DPP v Moseley [2013] NTSC 8

PARTIES:	OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS v MOSELEY, Neil
TITLE OF COURT:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	86 of 2012 (21231745)
DELIVERED:	1 March 2013
HEARING DATE:	6 November 2012
JUDGMENT OF:	RILEY CJ, KELLY and BARR JJ

CATCHWORDS:

COURT OF CRIMINAL APPEAL – DECISION OF COURT OF CRIMINAL APPEAL ALLEGED BASED ON FRAUD – JURISDICTION OF SUPREME COURT TO SET ASIDE – EQUITABLE JURISDICTION
Decision of the Court of Criminal Appeal, setting aside the defendant's conviction and granting retrial, alleged to have been actuated by fraud – whether the Supreme Court has jurisdiction in equity to set aside decision of the Court of Criminal Appeal – action on original bill part of the equitable jurisdiction of the Supreme Court of South Australia immediately before 1 January 1911 – incorporated into the original civil jurisdiction of the Supreme Court of the Northern Territory by s 14(1)(b) Supreme Court Act (NT) – held Supreme Court has jurisdiction to set aside the judgment of the Court of Criminal Appeal in the event fraud is established.

PRACTICE AND PROCEDURE
Preliminary questions as to jurisdiction of Supreme Court – referral by single Justice pursuant to s 21(1) *Supreme Court Act* – whether the Supreme Court has jurisdiction in equity to set aside decision of the Court of Criminal Appeal – if jurisdiction exists, whether the Supreme Court should decline to exercise – held no reason based on principles of criminal justice or equity for Supreme Court to decline exercise of jurisdiction in the event fraud is established.

Criminal Code (NT), s 407(1)
Supreme Court Act (NT), s 14 (1) (b), s 21(1)
Equity Act 1866 (SA)
Supreme Court Act 1878 (SA)

Clone Pty Ltd v Players Pty Ltd (In Liquidation Receivers Appointed) and Ors [2012] SASC 12, applied

Grierson v The King (1938) 60 CLR 431; *Harrison v Schipp* (2002) 54 NSWLR 612; *Hip Foong Hong v H Neotia & Co* [1918] AC 888, considered

Bailey v Marinoff (1971) 125 CLR 529, followed

Briginshaw v Briginshaw (1938) 60 CLR 336; *McDonald v McDonald* (1965) 113 CLR 529; *Neath Holdings v Karajan Holdings Pty Ltd* (1992) 110 ALR 449; *Reifek v McElroy* (1965) 112 CLR 517; *McDonald v McDonald* (1965) 113 CLR 529, referred to

Moseley v The Queen [2012] NTCCA 11, referred to

REPRESENTATION:

Counsel:

Plaintiff:	M P Grant QC, P M Usher, C A Smyth
Defendant:	S J Odgers SC, N Aughterson

Solicitors:

Plaintiff:	Office of Director of Public Prosecutions
Defendant:	Ward Keller

Judgment category classification:	B
Judgment ID Number:	Bar1304
Number of pages:	24

IN THE FULL COURT
OF THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

DPP v Moseley [2013] NTSC 8
No. 86 of 2012 (21231745)

BETWEEN:

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS
Plaintiff

AND:

NEIL MOSELEY
Defendant

CORAM: RILEY CJ, KELLY and BARR JJ

REASONS FOR JUDGMENT

(Delivered 1 March 2013)

THE COURT

[1] The issue for determination by the Court on the reference pursuant to s 21(1) of the *Supreme Court Act* is whether the Supreme Court in its equitable jurisdiction may set aside a judgment of the Court of Criminal Appeal,[1] which set aside the conviction of the defendant and ordered a fresh trial on the charge of aggravated robbery, in circumstances where the judgment of the Court of Criminal Appeal was actuated by fraud. For

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

reasons set out below, we have found that the Supreme Court does have jurisdiction.

[2] It should not be assumed from this judgment that the Court has made any finding as to the fraud alleged by the plaintiff against the defendant and other persons. There has been no hearing of the plaintiff's case and this judgment is concerned only with the preliminary issue.

[3] Ultimately the plaintiff will bear the onus of proof of the alleged fraud. As Taylor J pointed out in *McDonald v McDonald*,[2] a judgment will be set aside on the ground of fraud only after an affirmative finding of the fraud alleged. The required standard of proof is on the balance of probabilities, as explained by the High Court of Australia in its decisions in *Briginshaw v Briginshaw*,[3] *Rejfek v McElroy*[4] and *Neat Holdings v Karajan Holdings Pty Ltd*.[5]

Background

[4] The defendant was charged on indictment with aggravated robbery alleged to have been committed in company with Maximilian Tippett on 2 March 2011.

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[2] *McDonald v McDonald* (1965) 113 CLR 529. At 535, Taylor J said that an application to set aside a judgment on the ground of fraud is not, in substance, an appeal in the strict sense at all but an independent proceeding in which the party complaining carries the onus of establishing the fraud alleged, citing *Cabassi v Vila* (1940) 64 CLR 130 at 147.

[3] *Briginshaw v Briginshaw* (1938) 60 CLR 336, at 361 - 3.

[4] *Rejfek v McElroy* (1965) 112 CLR 517, at 521 - 2.

[5] *Neat Holdings v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at 449 - 50.

[5] At the trial, there was no dispute that two men committed an aggravated armed robbery at a Kentucky Fried Chicken (KFC) shop in Coconut Grove, a Darwin suburb, shortly after 10.30 pm on 2 March 2011.

[6] The amount stolen in the robbery was $2,900 in cash and coins. The coins were wrapped in brown coloured paper with the word “Armaguard” printed on it.

[7] The issue at trial in relation to the defendant was whether the prosecution could prove beyond reasonable doubt that he was one of the two robbers. Both robbers wore black clothes and were masked, and there was no identification evidence in respect of the defendant or Tippett. The prosecution relied upon circumstantial evidence, and upon alleged admissions made by the defendant to a man named Frank Holden, a friend of the defendant and Tippett.

[8] During the robbery, one of the robbers attempted to pursue a KFC employee who jumped over the counter and ran away. However, the pursuing robber slipped and fell to the floor.

[9] Immediately after the robbery, the robbers ran towards the back door of the KFC shop and left. The KFC shop manager went outside and saw the robbers sitting in a car which he identified as a red Commodore. That vehicle drove away quickly.

[10] There was no dispute at trial that the appellant had rented a red Commodore on 26 February 2011, and that he was arrested in that car on 3 March 2011 driving towards Katherine. At the time of his arrest, the defendant had more than $1,300 in cash in his wallet. The cash was all in good condition. The appellant said in evidence that he had received $600 of that money as Centrelink payments; $400 for some work that he had done; that he had won a couple of hundred dollars at the Casino; and that he had borrowed $300 from Frank Holden, $150 of which he had given to Tippett. There was also evidence that he had spent some money on purchasing petrol and food for the Katherine trip.

[11] At the time of the defendant's arrest, Police found a pair of black pants on the rear seat of the red Commodore. In a pocket of the black pants was brown paper with the word "Armaguard" printed on it, similar to the wrapping on coins taken during the robbery. The defendant gave evidence at trial, but was unable to provide any explanation of how he might have innocently obtained the coins in such paper rolls. He claimed that he had never seen that paper before.[6]

[12] At the time of his arrest, the defendant had a number of bruises to the side of his knee and the underside of his forearm which the Crown submitted to the jury were caused by a fall inside the Kentucky Fried Chicken shop.[7]

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[6] *Moseley v The Queen* [2012] NTCCA 11 at [10].
[7] see par [8] above.

[13] The Court of Criminal Appeal found that there was considerable evidence supporting a conclusion that the red Commodore sedan being driven by the defendant at the time of his arrest was the same vehicle used by the two robbers.[8]

[14] There was no dispute at the trial that the red Commodore was left at a location very near the Tippett family home at some time during the night of 2 March 2011. The prosecution led evidence that the robbery was reported at 10.48 pm, and that the defendant attempted six calls to Frank Holden between 10.56 pm and 10.59 pm, before getting through to Holden at 11.12 pm. The implication was that the defendant was concerned that Police would be looking for the red Commodore in connection with the robbery. Rather than continue to drive the vehicle, the defendant wanted Mr Holden to pick him up from where he had left the red Commodore.

[15] The defendant in his evidence denied that he was one of the robbers and claimed that, at the time of the robbery, he had driven with his girlfriend to Casuarina Beach in Frank Holden's car. He said that he made one call to Holden to enquire whether Holden wanted food, and another to see if he wanted ice coffee or cigarettes.

[16] The defendant claimed in evidence that he had lent the red Commodore to a friend named William Phillips, and that he did not get the car back until the following day, when he went to pick it up from its location near the Tippett

[8] *Moseley v The Queen* [2012] NTCCA 11 at [7].

family home. However, when the defendant was stopped in the red Commodore by police, and informed that police suspected it had been used in a robbery, the defendant did not mention that he had lent the car to anyone.

[17] The defendant was unable to provide any details about "William Phillips", other than saying that he lived on the Gold Coast. He claimed that he had never made a call to Phillips, nor received a call from him, on his mobile phone. He claimed that he telephoned Phillips on the morning of 3 March from a public phone at the Northlakes Shopping Centre because he had forgotten to take his mobile phone. The Centre was only a short distance from where he claimed he left his phone and there was no apparent reason why he would have made such a call from a public telephone. The Crown submitted that it was a remarkable and very suspicious coincidence that Mr Phillips had decided to leave the car at a location near the home of the Tippett family for no apparent reason.

[18] Frank Holden gave evidence at the trial which can be briefly summarized as follows: the defendant and Tippett were at his home on the night in question; they went out at some time in the late evening; they did not take his vehicle; he later received a phone call to pick them up from a location near the Tippett home; he picked them up and took them back to his place; the defendant then borrowed Holden's car to pick up his girlfriend; and the following day Holden drove the defendant to pick up the red Commodore.

[19] During cross-examination evidence directly inconsistent with his evidence in chief was elicited from Holden. Holden agreed that Tippett was with him while he watched a movie that started at 9:30 pm and did not finish until midnight; and Holden agreed that the defendant did not leave his home until 10:45 pm when he left in Holden's vehicle.[9]

[20] The prosecution sought to have Holden declared a hostile witness on the basis of two statements he had made to police in which he stated that, when he picked up the defendant and Tippett from the location near Tippett's house, the defendant had said: "No, we weren't at the Beachfront, we just fucked up big time"; and Tippett said: "I was all calm, but you were freaked out," and that subsequently they had told him that they robbed "a KFC".

[21] After Holden had given evidence inconsistent with the prosecution case, the trial judge allowed the prosecution to cross-examine Holden in front of the jury in order to undermine his credibility. In that cross-examination, Holden admitted making the statements to Police, but said that the part involving the alleged admission about the robbery was not true. He did however maintain the truth of the other statements which implicated the defendant in the commission of the robbery.[10]

[22] The jury found the defendant guilty of the aggravated robbery charge and on 18 August 2011 he was convicted and sentenced to nine years imprisonment.

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9 *Moseley v The Queen* [2012] NTCCA 11 at [19].
10 *Moseley v The Queen* [2012] NTCCA 11 at [20].

[23] Tippett did not give evidence at the trial. He, also, was found guilty of the aggravated robbery charge. He was convicted and sentenced to seven years imprisonment.

Fresh evidence

[24] On 6 October 2011, Miguel Franco Da Silva, a prisoner at Darwin Correctional Centre, confessed in a statutory declaration that he was the person who accompanied Tippett during the commission of the robbery. Da Silva subsequently maintained that confession, including in an interview with police on 17 January 2012.

[25] Tippett corroborated Da Silva's confession in an affidavit sworn on 2 February 2012, in which he deposed that the person who had committed the robbery with him was Da Silva.

[26] The defendant swore an affidavit on 20 December 2011 asserting that certain evidence given by him at trial was false, including that he had lent the Commodore vehicle to William Phillips when, in fact, he had lent it to Tippett, and that he had given $150 to Tippett. He maintained that the rest of the evidence he had given at his trial was true.

[27] The defendant subsequently instituted an appeal against conviction to the Court of Criminal Appeal. The ground of the appeal was that there had been a miscarriage of justice resulting from the absence at the trial of new and/or fresh evidence. At the appeal hearing, Da Silva and Tippett both gave

evidence to the effect that Da Silva was the person who had accompanied Tippett during the commission of the robbery. The defendant gave evidence that he had not been involved in the robbery, but that he had innocently loaned the getaway vehicle to Tippett, who confessed to him the next day that he had used the car in the robbery.[11]

[28] On 6 June 2012, the Court of Criminal Appeal quashed the conviction of the defendant and ordered a new trial.[12] In so doing the Court adopted and applied the principles summarised by Kirby J in *R v Abou-Chabake*[13] and found that the quality of the fresh evidence was, "in the context of the evidence given at the trial, of a sufficient quality that there was a significant possibility that the jury acting reasonably would have acquitted the accused." The appeal was allowed on that basis.

[29] Although both Tippett and Da Silva alleged and agreed, in their evidence before the Court of Criminal Appeal, that they had committed the robbery together, the evidence of Da Silva was probably determinant of the successful outcome of the appeal, for reasons which appear from the appeal judgment:

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[11] AB 82.5 - 83.5.
[12] *Moseley v The Queen* [2012] NTCCA 11at [29].
[13] (2004) 149 A Crim R 417 at p 427 - 428.

> "… Da Silva was arrested on 4 March 2011 for breach of a domestic violence order and was remanded in custody on the same day. He believes he is due to be released sometime between mid August or November 2013 and he had no other charges outstanding against him. There is no evidence that he had previously been involved in a robbery. There is no evidence that Da Silva has anything to gain by admitting to a robbery which he did not commit. No motive has been established to explain why Da Silva would give false evidence. Da Silva was made aware by the police of the kind of sentence which the appellant is serving and he is also aware that his confession was likely to result in a lengthy term of imprisonment for him, although his evidence is that he believes that his sentence would not be anywhere near the term imposed on the appellant, particularly as he intends to plead guilty and he does not have any prior convictions for armed robbery."[14]

[30] There were discrepancies in the versions given by Da Silva and Tippett, which the Crown contended raised a strong inference of collusion. However, the Court did not consider that a jury acting reasonably would necessarily have come to that view. There is no doubt that the Court's assessment was greatly influenced by the apparent lack of motive on Da Silva's part to falsely confess to participation in the KFC robbery.

[31] The order of the Court of Criminal Appeal quashing the defendant's conviction and ordering a retrial was authenticated by the Registrar on 7 June 2012.

The originating motion and reference to the Full Court

[32] On 25 July 2012, Da Silva was interviewed by Northern Territory police detectives and recanted his confession that he was the person who had accompanied Tippett during the commission of the robbery. Da Silva told

[14] *Moseley v The Queen* [2012] NTCCA 11 at [33].

police that the defendant had persuaded him to falsely 'put his hand up' for the robbery, by the inducement that, after the defendant was released, he would pay Da Silva "about two hundred thousand dollars" from compensation monies he said he expected to receive. Da Silva told police that the defendant had admitted that he, the defendant, had committed the robbery, and the only thing that could have him acquitted was if some other person claimed responsibility. Da Silva said that the account which he had given to police on 17 January 2012 in relation to his involvement in the robbery was false. Da Silva also told police that his statutory declaration of 6 October 2011 was written in the defendant's presence, and under the defendant's instruction as to its content. Da Silva said that he had met Tippett for the first time in prison.

[33] If the information provided by Da Silva to the Northern Territory police on 25 July 2012 was correct, then the defendant's appeal was predicated upon a fabrication. If the 'fresh evidence' was false, there was in fact no significant possibility that the jury acting reasonably would have acquitted the accused, and the Court of Criminal Appeal made the finding referred to in par [28] above as a result of the defendant's deception.

[34] By originating motion filed 24 August 2012, the plaintiff alleged that the judgment of the Court of Criminal Appeal was actuated by fraud on the part of the defendant, Tippett and Da Silva, and sought an order setting aside the

judgment of the Court of Criminal Appeal. The defendant opposed the making of the orders sought.

[35] On 21 September 2012, pursuant to s 21(1) of the *Supreme Court Act*, Riley CJ referred the following questions of law to the Full Court:

> 1. Does the Supreme Court have jurisdiction and power to grant the relief sought in the Originating Motion dated 24 August 2012 or otherwise to enjoin the defendant from taking the benefit of the judgment of the Court of Criminal Appeal in *Moseley v The Queen* [2012] NTCCA 11?
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> 2. If yes to question 1, should the Supreme Court decline to entertain the proceedings commenced by Originating Motion dated 24 August 2012 on the basis that a retrial is an appropriate forum in which to determine the truth of the fact pleaded in the Originating Motion of 24 August 2012?

The issues on the reference

[36] The general principle in relation to the reopening or setting aside of a judgment is as stated by Barwick CJ in *Bailey v Marinoff*,[15] namely that once an order disposing of a proceeding has been perfected by being drawn up as the record of the court, that proceeding (apart from any specific and relevant statutory provision) is at an end in that court and is beyond recall by that court. As mentioned above, the judgment of the Court of Criminal Appeal has been authenticated.

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[15] *Bailey v Marinoff* (1971) 125 CLR 529 at 530. See also *Gamser v The Nominal Defendant* (1977) 136 CLR 145 at 154, per Aickin J; *Elliott v The Queen* (2007) 234 CLR 38 at 42 [7]; *Burrell v The Queen* (2008) 238 CLR 218 at [24], [29].

[37] The Court of Criminal Appeal is a statutory emanation of the Supreme Court created by the *Criminal Code*.[16] However, its jurisdiction is statutory and there are no specific statutory provisions in the *Criminal Code* which would permit the Court of Criminal Appeal to set aside or reopen a judgment on appeal after the judgement has been perfected; nor does the Court of Criminal Appeal have inherent power to do so. The parties to this appeal do not contend otherwise.[17]

[38] We have concluded that the Supreme Court exercising equitable jurisdiction may set aside a judgment obtained by fraud. The former courts of Chancery exercised the power to intervene by an original bill to provide a remedy where the more rigid common law courts lacked the capacity to do so. The remedy was described by Dixon J in *Grierson v The King* [18] as an "independent proceeding equitable in its origin and nature", which (unlike the proceeding on a bill of review[19]) survived the Judicature Act reforms :

> In Chancery, rehearings, that is, appeals, were no longer admitted after enrolment of the decree, although an independent bill of review might be filed based upon error apparent or on facts newly discovered (*Sydney Smith's Chancery Practice*, 7th ed. (1862), vol. 1, p. 809 et seq.). Under the Judicature system an action may be brought to set aside a judgment obtained by fraud, but it is an independent proceeding equitable in its origin and nature (*Ronald v Harper* (1913) V.L.R. 311, at p. 318 per *Cussen* J.; *Halsbury's Laws*

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16 s 407(1) Criminal Code reads "The Supreme Court shall be the Court of Criminal Appeal and the Court shall be duly constituted if it consists of not less than 3 judges and of an uneven number of judges."

17 Plaintiff's Outline of Submissions, 26 October 2012, par 26; Defendant's Outline of Submissions, 29 October 2012, par 11.

18 *Grierson v The King* (1938) 60 CLR 431 at 436.

19 There is a very useful discussion of the distinction between the original bill and the bill of review in the judgment of Giles JA in *Harrison v Schipp* (2002) 54 NSWLR 612 at 634 [157], and in the judgment of Ipp A-JA at 650 [243] to [255]. The bill of review was supplanted by the statutory appellate system; the original bill was not.

> *of England,* 2nd ed., vol. 19, p. 266, and the cases there collected, particularly *Jonesco v Beard* (1930) A.C. 298). … [20]

[39] The Chancery jurisdiction on an original bill and its applicability in New South Wales were discussed by the Court of Appeal in *Harrison v Schipp*.[21] The Court in that case held that the procedure formerly known as a bill of review, based on the discovery of new matter subsequent to trial, was no longer available in New South Wales, whereas the action by an original bill to set aside a judgment based on fraud still remained. Handley JA explained[22] the original bill proceeding as follows:

> A litigant could impeach a decree obtained by fraud by an original bill in Chancery. This was not a bill of review and could be filed without leave. The fraud used was the principal point to be established (Mitford at 97, 112-3, Daniell at 1428-9). Where this was proved the Court would rescind the decree and restore the parties to their former situation whatever their rights might be (*Birne v Hartpole* (1717) 5 Bro PC 197 at 200; 2 ER 624 at 626). In *Barnesly v Powell* (1748) 1 Ves sen 119 at 120; 27 ER 930], Lord Hardwicke LC said: "There are several instances of relief, notwithstanding a former decree, if obtained by fraud and imposition, which infects judgments at law and decrees of all courts, and annuls the whole in the consideration of this court".
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> See now *Hip Foong Hong v H Neotia & Co* [1918] AC 888 at 894; *Jonesco v Beard* [1930] AC 298 at 301-2; *McDonald v McDonald* (1965) 113 CLR 529 at 542; and *Toubia v Schwenke* (2002) 54 NSWLR 46.

[40] Handley JA then examined in detail the case and statute law in New South Wales and, in relation to the action to set aside a judgment based on fraud,

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[20] The statement of Dixon J was recently endorsed by Kirby J in *Burrell v The Queen* (2008) 238 CLR 218 at [98].
[21] *Harrison v Schipp* [2002] 54 NSWLR 612.
[22] at 618 par [18] and par [19].

concluded[23] that the jurisdiction of a Court of Equity to set aside a judgment for fraud was not affected by the legislative changes in New South Wales or in England because such proceedings were based on a cause of action under the general law. A similar conclusion was reached by Giles JA:[24]

> Separate proceedings can be brought to set aside an order which has been entered and have a new trial on the ground that the order was obtained by fraud (see for example *Hip Foong Hong v H Neotia and Co* [1918] AC 888; *Jonesco v Beard* [1930] AC 298; *McDonald v McDonald* (1965) 113 CLR 529; *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534. …

[41] After the passing of the Judicature Acts of 1873 and 1875 (UK), which created a new Supreme Court of Judicature consisting of the High Court of Justice and the Court of Appeal, the powers formerly exercised by Chancery for the impeachment of common law judgments for fraud became available to the High Court of Justice, and it was accepted in England that proceedings could be brought in the High Court of Justice to set aside a judgment for fraud.[25] Perfected common law judgments were often impugned on the ground of fraud.[26] The Judicature Acts conferred on the High Court of Justice, by necessary implication from its creation as a single

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23 at 626 [66].

24 630 [139]. The High Court had confirmed the continued existence in Australia of the jurisdiction in equity for the impeachment of judgments for fraud, by a separate proceeding, in *DJL v Central Authority* (2000) 201 CLR 226 at [37].

25 *Boswell v Coaks (No 2)* (1894) 86 LT 365, cited by Handley JA in *Harrison v Schipp* (2002) 54 NSWLR at 622 [40] – [45], and by Kourakis J in *Clone Pty Ltd v Players Pty Ltd (In Liquidation Receivers Appointed) and Ors* [2012] SASC 12 at [47].

26 D M Gordon QC, "Fraud or New Evidence as Grounds for Actions to set aside Judgments - I" (1961) 77 L.Q.R. 358 at 369-370, cited by Kourakis J in *Clone Pty Ltd v Players Pty Ltd (In Liquidation Receivers Appointed) and Ors* [2012] SASC 12 at [49].

court of law and equity, the combined powers of the courts which it replaced. [27]

The original jurisdiction of the Northern Territory Supreme Court

[42] The power to rescind or set aside a judgment by a proceeding on an original bill was part of the equitable jurisdiction of the Supreme Court of South Australia immediately before 1 January 1911, and is thus incorporated into the original civil jurisdiction of the Supreme Court of the Northern Territory by s 14(1)(b) *Supreme Court Act* (NT).[28]

[43] The Supreme Court of South Australia prior to 1911 was constituted a "Court of Equity" on which was conferred the equitable jurisdiction and associated powers of "the Lord High Chancellor of Great Britain",[29] and the like equitable jurisdiction of the Lord High Chancellor of Great Britain and the High Court of Chancery.[30] The practice and procedure of the Court in its equity jurisdiction was that of the High Court of Chancery.[31] The *Supreme Court Act 1878* (SA) consolidated and amended the earlier Supreme Court Acts and expressly provided (by s 5) for the concurrent administration of law and equity by the Supreme Court. By constituting the Supreme Court of

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27 See, for example, *Clone Pty Ltd v Players Pty Ltd (In Liquidation Receivers Appointed) and Ors* [2012] SASC 12 at [49].

28 The provision reads as follows: "14(1) In addition to the jurisdiction conferred on it elsewhere by this Act, the Court: ... (b) has, subject to this Act and to any other law in force in the Territory, in relation to the Territory, the same original jurisdiction, both civil and criminal, as the Supreme Court of South Australia had in relation to the State of South Australia immediately before 1 January 1911."

29 The Supreme Court Act 1855-6. The jurisdiction and powers of the Supreme Court of South Australia are described in *Clone* (supra) at [51] to [74].

30 *Equity Act 1866* (SA).

31 *Equity Act 1866* (SA).

South Australia as a court of law and equity, the 1878 Act accumulated in the Supreme Court the same powers to control its proceedings and records as were formerly exercised by both the superior common law courts and the High Court of Chancery in England. Because the Supreme Court of South Australia had concurrent jurisdiction in law and equity, the powers which were once exercised by courts of Chancery were also available to the Court in the exercise of its jurisdiction in common law actions.

[44] The civil jurisdiction of the Supreme Court of South Australia – as a court of law and equity – remained the same up to 1 January 1911, and continued until the enactment in South Australia of the *Supreme Court Act 1935*.

[45] In our opinion, the effect of s 14(1)(b) *Supreme Court Act* (NT) is that the Supreme Court of the Northern Territory has concurrent jurisdiction in law and equity (as did the Supreme Court of South Australia immediately before 1 January 1911) and that its equitable jurisdiction includes the jurisdiction to set aside common law judgments on the grounds of fraud.

Jurisdiction in equity in relation to appeal judgments

[46] The defendant has raised an issue as to whether the Supreme Court's equitable jurisdiction may be exercised in relation to an appeal judgment (in particular a 'criminal appeal judgment') as distinct from a first instance judgment. Counsel for the defendant submitted that there is nothing in the English cases to suggest the availability of collateral proceedings in equity

to set aside a decision of a court of appeal where the fraud arises only in that court (as distinct from setting aside a judgment of first instance that has been affirmed on appeal).[32]

[47] There is no reason in principle or otherwise why the Supreme Court's equitable jurisdiction would not extend to or include the jurisdiction to set aside an appeal judgment on the grounds of fraud. We note that there are no statutory provisions which, expressly or by implication, abolish, exclude or limit the Supreme Court's equitable jurisdiction to impeach judgments based on fraud. In our view, it does not matter that the fraud may have been perpetrated on an appeal court rather than on a first instance court. To the extent that it is relevant, we note that the Court of Criminal Appeal in the present case exercised a first instance function of hearing, viva voce, the evidence of the defendant, Da Silva and Tippett now sought to be impugned in this proceeding.

[48] In any event, as mentioned in par [37] above, the Court of Criminal Appeal is a statutory emanation of the Supreme Court created by the *Criminal Code*. Since there is only one court – the Supreme Court – there would be no valid reason, based on court hierarchy, for the Supreme Court to lack jurisdiction to rescind or set aside the order of the Court of Criminal Appeal.

[32] Supplementary Submissions of Defendant, 12 November 2012, par 7.

[49] We note finally that the passage extracted from *Grierson v The King* in par [38] above contemplates the application of the fraud exception to judgments on appeal in criminal matters.[33]

[50] The potential of fraud to corrupt and bring into disrepute the system of justice administered by the courts has been referred to in strong terms by other courts. For example, in *Harrison v Schipp* (supra) Ipp A-AJ said:

> Due regard has to be given to the fact that fraud is one of the "pillars which support the entire structure of the equitable jurisdiction" (Meagher, Gummow and Lehane, *Equity Doctrines and Remedies*, 3rd ed (1992), p.339, par 1207). It has always been recognised that "equity has a broad jurisdiction to unravel fraud and set to rights its consequences" (per the full Federal Court in *Monroe v Schneider Associates (Inc) v No 1 Raberem Pty Ltd* (1992) 37 FCR 234 at 240). The jurisdiction to impeach judgments obtained by fraud is so deeply embedded in equity that very clear words would be required in any legislation before it would be construed as interfering in any way with the powers of a court of equity in this respect.[34]

[51] In *Clone*,[35] the rationale for the jurisdiction of the Supreme Court of South Australia to set aside judgments obtained by fraud was stated by Kourakis J as follows (underline emphasis added):

> A judgment which is regular and apparently sound on the evidence presented to the Court which gave the judgment should, as a general rule, be maintained in the interests of the finality of litigation. It is for that reason that courts are cautious in the exercise of the discretion to allow further evidence on appeal. However, fraud is viewed differently. The public interest in finality necessarily entails tolerance of some judgments which events subsequently show to have

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[33] See also *Burrell v The Queen* (2008) 238 CLR 218 at [98], where Kirby J. also appeared to accept the application of the fraud exception to appeal judgments in criminal matters; and *Gamser v Nominal Defendant* (1977) 136 CLR 145 at 154, where Aicken J accepted the application of the fraud exception to appeal judgments in civil matters.

[34] *Harrison v Schipp* [2002] 54 NSWLR 612, at 651 [256].

[35] *Clone Pty Ltd v Players Pty Ltd (In Liquidation Receivers Appointed) and Ors* [2012] 1 SASC 12 at [97].

> been mistaken, but there is little or no public interest in allowing a litigant who has cheated justice to retain the fruits of his or her fraud. To do so would tend to bring the administration of justice into disrepute because it would lend the assistance of the compulsory processes of the Courts to the litigant who was the most effective fraudster. If evidence of material fraud is discovered within the period in which an appeal can be brought, or even after that period has expired but before the Full Court has determined an appeal from the trial judgment, the Full Court can consider and pass judgment on the allegation of fraud. However if the fraud practised at trial is discovered after an appeal on other grounds has been dismissed, there is no remedy unless the Court at first instance retains the power once exercised in Chancery on an Original Bill alleging fraud. For that reason, the existence of a power in the trial court to set aside a judgment obtained by fraud has consistently been recognised in common law jurisdictions since the Judicature Acts.

[52] In the event that the fraud alleged against the defendant and others were proven, it would be extraordinary if the Supreme Court lacked jurisdiction to grant relief for the reason that an appeal court, and not a trial court, had been deceived, particularly so where the appeal court in this case performed what is usually a trial court function in hearing evidence of witnesses.

[53] The absence of any other remedy for the alleged fraud is a compelling reason for the Supreme Court to utilize the former Chancery remedy to restore the position between the parties to that which existed before the institution of the defendant's appeal to the Court of Criminal Appeal on the basis of the (now impugned) fresh evidence. As Lord Buckmaster said in *Hip Foong Hong v H Neotia & Co*: "A judgment that is tainted and affected by fraudulent conduct is tainted throughout, and the whole must fail".[36]

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

Defendant's alternative submissions

[54] The defendant argues[37] that, if there is jurisdiction, the Supreme Court should decline to entertain the proceedings.

[55] First it is argued that "what is alleged is simply the commission of perjury in the Court of Criminal Appeal." In our view, however, that mischaracterizes what (it is alleged) took place. The fraud alleged involved the commission of perjury by the defendant and two other persons, in collusion with one another, with the promise of payment of a substantial sum of money to Da Silva for his agreement to falsely admit to committing a crime he did not commit, in order to secure an acquittal or a re-trial for the defendant after he had been found guilty by a jury. We bear in mind that the alleged false evidence given in the Court of Criminal Appeal secured an order for retrial. There may be cases involving commission of perjury where the Supreme Court would decline jurisdiction;[38] but, on the facts alleged, the present case is not one. The alleged fraud was egregious.

[56] Second, it is argued that there are different standards of proof in civil and criminal proceedings. While that is quite correct, in considering whether the Supreme Court should decline jurisdiction, the appropriate starting point for a consideration of different standards of proof is the jury's verdict after trial. The jury found the defendant guilty of the charge and in so finding must have been satisfied beyond reasonable doubt of his guilt. On the other

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[37] Defendant's Outline of Submissions, par 24 and following.

[38] See, for example, *Wentworth v Rogers* (No 5) (1986) 6 NSWLR 534 at 538D - 539F.

hand, the decision of the Court of Criminal Appeal to grant a retrial was based on a finding not that "the quality of evidence was such as to warrant a verdict of acquittal" but that the quality of evidence "… was, in the context of the evidence given at the trial, of a sufficient quality that there was a significant possibility that the jury acting reasonably would have acquitted the accused".[39]

[57] Thus, the onus discharged by the defendant to secure a retrial was not proof beyond reasonable doubt, nor even proof on the balance of probabilities, but rather proof of a significant possibility that a reasonable jury would have acquitted.

[58] On a proper consideration and comparison of standards of proof, we consider that there is no reason based on principles of criminal justice or equity for this Court to decline to entertain the proceedings.

[59] Third, the defendant argues that there is an additional consideration that, in effect, the same or similar issues will arise in the proposed civil proceedings as will arise in the retrial of the defendant. It is argued that "the plaintiff will have the benefit of evidence given before the Supreme Court in the civil proceedings", and that the defendant's participation in such civil proceedings might prejudice his future defence of any criminal charge.

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

[60] It is correct that a retrial will take place if the plaintiff is unsuccessful in establishing fraud. It is also correct that the plaintiff might receive some forensic advantage and that the defendant might suffer some disadvantage at a retrial as a result of the defendant having exposed more of his position than would otherwise be the case in a criminal trial. However, we note that the defendant has already submitted to such forensic disadvantage by giving evidence at his trial and before the Court of Criminal Appeal, exposing himself to cross-examination on both occasions.

Conclusion

[61] We consider that, if the alleged fraud is established,[40] the appropriate remedy would be judicial rescission of the order of the Court of Criminal Appeal. That remedy is more appropriate to a tainted criminal appeal judgment than the grant of an injunction to restrain the defendant from taking the benefit of that judgment.

[62] We answer the referred questions as follows:

Question 1

Does the Supreme Court have jurisdiction and power to grant the relief sought in the Originating Motion dated 24 August 2012 or otherwise to enjoin the defendant from taking the benefit of the judgment of the Court of Criminal Appeal in *Moseley v The Queen* [2012] NTCCA 11?

Answer

Yes. The Supreme Court has jurisdiction and power to grant the relief sought in the Originating Motion dated 24 August 2012, par 9(a), that is, an

[40] On the standard of proof referred to in par [3] above.

order setting aside the judgment of the Court of Criminal Appeal in *Moseley v The Queen* [2012] NTCCA 11.

Question 2

If yes to question 1, should the Supreme Court decline to entertain the proceedings commenced by Originating Motion dated 24 August 2012 on the basis that a retrial is an appropriate forum in which to determine the truth of the fact pleaded in the Originating Motion of 24 August 2012?

Answer

No

[63] We will hear the parties in relation to costs and any consequential matters.
