

Three points concerning the structure of s.568(1) should be noted at the outset. First, on an appeal against conviction, the appellate court shall allow the appeal if it thinks:

- the “verdict of the jury” should be set aside on the ground that it is “unreasonable or cannot be supported having regard to the evidence”; or
- the judgment of the court before which the appellant was convicted should be set aside on the ground of a “wrong decision of any question of law”; or
- that on any ground there was a “miscarriage of justice”.

Secondly, if one of these grounds is satisfied, the proviso then comes into play. Thus, if the court is of the opinion that the point raised in the appeal might be decided in favour of the appellant (presumably on the ground that there was a “wrong decision of any question of law, or on any ground there was a miscarriage of justice,” it may dismiss the appeal if satisfied that “no substantial miscarriage of justice” has actually occurred.⁴

Thirdly, as a matter of logic — if nothing else — the proviso can have no application to the first ground upon which an appeal shall be allowed i.e. that the verdict of the jury is unreasonable or cannot be supported having regard to the evidence, since that is the statutory basis upon which jury verdicts are set aside as “unsafe and unsatisfactory”⁵. If a jury verdict falls into that category, obviously it cannot be saved by the proviso.⁶ However, as will be seen, the ratio of *Weiss* may, on one view, render this ground somewhat superfluous.

INTERPRETATION OF THE PROVISO PRE-*WEISS*

Until *Weiss*, the analysis of Fullagar J in *Mraz v The Queen* (1955) 93 CLR 493 at 514 generally was regarded as the classic exposition of the operation of the proviso. He said:

It is very well established that the proviso to s.6(1) [of the *Criminal Appeal Act 1912* (NSW)] does not mean that a convicted person, on an appeal under the Act, must

show that he ought not to have been convicted of anything. It ought to be read, and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant *may thereby have lost a chance which was fairly open to him of being acquitted*, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law. It is for the Crown to make it clear that there is no real possibility that justice has miscarried. [Emphasis added.]

Later cases in the High Court incrementally added to and explained this formulation, but its essence seemed never to be in doubt. Thus, for example, Barwick CJ in *R v Storey* (1978) 140 CLR 364 at 376 spoke of “a real chance of acquittal”. He expressed the view:

If error be present, whether it be by admission or rejection of evidence, or of law or fact in direction to the jury, there remains the question whether none the less the accused has really through that error or those errors *lost a real chance of acquittal*. Put another way, the question remains whether a jury of reasonable men, properly instructed and on such of the material as should properly be before them, would have failed to convict the accused: or were the errors such that if they were removed a reasonable jury might well have acquitted. [Emphasis added.]

It was recognised that there may be circumstances where, even if the jury would have come to the same result despite the

impugned misdirection, the proviso could not be applied. Gibbs CJ (with whom Stephen and Murphy JJ agreed) observed in *Quartermaine v The Queen* (1980) 143 CLR 595 at 600–601:

Ordinarily, when there has been a misdirection of law, the proviso to s.689 [of the Criminal Code (WA)] will be applied if the Crown establishes that if there had been no misdirection the jury would (or must) have come to the same conclusion. However, Wickham J, who delivered the judgment of the Court of Criminal Appeal in the present case, recognised that even if this were established “there might still be a substantial miscarriage of justice if the trial was so irregular that no proper trial had taken place”, in that “there had been a serious departure from the essential requirements of the law”. The Court of Criminal Appeal was right in taking that view of the law ...

In *Wilde v The Queen* (1988) 164 CLR 365 at 372–373 this view was said to be “undoubtedly correct”:

The question remains whether a jury of reasonable men, properly instructed and on such of the material as should properly be before them, would have failed to convict the accused: or were the errors such that if they were removed a reasonable jury might well have acquitted.

[T]he proviso *was not intended to provide, in effect, a retrial before the Court of Criminal Appeal* when the proceedings before the primary court have so far miscarried as hardly to be a trial at all. It is one thing to apply the proviso to prevent the administration of the criminal law from being “plunged into outworn technicality” (the phrase of Barwick CJ in *Driscoll v The Queen* (1977) 137 CLR 517 at 527); it is another to uphold a conviction after a proceeding which is fundamentally flawed, merely because the appeal court is of the opinion that on a proper trial the appellant would inevitably have been convicted. The proviso has no application where an irregularity has occurred which is such a departure from the essential requirements of the law that it goes to the root of the proceedings. If that has occurred, then it can be said, without considering the effect of the irregularity upon the jury’s verdict, that the accused has not had a proper trial and that there has been a substantial miscarriage of justice. Errors of that kind may be so radical or fundamental that by their very nature they exclude the application of the proviso ... [Emphasis added.]

Later still, in *Glennon v The Queen* (1994) 179 CLR 1 at 8–9, 12–13, the High Court held of an impugned misdirection that where the misdirection is not fundamental, the appellate court must be satisfied that, in the absence of the misdirection, “the jury would inevitably have reached the same verdict”. And in *Grey v The Queen* (2001) 75 ALJR 1708; 184 ALR 593 at [25], Gleeson CJ, Gummow and Callinan JJ made it clear that, where there has been a departure from the requirements of a properly conducted trial, it cannot be said that there has been no substantial miscarriage of justice, unless an appropriately



Subscribe to the Law Institute Journal (LIJ)

You are currently reading one of the **two best legal publications in Australia – the other is the LIJ.**

The LIJ is the official publication of the Law Institute of Victoria and is mailed monthly to more than 11,000 members of the legal profession, including judges, solicitors, barristers, law libraries and allied professionals. Its comprehensive coverage of the latest developments for lawyers includes articles by experts on specific areas of practice, summaries of judgments, practice notes, I.T., ethics, book and website reviews. The LIJ has won many awards, including at the Melbourne Press Club Quills and the VJF Legal Reporting Awards. Your subscription also gives you access to the password-protected online LIJ archive.

To subscribe, call LIJ Subscriptions Officer Brigitte Tyrrell on (03) **9607 9337** or email bttyrell@liv.asn.au or download a form from www.liv.asn.au/journal/forms/lijsubscribe.html. The annual subscription costs **\$159.00** (GST inclusive).

instructed jury (acting reasonably, and applying the correct onus and standard of proof) would inevitably have convicted.⁷

In relatively recent times, however, judicial uncertainty as to the meaning of the proviso has been expressed. As has been noted above, the body of s.568(1) permits an appeal to be allowed if there be a “miscarriage of justice”, whereas the proviso permits dismissal of an appeal if there be no “substantial miscarriage of justice”. The judicially perceived tension between the body of the provision and the proviso has been the subject of a deal of discussion,⁸ culminating in *Weiss*.

WEISS IN THE COURT OF APPEAL

The appeal to the High Court in *Weiss* was, so it seems, prompted by certain observations of Callaway JA in the Court of Appeal with respect to the correct application of the proviso.

Before turning to those observations it is worthwhile briefly setting out the factual context in which they were made.

The appellant, Bohdan Weiss, was convicted of the murder of Helen Grey. Ms Grey was beaten to death on 24 November 1994. At his trial, Jean Horstead, with whom the appellant was living in 1994, was an important witness against him. She gave evidence that, on the night of the murder, the appellant had confessed to her that he had killed Ms Grey. She said that she had at first provided the appellant with a false alibi. Some years later, however, after she had left the relationship with the appellant and moved to America, she had decided to tell the truth. Evidence was led that, some time after Ms Grey was murdered, the appellant formed and maintained a sexual relationship with a female other than Ms Horstead. Over objection, the prosecution was permitted to adduce evidence in cross-examination of the appellant that at the time he began his relationship with the other female she was not yet 15 years old. (It was not disputed on appeal that evidence of her age should not have been adduced.) To maintain a sexual relationship with a girl under 16 years was a serious crime. The prosecution did not later suggest that maintaining a sexual relationship with an under-age female went to the appellant’s credit.

In the Court of Appeal, the Court (Callaway and Batt JJA, and Harper AJA) unanimously held that the evidence of the female’s age should not have been admitted. Callaway JA (with whose reasons the other members of the Court agreed)

held that her age was not relevant, that it could not be led to bolster the credit of Ms Horstead and that, if it did have any significant probative value, it was outweighed by its prejudicial quality. The Court of Appeal nonetheless dismissed the appellant’s appeal, holding that the proviso to s.568(1) of the *Crimes Act 1958* applied.

Following discussion of the state of the authorities concerning the proviso and its application, Callaway JA concluded that a distinction should be drawn between an appellate court asking whether, without the wrongly admitted evidence, “the jury at the appellant’s trial” would inevitably

***Weiss* was a joint judgment of six members of the High Court (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ). In the Court’s analysis, the root question was one of statutory construction. The words of the statute govern, not the various judicial attempts at interpretation.**

have convicted him, and asking whether, without that evidence, “any reasonable jury”, properly instructed, would inevitably have convicted him. On the former test (the “this jury” test) Callaway JA concluded that the appellant’s conviction was inevitable; on the latter test (the “any reasonable jury” test) he was of the opinion that it could not be said that the appellant’s conviction was inevitable.

Given some earlier Victorian decisions, Callaway JA concluded that the relevant test was the “this jury” test and that the appeal should be dismissed. He outlined the parameters of the debate as follows:⁹

Putting fundamental irregularity to one side, there are two expressions that are used to describe cases where the proviso does not apply. One expression refers to the loss of a chance of acquittal, whether a “real chance” or a “chance which was fairly open”. The other expression is that the conviction of the appellant was inevitable. It is clear from the authorities that they are different ways of expressing the same test. I have always proceeded on the basis that the proviso may be applied where the wrong decision on a question of law or other irreg-

ularity made no difference and that that is all that is meant when it is said that an appellant’s conviction was inevitable. *It was “inevitable” in the sense that this jury would still have convicted the appellant in the absence of the irregularity, not that he or she would have been convicted by any reasonable jury.* In other words, I have not regarded the proviso as inapplicable simply because, for reasons wholly unconnected with the wrong decision or other irregularity, a reasonable jury might have acquitted the appellant or confined the proviso to cases where a verdict of acquittal would be perverse. I have adopted my customary approach in this case, believing it to be normal practice in this State, but I acknowledge that I have been troubled by some statements of high authority. *If the test were inevitability, in the sense that any reasonable jury properly instructed would inevitably have reached the same conclusion as this jury, I could not apply the proviso to this case.* A new trial would have to be directed. [Emphasis added; footnotes omitted.]

With these words in mind it is timely to consider the High Court’s treatment of the proviso on appeal from the Court of Appeal’s judgment.

THE “EXCHEQUER RULE”

Weiss was a joint judgment of six members of the High Court (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ). In the Court’s analysis, the root question was one of statutory construction. The words of the statute govern, not the various judicial attempts at interpretation. According to the Court, the task of construction was not to be accomplished “by simply taking the text of the statute in one hand and a dictionary in the other”.¹⁰

It was pointed out that the *Criminal Appeal Act 1907* (UK), from which the proviso is drawn, was enacted against the backdrop of the Exchequer rule.¹¹ In criminal cases the rule was stated as being that “if any bit of evidence not legally admissible, which might have affected the verdict, had gone to the jury, the party against whom it was given was entitled to a new trial”¹². Having regard to history, the High Court concluded that the proviso contained in s.4(1) of the 1907 Act was intended to abolish the Exchequer rule.¹³ So much might be accepted.

Moreover, the High Court thought that history and the Exchequer rule also shed light on the drafting of the section. As we have seen, s.568(1) of the *Crimes Act*

1958 provides that the Court of Appeal shall allow an appeal against conviction if there is a “miscarriage of justice”; but may dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred. Under the old Exchequer rule, “miscarriage of justice” was any departure from trial according to law, regardless of the nature or importance of that departure. According to the High Court’s analysis, the use of the words “substantial” and “actually occurred” in the proviso were intended to require the appellate court to consider matters “beyond the bare question of whether there had been any departure from applicable rules of evidence or procedure”¹⁴. Again, so much may be accepted.

THE HIGH COURT’S ERROR

Once the view is arrived at that the proviso was intended to require consideration of matters beyond the question of whether there had been a departure from applicable rules of evidence or procedure, the next question to arise is, what matters are to be addressed in deciding whether a substantial miscarriage of justice has actually occurred? The Court said: “The question becomes, when is that intervention justified?” And that, in turn, requires examination of when a court should conclude that “no substantial miscarriage of justice has actually occurred”.¹⁵

It is at this point that, with respect, the Court fell into error.

The Court made it plain that an appellate court is required to decide for itself whether a substantial miscarriage of justice has actually occurred. To look to inevitability of result, or to a “fair” or “real chance of acquittal”, and thus to look to what a jury (whether the trial jury or a hypothetical reasonable jury) might have done is, in the High Court’s opinion, “to distract attention from the statutory task as expressed by criminal appeal statutes”.¹⁶

It might be accepted undoubtedly as correct that an appellate court must decide for itself whether there has in a given case been a substantial miscarriage of justice. The section requires no less. In a breathtaking glide, however, and contrary to a long line of authority, the High Court concluded that the task of deciding whether a substantial miscarriage of justice has actually occurred “is to be undertaken in the same way an appellate court decides whether the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence”.¹⁷ Why that

is so is not expressed with any clarity, if at all.

Approaching the determination of the meaning of the proviso as one of statutory construction, then it is submitted that there simply is no justification for reading into the words of the section the implication that the appellate court must approach the matter in the same way that it decides whether the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence. Such an implication — if it is to be found — could only flow from the words “the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal ‘if it considers that no substantial miscarriage of justice has actually occurred’”. Nothing in these bare words — even paying due regard to the historical underpinnings of the Exchequer rule — is capable of founding the approach now dictated by the High Court.

Indeed, the words of the statute point the other way. To approach the matter in the manner suggested by the Court in *Weiss* is arguably to render the first ground for intervention by an appellate court found in the body of s 568(1) of the *Crimes Act 1958* (and its equivalents) superfluous.

THE “CURATIVE” CANADIAN CRIMINAL CODE

The High Court does not appear to have considered the position in Canada.

In that country the proviso¹⁸ is described as “the curative provision”. It is regarded as placing a burden on the Crown to justify the denial of a new trial despite the presence of error in the court from which the appeal is brought. Satisfaction of the onus is a condition precedent to the application of the proviso. However, the proviso need not be applied even if the onus is met.¹⁹ The question to be asked is whether the verdict would necessarily have been the same if the error had not occurred.²⁰

The leading case upon the application of the proviso in Canada is that of the Supreme Court of Canada in *R v Khan* [2001] 3 SCR 823; (2001) 160 CCC (3d). Arbour J (delivering the judgment of McLachlin C.J. and L’Heureux-Dubé, Gonthier, Major, Binnie and Arbour JJ) described the position as follows:

[27] In every case, if the reviewing court concludes that the error, whether procedural or substantive, led to a

denial of a fair trial, the court may properly characterize the matter as one where there was a miscarriage of justice. In that case, no remedial provision is available and the appeal must be allowed. I will now examine these propositions in more detail.

[28] This Court has enunciated on numerous occasions the proper test for the application of the curative proviso (see *Colpitts v The Queen* [1965] SCR 739; *Wildman v The Queen* [1984] 2 SCR 311; *R. v B (FF)* [1993] 1 SCR 697; *R. v Bevan* [1993] 2 SCR 599). It can only be applied where there is no “reasonable possibility that the verdict would have been different had the error ... not been made” (*Bevan*, *supra*, at p. 617).

[29] The jurisprudence reveals that the proviso will generally be applied, in accordance with the above principles, in two types of situations. A. W. Mewett has described the two possible approaches in “No Substantial Miscarriage of Justice”, in A. N. Doob and E. L. Greenspan, eds., *Perspectives in Criminal Law* (1985), 81, at p. 94:

What we see are again two fundamentally different views of the application of the proviso. One view proceeds on the basis of asking whether, absent the error or wrongly admitted evidence, the rest of the evidence is so overwhelming as to make the outcome of a retrial a virtual certainty; the other of asking whether, ignoring the rest of the evidence, the jury might have been influenced by the error or the wrongly admitted evidence.

On the one hand, appellate courts will maintain a conviction in spite of the errors of law where such errors were either minor in themselves or had no effect on the verdict and caused no prejudice to the accused. This accords with the original purpose of the section, as described early on by Taschereau J., writing for the majority of this Court, in *Chibok v The Queen* (1956) 24 CR 354 at p. 359:

It would indeed be a shocking impediment to the proper administration of criminal justice, if criminals were allowed to go free because of a *trivial error in law or of an oversight of no material consequence*. [Emphasis added.]

As stated by Lamer CJ, for the Court, in *R. v Tran* [1994] 2 SCR 951 at p. 1008, “[s]ection

686(1)(b)(iii) is designed to avoid the necessity of setting aside a conviction for minor or 'harmless' errors of law where the Crown can establish that no substantial wrong or miscarriage of justice has occurred."

[30] The case law is replete with examples of situations where either the triviality of the error itself, or the lack of prejudice caused by a more serious error of law, justified the application of the curative proviso. *In all those cases, the appellate courts were convinced that the error could have had no effect on the verdict.* Because of the nature of the errors and of the issues with respect to which they were made, it was possible to trace their effect on the verdict and ensure that they made no difference. Generally, the errors concerned evidence that was insignificant to the determination of guilt or innocence or benefited the accused by imposing a more onerous standard on the Crown. Errors in the charge to the jury respecting a very minor aspect of the case that could not have had any effect on the outcome or concerning issues that the jury was otherwise necessarily aware of were also cured by the application of the proviso. Similarly, in some cases the errors concerned preliminary findings that would nevertheless, as a matter of law, inevitably have resulted in the same finding made by the trial judge.

[31] In addition to cases where only a minor error or an error with minor effects is committed, there is another class of situations in which s.686(1)(b)(iii) may be applied. This was described in the case of *R. v S* (PL) [1991] 1 SCR 909 at p. 916, where, after stating the rule that an accused is entitled to a new trial or an acquittal if errors of law are made, Sopinka J. wrote:

There is, however, an exception to this rule in a case in which the evidence is so overwhelming that a trier of fact would inevitably convict. In such circumstances, depriving the accused of a proper trial is justified on the ground that the deprivation is minimal when the invariable result would be another conviction.

Therefore, it is possible to apply the curative proviso even in cases where errors are not minor and cannot be said to have had only a minor effect on the trial, *but only if it is clear that the evidence pointing to the guilt of*

the accused is so overwhelming that any other verdict but a conviction would be impossible. [Some citations omitted; further emphasis added.]

Thus it may be observed that the Canadian test seems to revolve around inevitability of result which, as we have seen, is one of the matters which animated Callaway JA's judgment in the Court of Appeal in *Weiss*. It is surprising that the High Court apparently paid no regard to the entrenched Canadian position when so revolutionising the application of the proviso for Australian courts.

NEW ZEALAND COURTS REJECT *WEISS*

Weiss has not been followed in New Zealand.

In *R v Sungsuwan* [2006] 1 NZLR 730, two of the Judges of the Supreme Court, Elias CJ²¹ and Tipping J,²² considered that the New Zealand proviso²³ could properly be applied in situations where the ground under s.385(1)(b) (wrong decision on a question of law) had been made out.

The approach in New Zealand is either the "this jury" test or the "any reasonable jury" test. Thus in *R v McI* [1998] 1 NZLR 696 Thomas J²⁴ said of the application of the proviso:

In my view, it is clear Parliament did not want convicted persons to go free or obtain the benefit of a new trial on the basis of an error of law or irregularity unless the error or irregularity would have made a difference to the outcome ... *The question therefore becomes; on the whole of the admissible evidence, could a reasonable jury have failed to convict?...* The necessary consequence of the proviso is that it is not every error of law or breach of the rules of evidence or procedure which have evolved to ensure a fair trial for an accused which is necessarily fatal. Any such error or irregularity needs to be material to the outcome of the trial. Unless it is, no injustice has been done. The impact of the fact the proviso has been enacted cannot be ignored. In enacting it, Parliament clearly indicated that it is not every lapse or breach of the rules of procedure or evidence, even though the lapse or breach may amount to a miscarriage of justice, which need result in a successful appeal. [Emphasis added.]

And Tipping J²⁵ observed:

[I]t is important to recognise that the Court is not thereby invited to come to its own view about whether the appellant was in

fact guilty of the crime or crimes alleged. Rather, the Court is required to assess whether, without the error or deficiencies of process, the jury would still have convicted. It is what the jury would have done without the errors or deficiencies which is the issue, not what the Court thinks of the ultimate merits of the conviction. If, in spite of the errors or deficiencies, the jury would have convicted anyway, there can be no prejudice to the appellant from those errors or deficiencies... [T]he test for application of the proviso should be framed as follows. Before the proviso may be applied, this Court must be sure that the jury would without doubt have convicted had the matter or matters giving rise to the initial miscarriage of justice not been present. [Emphasis added.]

In *R v Howse* [2003] 3 NZLR 767 at [45] the New Zealand Court of Appeal endorsed these views. On appeal, the Privy Council affirmed statements of the law in Australia (pre-*Weiss*)²⁶ to a similar effect and said the proviso applied only in cases where the dismissal of the appeal would not countenance a "radical or fundamental error".²⁷

Weiss specifically was considered by the Court of Appeal in *R v Haig* [2006] NZCA 226.²⁸ William Young P and Chambers J said that "[d]espite the English and Australian decisions to which we have referred, the weight of authority in this jurisdiction is such that we think it appropriate to continue to apply the existing New Zealand principles"²⁹

HOW IS THE PROVISO NOW TO BE APPLIED?

As has been seen, *Weiss* now dictates that an appellate court is to approach the application of the proviso in the same way as it approaches a complaint that a verdict is unsafe and unsatisfactory. This raises the question, what room is left for the second and third grounds of s.568(1), which permit appellate intervention if the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or if on any ground there was a miscarriage of justice? To answer this question it is necessary to determine for what *Weiss* stands.

The following observations from *Weiss* contain the ratio:

[41] [The statutory task of applying the proviso] is to be undertaken in the same way an appellate court decides whether the verdict of the jury

should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence. *The appellate court must make its own independent assessment of the evidence and determine whether, making due allowance for the “natural limitations” that exist in the case of an appellate court proceeding wholly or substantially on the record, the accused was proved beyond reasonable doubt to be guilty of the offence on which the jury returned its verdict of guilty. There will be cases, perhaps many cases, where those natural limitations require the appellate court to conclude that it cannot reach the necessary degree of satisfaction. In such a case the proviso would not apply...*

[42] It is neither right nor useful to attempt to lay down absolute rules or singular tests that are to be applied by an appellate court where it examines the record for itself, beyond the three fundamental propositions mentioned earlier ... *It is not useful to attempt that task because to do so would likely fail to take proper account of the very wide diversity of circumstances in which the proviso falls for consideration.*

[43] There are, however, some matters to which particular attention should be drawn. First, the appellate court’s task must be undertaken on the whole of the record of the trial including the fact that the jury returned a guilty verdict ... *But there are cases in which it would be possible to conclude that the error made at trial would, or at least should, have had no significance in determining the verdict that was returned by the trial jury.* The fact that the jury did return a guilty verdict cannot be discarded from the appellate court’s assessment of the whole record of trial. Secondly, it is necessary always to keep two matters at the forefront of consideration: the accusatorial character of criminal trials such as the present and that the standard of proof is beyond reasonable doubt.

[44] Next, the permissive language of the proviso (“the Court ... may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal ...”) is important. So, too, is the way in which the condition for the exercise of that power

is expressed (“if it considers that no substantial miscarriage of justice has actually occurred”). *No single universally applicable description of what constitutes “no substantial miscarriage of justice” can be given.* But one negative proposition may safely be offered. It cannot be said that no substantial miscarriage of justice has actually occurred unless the appellate court is persuaded that the evidence *properly admitted at trial* proved, beyond reasonable doubt, the accused’s guilt of the offence on which the jury returned its verdict of guilty.

[45] *Likewise, no single universally applicable criterion can be formulated which identifies cases in which it would be proper for an appellate court not to dismiss the appeal, even though persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused’s guilt. What can be said, however, is that there may be cases where it would be proper to allow the appeal and order a new trial, even though the appellate court was persuaded to the requisite degree of the appellant’s guilt ...* [Footnotes omitted, additional emphasis added.]

Although it is not an easy task to determine comprehensively all of the implications of *Weiss*,³⁰ a few propositions may be distilled:

- There may be many cases where the natural limitations attendant upon appellate review lead an appellate court to the view that it cannot reach satisfaction beyond reasonable doubt. (This seems to be directed towards, for example, those cases which turn on the credit of witnesses judged from demeanour.)
- There are cases in which it would be possible to conclude that the error made at trial would (or at least should) have had no significance in determining the verdict returned by the jury. (Presumably, for example, those cases that do not turn on demeanour.)
- No single universally applicable description of what constitutes “no substantial miscarriage of justice” can be given.
- No single universally applicable criterion can be formulated which identifies cases in which it would be proper for an appellate court not to dismiss the appeal, even though persuaded that the evidence properly admitted at trial proved guilt beyond reasonable doubt.

- There may be cases where it would be proper to allow the appeal and order a new trial, “even though the appellate court was persuaded to the requisite degree of the appellant’s guilt”.

On a practical level a cynic might observe that *Weiss* now permits an intermediate appellate court to say to an appellant: “You’ve not had a proper trial according to law before this jury (whose constitutional function is to determine guilt or non-guilt), but we’re going to deny you a proper trial before another jury because we think that you’re guilty. We will be your jurors and we will try you.”

THE HIGH COURT POST-WEISS

Immediately following *Weiss*, the High Court delivered judgment in *Nudd v The Queen* (2006) 80 ALJR 614; 225 ALR 16. Much of the language was redolent of *Mraz*.³¹ Only the Chief Justice³² and Kirby J³³ mentioned *Weiss*; and then only in passing. It excited hope in some quarters that *Weiss* was, perhaps, quietly to be swept under the judicial carpet.

However, the proviso was again up for grabs in *Darkan* (2006) 80 ALJR 1250; 228 ALR 334. Somewhat disappointingly, the majority³⁴ repeated that “[a]n appellate court invited to consider whether a substantial miscarriage of justice has actually occurred is to proceed in the same way as an appellate court invited to decide whether a jury verdict should be set aside on the ground that it is unreasonable, or cannot be supported having regard to the evidence”.³⁵ In so doing it “must make its own independent assessment of the evidence and determine whether, making due allowance for the natural limitations that exist in the case of an appellate court proceeding wholly or substantially on the record, the accused was proved beyond reasonable doubt to be guilty”.

In dissent, Kirby J made some further important observations as to the application of the proviso:

[139] ... The ordinary postulate of the Australian legal system is that a person, accused of a crime, is entitled to a trial that conforms to the requirements of the law. Most especially, in the trial of serious criminal charges, *the person is normally entitled to have the jury, as the “constitutional judge of fact”, resolve contested questions of fact by the application of the applicable law correctly explained to them by the presiding judge ...*

[140] A legal mistake in *peripheral mat-*

ters, such as on non-fundamental issues of procedure, an insubstantial error in admitting this or that piece of evidence or a misdirection on a particular point of fact or law arising in the trial may not touch the fundamental requirement of having a trial “according to law”. *But where the error that is established involves a mistaken direction with respect to an essential ingredient of the offence and a misdescription to the decision-maker (here the jury) of the content of that ingredient, a real question is presented as to whether the outcome then truly answers to a trial “according to law”.*

[141] Clearly, the language of the “proviso” is only enlivened when mistakes have happened. The mistakes which [the proviso] contemplates include, explicitly, “the wrong decision on any question of law”. However, the “proviso” is manifestly to be understood against the background of the fundamental assumption that *high standards of lawfulness are observed in the conduct of criminal trials ...*

[142] ... The appellate court, deciding the “proviso” question, is obliged to reach its own conclusion according to the statutory criteria. However, necessarily, it does so *in the context of a legal system that observes high standards of compliance with the law; is protective against miscarriages of justice and wrongful convictions; and ordinarily applies the rigorous criterion for proof of criminal guilt, namely proof beyond reasonable doubt.* [Footnotes omitted; emphasis added.]

And later he observed:

[161] ... (1) ... *In a court of error, such as this, where a serious mistake of law is revealed, there is a strong reason of principle why such mistakes should ordinarily be marked by the provision of relief and an order for a retrial. Indeed, this is the primary instruction of the Code itself (“shall allow the appeal”).*

(2) The foregoing is especially so where the mistake has involved a misdescription to the jury of the ingredients of the offences charged against the appellants. Misdirections of such a kind are more serious than others. ... *The increasing insist-*

ence of appellate courts upon the accurate explanation to juries of the central ingredients of the offence(s) charged is, in my opinion, a reason for the greater caution in the intermediate courts in the application of the “proviso” in recent years. Nothing said by the Court in Weiss suggests a reversal of that caution. It really speaks for itself. If the decision-maker in the trial (the jury) is misled as to its essential function and provided with an incorrect statement of the applicable legal components of the offence, the postulate of a trial according to law is not fulfilled. No amount of appellate reasoning can then replace that normal entitlement belonging to all persons accused of serious crimes. The “proviso” assumes that the essential postulate has been fulfilled ... [Footnotes omitted; emphasis added.]

It is probably too early to discern any trends in the judgments of intermediate appellate courts so as to predict those cases where the proviso will not stand in the way of a successful appeal.

Although Kirby J was in the minority, it might be argued that his observations are to be regarded as of general application.³⁶ Again, some propositions may be isolated:

- An accused is normally entitled to have the jury resolve contested questions of fact by the application of the applicable law correctly explained to them i.e. “according to law”.
- A legal mistake in peripheral matters may not touch the fundamental requirement of having a trial “according to law”.
- But where the error that is established involves a mistaken direction with respect to an essential ingredient of the offence and a misdescription to the jury of the content of that ingredient, a real question is presented as to whether the outcome then truly answers to a trial “according to law”.
- The proviso is to be understood against

the background of the fundamental assumption that high standards of lawfulness are observed in the conduct of criminal trials.

- The appellate court, deciding the proviso question, does so in the context of a legal system that observes high standards of compliance with the law; is protective against miscarriages of justice and wrongful convictions; and ordinarily applies the rigorous criterion for proof of criminal guilt.
- Where there is a serious mistake of law, there is a strong reason of principle why such a mistake should ordinarily be marked by the provision of relief and an order for a retrial. That is the primary instruction of the legislation (i.e. “shall allow the appeal”).
- The proviso assumes that the essential postulate of a trial according to law has been fulfilled.
- If the jury is misled as to its essential function and provided with an incorrect statement of the applicable legal components of the offence, the postulate of a trial according to law is not fulfilled.

INTERMEDIATE APPELLATE COURTS POST-WEISS

Warren CJ recently observed of the invocation of the proviso post-*Weiss* that this “is a more complex and difficult process than was previously so”.³⁷ That observation echoes earlier observations made by the Court of Appeal (Vic.) as to “internal tensions” to be found in the propositions laid out in the High Court’s judgment.³⁸

It is probably too early to discern any trends in the judgments of intermediate appellate courts so as to predict those cases where the proviso will not stand in the way of a successful appeal. However, post-*Weiss* the proviso has not been applied where there has been a misdirection touching the burden of proof,³⁹ incorrect admission of opinion evidence⁴⁰ or tendency evidence,⁴¹ or a failure properly to direct on propensity evidence.⁴² Nor was the proviso successfully invoked for misdirections on crucial identification evidence⁴³ or on consent in a rape case.⁴⁴ Similarly, where the prosecutor made an inflammatory address,⁴⁵ or indulged in improper cross-examination of the accused, the proviso was not applied.⁴⁶ And where a judge made very strong comments in summing up adverse to the accused,⁴⁷ and in another case left to the jury a possible basis for conviction not relied upon by the Crown,⁴⁸ the proviso did not defeat the appeal.

AN UNRESOLVED QUESTION

A tantalising question — which will require resolution at some future time — is whether the *Weiss* approach is applicable to appeals against conviction in Commonwealth cases. On one view, *Weiss* dictates that once error is found, an appellant is, in effect, tried by the appellate court. It is for the appellate court to determine whether guilt is established beyond reasonable doubt. Some would argue that to apply *Weiss* in Commonwealth cases is to infringe s.80 of the Constitution.⁴⁹

A PARTHEON SHOT?

As we have seen, the High Court's extraordinary decision in *Weiss* arose out of Callaway JA's decision in the Court of Appeal.

In one of his last criminal cases before retirement,⁵⁰ Callaway JA implicitly suggested that *Weiss* dictated that the Court was required in that case to send it back for a retrial rather than dismiss the appeal by invoking the proviso (which seems to be the opposite of what the High Court in general intended).

*Rajakaruna (No 2)*⁵¹ involved convictions for rape of two prostitutes and associated offences. One of the complainants made a complaint of rape, and was seen by the person to whom the complaint was made to bear obvious injuries. Between the time of the alleged rape and the complaint, however, the complainant spoke to another person who observed no injuries. Without directly cross-examining the complainant on the matter, counsel for the defence floated the argument in his final address that this evidence indicated that the injuries might not have been inflicted at the time of the rape, but at some other later time.

Counsel was criticised to the jury by the trial judge for putting this argument without first cross-examining on the topic. The Court of Appeal found this criticism to be wrong. It was held that the proviso could not be applied. Callaway JA's reasons for not applying the proviso are instructive. He said:⁵²

[5] Before the decision of the High Court in *Weiss v The Queen* this Court might have held that counsel's argument was so speculative that the judge's error made no difference despite the importance of the injuries to the prosecution case. I do not stay to consider whether that would have been our conclusion. *Before we can apply the proviso, we are now required, on the whole of the record, to say that we ourselves are*

satisfied beyond reasonable doubt that the applicant was guilty. There being no question of consciousness of guilt, if we disbelieve his assertions in the record of interview, the case is no better than if he had said nothing in his own defence. The prosecution case then depends on the credibility of the complainants. *To be satisfied beyond reasonable doubt that the applicant was guilty, one would need to see them give their evidence and be cross-examined.* [Footnotes omitted; emphasis added.]

CONCLUSION

The words of the proviso cannot carry with them the burden found by the High Court in *Weiss*. As a matter of language the proviso permits a court to ignore a miscarriage of justice that is not substantial. Nothing in the clear words of the proviso — regardless of its historical *raison d'être* — requires an appellate court to approach its application in the same way that a court must approach a complaint that a jury verdict is unsafe and unsatisfactory. To approach its interpretation in that way simply is to read words that are not there.

At one level, *Weiss* has placed an unwarranted extra burden upon intermediate appellate courts resting on dubious foundations. The extent of the proviso's practical application is in greater doubt now than it was before *Weiss* was delivered.

At another level, judges of intermediate appellate courts are left with the unpalatable alternatives of either refusing to apply it (which has the potential to undermine the authority of the High Court), or applying it in circumstances where conscientiously the judges believe it to be in error.

Weiss is wrong. It should be reconsidered.

Notes

1. *Criminal Appeal Act 1912* (NSW), s.6(1); *Criminal Law Consolidation Act 1935* (SA), s.353(1); *Criminal Code* (Q), s.688E(1) and (1A); *Criminal Appeals Act 2004* (WA), s.14(2); *Criminal Code Act 1924* (Tas), s.402(1) and (2); *Criminal Code Act* (NT), s.411(1) and (2). By contrast, the proviso is not found in the *Federal Court of Australia Act 1976* (Cth); as to the effect of which, see *Conway v The Queen* (2002) 209 CLR 203 at 218–219 [35]–[36] per Gaudron ACJ, McHugh, Hayne and Callinan JJ, 230–231 [76]–[77] per Kirby J.
2. *Crimes Act 1961* (NZ), s.385.

3. *Criminal Code* (Can.), s.686(1).
4. It is interesting to note that, by comparison, the Canadian equivalent limits the application of the proviso to “a wrong decision on a question of law” i.e. the second ground only. In a curious oversight, the Canadian legislation, and the cases based upon it, do not appear to have been resorted to as an aid to interpretation by the High Court in *Weiss*.

So far as is relevant, s.686 of the *Criminal Code* provides:

- (1) On the hearing of an appeal against a conviction . . . , the court of appeal
 - (a) may allow the appeal where it is of the opinion that
 - (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
 - (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
 - (iii) on any ground there was a miscarriage of justice;
 - (b) may dismiss the appeal where
 - (i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment,
 - (ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph (a),
 - (iii) notwithstanding that the court is of the opinion that on *any ground mentioned in subparagraph (a)(i) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred*, or
 - (iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby . . . [Emphasis added.]

5. See *M v The Queen* (1994) 181 CLR 487 at 492; *MFA v The Queen* (2002) 213 CLR 606 at [25].
6. See *R v Gallagher* [1998] 2 VR 671 at 675, where Brooking JA seems to accept that the proviso cannot be applied to the first ground. Brooking JA's judgment contains a thorough discussion of the topic.
7. Cases decided by the High Court where it was held that the proviso could not be applied include: *Krakouer v The Queen* (1998) 194 CLR 202; 72 ALJR 1229 (misdirections on the elements of the offence and burden of proof despite the strength of the Crown case); *Driscoll v The Queen* (1977) 137 CLR 517 and *Storey v The Queen* (1978) 140 CLR 364 (misdirection or non-direction on propensity evidence); *Farrell v The Queen* (1998) 194 CLR 286 (failure to admit psychiatric evidence bearing upon the credibility of a critical witness); *Gilbert v The Queen* (2000) 201 CLR 414 (conviction for murder where manslaughter had not been left to the jury); *Grey v The Queen* (2001) 75 ALJR 1708 (non-disclosure of evidence materially affecting credit of a crucial witness).
Cases where the High Court has applied the proviso include: *Suresh v The Queen* (1998) 72 ALJR 769 (evidence of non-recent complaint admitted without objection in a sex case, where the defence relied upon it as a prior inconsistent statement); *Wilde v The Queen* (1988) 164 CLR 365 (failure to sever an indictment where, however, the Crown case was extremely strong and the defence extremely weak); *Festa v The Queen* (2001) 208 CLR 593; 76 ALJR 291 (misdirection concerning identification evidence).
8. See *R v Gallagher* [1998] 2 VR 671; *Grey v The Queen* (2001) 75 ALJR 1708; 184 ALR 593 at [25], [52]–[56]; *Festa v The Queen* (2001) 208 CLR 593; 76 ALJR 291 at [110]–[123], [197]–[199], [222]–[228]; *Conway v The Queen* (2002) 209 CLR 203; 76 ALJR 358; *Ugle v The Queen* (2001) 211 CLR 171; 76 ALJR 886; *TKWJ v The Queen* (2002) 212 CLR 124.
9. *R v Weiss* (2004) 8 VR 388; 145 A Crim R 478 at [70].
10. (2005) 80 ALJR 444; 223 ALR 662; [2005] HCA 81 at [10].
11. Following *Crease v Barrett* (1835) 1 Cr M & R 919 at 933 [149 ER 1353 at 1359] the rule was taken to mean that courts had renounced all discretion, and, “where evidence formally objected to at *Nisi Prius* is received by the Judge, and is afterwards thought by the Court to be inadmissible, the losing party has a right to a new trial” — *Wright v Doe dem Tatham* (1837) 7 A & E 313 at 330 [112 ER 488 at 495] per Lord Denman CJ.
12. *R v Gibson* (1887) 18 QBD 537 at 540–541 per Lord Coleridge CJ. Compare *R v Grills* (1910) 11 CLR 400 at 410 per Griffiths CJ.
13. *Weiss* at [18].
14. *Weiss* at [18].
15. *Weiss* at [30].
16. *Weiss* at [40].
17. *Weiss* at [41].
18. See fn 5 above.
19. *R v Arcangioli* [1994] 1 SCR 129 at 146.
20. *Colpitts v The Queen* [1965] SCR 739 at 744.
21. At [6].
22. At [113].
23. Section 385(1) of the *Crimes Act 1961* (NZ) relevantly provides:
 - (1) On any appeal ... [the Court] must allow the appeal if it is of opinion:
 - (a) That the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence; or
 - (b) That the judgment of the Court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law; or
 - (c) That on any ground there was a miscarriage of justice; or
 - (d) That the trial was a nullity — and in any other case shall dismiss the appeal:

Provided that [the Court] may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.
24. At 701–2.
25. At 711–12.
26. In particular, at [36] Lord Carswell said of observations in *Wilde v The Queen* (1988) 164 CLR 365 at 372, 373, 374, per Brennan, Dawson and Toohey JJ. — “Their Lordships agree with these statements of the law and consider that they are correct.”
27. *R v Howse* [2006] 1 NZLR 433; [2005] UKPC 31 at [34]–[35].
28. See also *The Queen v Wilson* [2006] NZCA 150.
29. At [60].
30. In a case concerning whether manslaughter should have been left to the jury on a charge of murder, the Court of Appeal (Vic.) in *R v Gill* (2005) 159 A Crim R 243 at [28], in commenting on the High Court's judgment in *Weiss* at [43], said:
With respect, we regard those propo-
sitions as giving rise to some internal tensions, given that, for the purpose of assessing the application of the proviso, the appellate court must put aside the jury's verdict, while at the same time bearing in mind that the jury returned a guilty verdict; must bear in mind that the issues in a trial are shaped by the forensic decisions of counsel, while at the same time also bearing in mind that under the rule in *Gillard* [*Gillard v The Queen* (2003) 219 CLR 1] forensic decisions of counsel are to be ignored; and, subject to the modifications mentioned, must endeavour to decide the case itself, as would occur in an appeal in a civil matter, but with the difference that, if in the end the appellate court is not satisfied beyond reasonable doubt that the evidence below established that the accused was guilty of the offence charged, the court must ordinarily order that a new trial be had.
31. *Nudd* at [6] per Gleeson CJ; at [158]–[159] per Callinan and Heydon JJ.
32. *Nudd* at [2] (fn 2), [6].
33. *Nudd* at [57] (fn 83), [87] (fn 126), [112] (fn 153).
34. Gleeson CJ, Gummow, Heydon and Crennan JJ.
35. At [84], citing *Weiss v The Queen* (2005) 80 ALJR 444 at 454–455, [41] per Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ; 223 ALR 662 at 673–674.
36. See and compare the judgment of the majority at [96].
37. *R v Redmond & Anor* [2006] VSCA 75 at [23]. Lies were wrongly left as to consciousness of guilt. The proviso was not applied.
38. See fn 28 above.
39. *R v Nguyen* [2006] VSCA 158.
40. *Keller v R* [2006] NSWCCA 204.
41. *Gardiner v R* (2006) 162 A Crim R 233 (NSW, CCA).
42. *R v VA S* [2006] VSCA 159 at [32]–[33].
43. *R v Hackett* [2006] VSCA 138.
44. *W v R* (2006) 162 A Crim R 264 (Tas, CCA).
45. *Livermore v R* [2006] NSWCCA 334.
46. *Oldfield v R* [2006] NSWCCA 219.
47. *Taleb v R* [2006] NSWCCA 119.
48. *Robinson v R* (2006) 162 A Crim R 88 (NSW, CCA).
49. Section 80 of the Constitution provides (so far as is relevant):
The trial on indictment of any offence against any law of the Commonwealth shall be by jury ...
50. His last conviction appeal was *R v LRG* [2006] VSCA 288 (see at [35]).
51. [2006] VSCA 277.
52. At [5].