*Manufekai v The Queen* [2006] NTCCA 7

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| PARTIES: | MANUFEKAI |
| | v |
| | THE QUEEN |
| TITLE OF COURT: | COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY |
| JURISDICTION: | CRIMINAL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION |
| FILE NO: | CA 11 of 2005 (20320761) |
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| JUDGMENT OF: | MARTIN (BR) CJ, MILDREN & THOMAS JJ |

**CATCHWORDS:**

CRIMINAL LAW
Appeal against conviction – hearsay evidence correctly excluded – circumstance of aggravation – s 10 and s 154 of the *Criminal Code* – Presumption of causation – s 10 inapplicable – finding of guilt of circumstance of aggravation set aside.

**REPRESENTATION:**

*Counsel:*

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| Appellant: | S Odgers SC |
| Respondent: | D Lewis |

*Solicitors:*

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| Appellant: | Northern Territory Legal Aid Commission |
| Respondent: | Office of the Director of Public Prosecutions |

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IN THE COURT OF CRIMINAL APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

*Manufekai v The Queen* [2006] NTCCA 7
No. 11 of 2005 (20320761)

BETWEEN:

**MANUFEKAI**
Appellant

AND:

**THE QUEEN**
Respondent

CORAM: MARTIN (BR) CJ, MILDREN & THOMAS JJ

REASONS FOR JUDGMENT

(Delivered 24 February 2006)

**Martin (BR) CJ:**

**Introduction**

[1] The appellant was convicted by a jury of the crime of Dangerous Act contrary to s 154(1) of the Criminal Code. The jury also found the appellant guilty of two circumstances of aggravation, namely, that the appellant thereby caused grievous harm to the victim and that at the time of doing the dangerous act the appellant was under the influence of alcohol. The appellant appealed against the finding of guilt of the first circumstance of aggravation on the ground that the learned trial Judge erred in directions with respect to proof of that circumstance.

[2] Leave having been refused by a single Judge with respect to other grounds, the appellant sought the leave of this Court to appeal against his conviction on grounds that the trial Judge erred in excluding the evidence of an out of court statement by a person who was not called as a witness and that the verdict of the jury was unreasonable or cannot be supported having regard to the evidence.

[3] At the conclusion of the hearing of the appeal, the Court refused leave to appeal on those grounds in respect of which leave had been refused by a single Judge, but allowed the appeal against the finding of guilt of the circumstance of aggravation. Having allowed the appeal against the finding of guilt of the circumstance of aggravation, it was necessary for the Court to address the question of sentence. The Court allowed the appeal against the sentence and re-sentenced the appellant to 30 weeks imprisonment commencing on 24 March 2005. I now set out my reasons for arriving at those decisions.

**Trial evidence**

[4] The incident in which the victim was injured occurred outside the Walkabout Tavern in Nhulunbuy in the early hours of 28 July 2002. It was the Crown case that the accused and a Mr Tauheluhelu were standing outside the hotel when the victim walked nearby. Without warning or provocation, the appellant punched the victim in the face causing the victim to fall to the ground and strike his head on the concrete pathway. Mr Tauheluhelu then

stomped on the head of the victim. The appellant and Mr Tauheluhelu then left the area.

[5] The victim suffered a fractured jaw. He had no memory of being struck. Mr Tauheluhelu was not before the Court. The Crown case centred on the evidence of a Mr Sawford who was a security officer employed at the tavern. The evidence of Mr Sawford was summarised by the Judge in his directions to the jury in the following terms:

> "But in summary, the principal witness and the most important witness you might think was Mr Sawford. He told you that in July 2002 he was the security guard over there at the Walkabout Tavern. He was on duty that night.
>
> He told you of his knowledge of Paki [should be Buckie, a reference to the appellant] and that Paki was there that night. He was familiar with Paki, having seen Paki at least once a week over a period of some six months and possibly a year. Paki arrived at the nightclub with others including Sime [Mr Tauheluhelu].
>
> Towards the end of the night he had to remove Paki from the premises because he was intoxicated. He told you how he appeared. He said he was swaying, his eyes were closed for part of the time but when they were open they were bloodshot. His speech was slurred. He told you that Sime helped him take Paki out of the nightclub and they went across the road to the area where the telephones were and still are.
>
> Sime came back inside at one point and Paki was still across the road. Later Sime went outside again and they were both across the road, that is Paki and Sime. And Mr Sawford at that stage was outside having a cigarette. He said they were talking to each other. They were both standing up. He told you that the area was well-lit and he told you where the lights were.
>
> He then told you that a white male who I think is pretty clear is Mr Sweetman but he could not remember his name at that stage,

came out and said to Mr Sawford that he was going home. He was a regular as well at the premises. He had a short discussion, that is Mr Sawford had a short discussion with the man and it was at about 2:15am.

The man then walked across the road. He was a little bit intoxicated. He walked towards the phone boxes. He was feeling in his pocket for change or at least he was feeling in his pocket and Mr Sawford assumed for change. And while he was doing that, he was about a metre from Sime and Paki. He started to lift his head and as he did so, he was punched.

Mr Sawford was looking from the side view and he could see clearly. He saw Paki as the person who hit him. He used – that is Paki used his right arm and hit him with a jab. It was a good hit. The man fell backwards and hit the ground laying face up. He landed on his back and hit his head on the concrete. He did not try to break his fall so he just went straight back.

He said – that is Mr Sawford said that the blow was to the nose and the left side of the face. Mr Sawford then approached, he went over towards what was happening and said to the men: 'Leave him alone'. Paki and Sime then walked towards the man and Sime lifted his right leg and stomped on the head of the man on the ground. Pretty gruesome stuff.

They – that is Sime and Paki then walked off. Mr Sawford followed them to make sure that they had gone. He then inspected the man. He found he was breathing. He said he was snoring. He was completely out of it. There was some dark blood on his face."

[6] It was the appellant's case that Mr Tauheluhelu threw the punch. Alternatively, if the appellant threw the punch, it was contended that the Crown evidence was incapable of proving that the punch caused grievous harm to the victim because the evidence did not exclude the possibility that the grievous harm was caused by the stomp delivered by Mr Tauheluhelu.

[7] The appellant did not give evidence. He relied upon the contents of an interview with police during which he said he did not punch the man. He maintained that Mr Tauheluhelu walked past him and, with his left hand, delivered a big punch to the victim which knocked the victim out. The appellant told police he did not see Mr Tauheluhelu stomp on the victim.

**Hearsay Evidence**

[8] A ground of complaint in respect of which leave to appeal was refused concerns the refusal of the trial Judge to permit evidence to be given of a statement out of court by Mr Tauheluhelu. A Crown witness, Mr Panuve, whose son-in-law is the brother of the appellant, was at the tavern on the night in question. In a statement to the police dated 21 November 2004 Mr Panuve said he saw three people arguing outside the tavern and he kept walking towards the Arnhem Club. As he was walking he looked back and saw a man lying on the ground and the appellant and Mr Tauheluhelu move away from the scene. Mr Panuve kept walking to the Arnhem Club. The statement continued:

> "When I was inside the Arnhem Club, Sime came a short time later. I asked him 'Why did Fepaki knock the man down?', Sime replied 'No, not Fepaki, it's me'. I then asked him why, he replied 'I don't like arguing'".

[9] The appellant sought to lead evidence of the statement by Mr Tauheluhelu to Mr Panuve as evidence implicating Mr Tauheluhelu in the commission of the offence and as evidence exculpatory of the appellant. It is not in dispute that the proposed evidence was hearsay evidence as the appellant sought to

lead evidence of the statement by Mr Tauheluhelu as evidence of the truth of the statement that Mr Tauheluhelu and not the appellant struck the victim. In addition, it was not in dispute that the evidence was not admissible as a recognised exception to the rule against hearsay evidence.

[10] Relying upon the decision of the High Court in *Bannon v The Queen* (1995) 185 CLR 1, the trial Judge held that the proposed evidence was inadmissible hearsay evidence and declined to admit it.

[11] In this Court counsel for the appellant acknowledged that the proposed evidence would be hearsay evidence and does not fit within a recognised exception. In substance counsel contended that a flexible application of the hearsay rule should be adopted by this Court as such an application was not ruled out by the High Court in *Bannon*. Reliance was placed upon the fact that the Uniform Evidence Act, adopted in a number of Australian jurisdictions, permits the admission of such hearsay evidence. Reliance was also placed upon a line of Queensland authority permitting the admission in a hearsay form of evidence of an out of court admission to the commission of an offence by a person not called as a witness.

[12] In *Bannon*, the out-of-court statements made by the appellant's co-accused in the absence of the appellant were tendered as evidence against the co-accused. The appellant sought to rely upon the statements as exculpating him. The trial Judge directed the jury that the co-accused's statements were not evidence in the appellant's case and could not be used against him. No

direction was given about the possible exculpatory use that the appellant could make of the statements by the co-accused.

[13] In dealing with a submission that the evidence of the out-of-court statements by the co-accused should have been admitted for the purpose of assisting the defence of the appellant, Brennan CJ discussed various proposals for the relaxation of the rule against the admissibility of hearsay evidence. His Honour was plainly of the view that the proposed evidence was inadmissible in the appellant's case as the rule then stood. His Honour expressed views adverse to the proposed changes to the rule.

[14] Deane J agreed with the conclusions in the joint judgment of Dawson, Toohey and Gummow JJ that the appeal be dismissed and expressed "general agreement" with what their Honours said about the appellant's submissions "supporting either a broad flexible relaxation of the hearsay rule to allow evidence of inherently reliable hearsay statements 'at the instance' of an accused or a widening of the exception from the hearsay rules of some statements made against interest" (13). It follows from his Honour's references to a "relaxation" of the hearsay rule and a "widening" of the exception that in his Honour's view the proposed evidence was inadmissible in the appellant's case.

[15] In their joint judgment, Dawson, Toohey and Gummow JJ referred to the direction given by the trial Judge that what had been said out of court by the co-accused and not in the presence of the appellant was not evidence in the

trial of the appellant and observed that the direction was "undoubtedly correct as a general proposition". Their Honours then said (22):

> "Out of court statements are not evidence of the truth of what is said unless the statement falls within an exception to the rule against hearsay."

[16] That brief statement of the principle reflects the rule against hearsay evidence as it has been understood and applied in a multitude of authorities. Their Honours went on to state (22):

> "As the law stands in this country, there is no exception to the hearsay rule which renders admissible either against or in favour of an accused hearsay evidence of a confession by a co-accused or by a third party."

[17] Counsel for the appellant did not contest the proposition that there is no exception to the rule against hearsay evidence which would permit the admission of the statement by Mr Tauheluhelu. However, counsel submitted that it is open to this Court to apply a flexible approach to the rule against hearsay and that such an approach has not been excluded by any decision of the High Court.

[18] There is no statement in the joint judgment in *Bannon* supporting the proposition for which counsel contended. Their Honours discussed the more flexible approach adopted in Canada and some jurisdictions in the United States and referred to statements of individual Judges in previous decisions of the High Court supporting a more flexible approach. They concluded that on the most favourable view of the out-of-court statements, those statements

would not be admissible pursuant to the more flexible approach adopted in Canada and the United States. In those circumstances, their Honours said (28):

> "It is therefore unnecessary and inappropriate for this Court to determine whether it should follow the decisions in those countries which extend the exceptions to the rule against hearsay to third party concessions."

[19] In my view, in the joint judgment their Honours affirmed the existing law that out-of-court statements are not evidence of the truth of what is said unless the statements fall within an exception to the rule against hearsay. In addition, their Honours declined to adopt a more flexible approach or to extend the exceptions to the rule against hearsay. While their Honours did not rule out a more flexible approach or an extension to the exceptions as possible future developments, leaving that possibility open did not change the law as it now stands.

[20] McHugh J cited the classic statement of the rule against hearsay evidence in *Subramaniam v Public Prosecutor* [1956] 1 WLR 965 at 970 and stated that, "prima facie, that rule prevented the appellant from using the Calder statements to prove that she alone was responsible for the murders". Referring to statements by individual Judges of the High Court supporting a more flexible approach, McHugh J noted that "no case in this Court has decided that the law of hearsay is a principle rather than a rule with exceptions or that the rule is always subject to an exception in the case of evidence that is 'reliable'" (32). His Honour added that in the

circumstances under consideration it was not necessary "to decide whether the hearsay rule is subject to an exception corresponding with that formulated by Mason CJ in *Walton*".

[21] McHugh J also dealt with the "necessary and reliable exception" recently developed in Canada. His Honour held it was unnecessary "to determine whether the principle of necessity and reliability as developed in Canada should be adopted in this country". It follows from his Honour's reference to "adoption" that in his Honour's view the Canadian approach is not part of the law in this country.

[22] The judgments in *Bannon* proceed on the basis that as the law stands, unless authorised by statute, evidence of the type under consideration is inadmissible because it would infringe the rule against hearsay evidence and does not fall within any exception to that rule. This view is consistent with numerous previous decisions of the High Court. Although some Judges in previous decisions have expressed the view that the rule should not be applied inflexibly, that view has not been adopted by a majority of Judges in any decision of the High Court.

[23] In Queensland, an out of court admission to the commission of an offence by a person not charged with an offence and not called as a witness is admissible at the trial of a person accused with committing that offence. The line of authority appears to have begun with the decision of the Court of Appeal in *R v Zullo* [1993] 2 Qd R 572. It was recently confirmed by

McPherson JA in *R v K; ex parte Attorney-General* (Qld) (2002) 132 A Crim R 108 and *R v Martin & Others* (2002) 134 A Crim R 568. In *Martin* his Honour acknowledged that at the time of the decision in *R v K* he was not aware of the judgment of the High Court in *Bannon* but, having read *Bannon*, he was not persuaded that the reasons in *Bannon* were necessarily inconsistent with the Queensland line of authority. His Honour remarked that until overruled by the High Court, *Zullo* remains binding in Queensland.

[24] I must respectfully disagree with McPherson JA. In my view the High Court has confirmed the state of the law in *Bannon* and this Court is bound to apply the law in accordance with the decision of the High Court. Although there is much to be said in favour of a more flexible approach, it is unnecessary and inappropriate for this Court to enter the debate as to whether a more flexible approach should be adopted or otherwise. If a more flexible approach is to be adopted, it can only occur through a decision of the High Court or legislative intervention.

**Circumstance of aggravation – grievous harm - causation**

[25] The jury found that the dangerous act of the accused in punching the victim thereby caused grievous harm to the victim. The appellant complains that the evidence was not capable of establishing that fact beyond reasonable doubt because the evidence was incapable of excluding as a reasonable possibility that the grievous harm was caused by the kick to the head delivered by Mr Tauheluhelu.

[26] The evidence established that the grievous harm could have been caused either by the initial punch or by the subsequent kicking. The medical practitioner who treated the victim agreed it was not possible to discern which blow caused the injury. It was in these circumstances that the Crown relied upon s 10 of the Criminal Code Act which is in the following terms:

> "**10. Death or grievous harm caused in the course of violence of 2 or more persons**
>
> When a person dies or is found to be dead or to have suffered grievous harm after 2 or more persons have used violence against him or his person and it is proved that the death or grievous harm was caused as the result or in the course of that violence, but the evidence of the prosecution does not establish by whom it was caused, each of them is presumed either to have caused or aided the other or others to cause the death or grievous harm until the contrary is proved if the violence used by him was of such a nature that it was likely to have caused, in the case of death, death or grievous harm or, in the case of grievous harm, grievous harm."

[27] The trial Judge directed the jury that the Crown was required to prove beyond reasonable doubt that the appellant caused grievous harm to the victim. His Honour provided the jury with an aide memoire in which, subject to the omission of any reference to death, the terms of s 10 were set out. In addition, after defining grievous harm, his Honour gave the following oral directions:

> "Mr Lewis quite correctly says: 'Look, that amounts to grievous harm and we don't have an issue about that. What we say is it wasn't us'.
>
> Okay, just going back though to page 2. What I have set out there is in fact s 10 of our Criminal Code, and it is under the heading grievous harm caused in the course of violence of two or more

persons. I just want to read that to you although I do not know that it will be an issue for you. Indeed, it should not be.

> When a person is found to have suffered grievous harm after two or more persons have used violence against him or his person, and it is proved that the grievous harm was caused as a result of or in the course of that violence but the evidence of the prosecution does not establish by whom it was caused, each of them, that is each of the two, is presumed either to have caused or aided the other or others to cause the grievous harm until the contrary is proved, if the violence used by him was of such a nature that it was likely to have caused grievous harm.

So where you have got somebody – it is a lot of legalese is it not? When you have got somebody who has been caused grievous harm as Mr Sweetman was and that was after two people, if that is what you find, caused violence to him, so in this case Sime and Paki, they are both, Sime and Paki responsible for the grievous harm that results if the doctors cannot tell you which particular blow or kick caused the damage.

So they both assume responsibility if you find that they both used violence against him, so to do that you would have to find that Mr Manufekai delivered the punch as opposed to Sime. We know that Mr Manufekai did not deliver the kick. That was delivered by Sime so it would have to be just the punch.

So if you are satisfied that Mr Manufekai delivered the punch, then that would be using violence against Mr Sweetman and he would be responsible for the grievous harm that flowed from that, even if it flowed from Sime kicking him and not from the punch.

And that will continue unless the contrary is proved and here there has been no evidence to suggest that the punch did not cause the damage that was suffered."

[28] The appellant submitted that s 10 cannot have any application to proof of the circumstance of aggravation accompanying a dangerous act committed contrary to s 154 of the Code. Counsel contrasted the requirement in s 154(2) that the Crown prove that by his dangerous act the appellant

"thereby caused" the grievous harm with the presumption in s 10 which is not a presumption that the person using the violence caused grievous harm to the victim. The presumption in s 10 is that each of the persons involved either caused or aided other or others to cause the grievous harm. This cannot stand, said counsel, with the wording of s 154(2) that the dangerous act "thereby causes grievous harm".

[29] In my opinion this ground is made out. Section 10 cannot have application to the circumstances under consideration. Section 10 is intended to have application where it is the Crown case that two or more persons have acted in concert in using violence against the victim. In such circumstances, as a matter of established principle, and subject to questions of the scope of the arrangement pursuant to which the persons were acting in concert, it does not matter which offender did the act which caused the death or grievous harm. By reason of their complicity, each of the offenders is responsible in law for the consequences of the violence. Although s 10 assists the prosecution, it reflects this fundamental principle while providing for proof to the contrary by the persons charged.

[30] Section 10 is not intended to have application where the persons applying the violence are not acting in concert. If s 10 applies where the persons inflicting the violence are not acting in concert, it could result in a person such as the appellant being convicted of murder although he was not acting in concert with another person who inflicted violence on the victim and notwithstanding that the Crown could not prove that any act of the appellant

caused the death of the victim. This would be a drastic consequence contrary to fundamental principle. A legislative intention to bring about such a consequence should not be inferred in the absence of very plain language to that effect.

[31] This point was not taken before the trial Judge. However, an error of law having occurred, the only appropriate course is to set aside the conviction in respect of the first circumstance of aggravation.

[32] There is a further basis upon which this ground of appeal should be allowed. On the basis of the application of s 10, it was necessary for the Crown to prove that the violence used by the appellant was of such a nature that it was likely to have caused grievous harm. The Crown relied upon the punch as violence fulfilling that requirement. Mr Sawford described the blow as a "jab" and said it was a "good hit". According to Mr Sawford, the victim fell straight back in a split second, landed on his back and hit his head on the concrete. In Mr Sawford's words, the victim "didn't know what hit him".

[33] The question whether the violence was of such a nature that it was likely to have caused grievous harm was a question for the jury. It was plainly open to the jury to be satisfied beyond reasonable doubt that the punch was of such a nature, but it was necessary for the Judge to give appropriate directions to the jury. Although his Honour gave the general direction in terms of s 10 to which I have referred, his Honour did not specifically direct the jury that it was necessary for the Crown to prove that the violence in the

form of the punch was of such a nature that it was likely to have caused grievous harm. To the contrary, his Honour effectively took that question away from the jury. He directed the jury that if the jury was 'satisfied that Mr Manufekai delivered the punch, then that would be using violence against Mr Sweetman" and the appellant would be responsible for the grievous harm even if the harm followed from the kick and not the punch.

[34] Although we do not have a transcript of the addresses of counsel, it appears likely that the conduct of the trial contributed to the error by the trial Judge. However, the question was one for the jury to determine and it was an error to direct them that the punch amounted to violence for the purposes of s 10.

**Verdict unreasonable**

[35] The remaining ground upon which leave to appeal is sought complains that the verdict of the jury was unreasonable and cannot be supported having regard to the evidence. Counsel referred to a number of matters which it was said support the possibility that Mr Sawford made a mistake as to who threw the punch. In particular, reliance was placed upon the distance at which Mr Sawford made his observations, the lighting and whether Mr Sawford was paying close attention. It was also suggested that as the applicant and Mr Tauheluhelu were standing side on to Mr Sawford, Mr Tauheluhelu being between the applicant and Mr Sawford, it is possible that Mr Sawford was mistaken in thinking that the applicant threw a right

hand punch whereas in fact Mr Tauheluhelu had thrown a left hand punch striking the victim.

[36] These matters were all questions for the jury. In particular, the jury's impression of the reliability of Mr Sawford was of particular importance. The jury had the distinct advantage of seeing and hearing Mr Sawford.

[37] In my view, neither individually nor in their combination do those matters raise any doubt about the guilt of the appellant. There is nothing in the evidence of Mr Sawford to suggest that he was unreliable in his essential observations. To the contrary, a reading of his evidence conveys the impression that he was a reliable witness. This complaint is not made out.

[38] For these reasons, I was of the view that leave to appeal on the first and third grounds concerning the hearsay evidence and the challenge to the verdict should be refused, but the appeal against the finding of guilt of the first circumstance of aggravation that the dangerous act caused grievous harm to the victim should be allowed.

**Sentence**

[39] The appeal against the finding of guilt of the circumstance of aggravation was, in substance, an appeal against sentence. The circumstance of aggravation is not an element of the offence of which the appellant was convicted, namely, the commission of a dangerous act contrary to s 154(1) of the Criminal Code. The circumstance of aggravation is a fact which has the effect of increasing the maximum penalty for the offence of Dangerous

Act. It was a fact of significance adverse to the interests of the appellant in the determination of sentence. The finding of guilt of the circumstance of aggravation having been quashed and a verdict of acquittal entered in respect of that circumstance of aggravation, in essence an appeal against sentence had been allowed and it was necessary for the court to re-sentence the appellant.

[40] The learned sentencing Judge imposed a sentence of three years imprisonment commencing 24 March 2005 and fixed a non-parole period of 18 months. That sentence was based upon the factual finding of the jury in the context of the application of s 10 that the appellant by his punch caused the fractures of the victim's jaw in two locations. Absent that circumstance of aggravation, this Court was required to sentence the appellant for committing a dangerous act, namely, punching the appellant while under the influence of alcohol. For the purposes of imposing sentence, this Court was required to ignore the injuries to the appellant.

[41] The appellant was granted bail pending the appeal on 19 October 2005. He had then served 30 weeks of the sentence imposed. Evidence was placed before this Court that the appellant and his partner are now living in New South Wales with their three year old child. The appellant is in employment as a casual welder averaging 38 hours per week. His employer is aware of the appellant's offending and expressed surprise as he has found the appellant to be a very reliable and diligent worker.

[42] The objective circumstances for which the appellant was to be sentenced were that while he was under the influence of alcohol the appellant punched the victim once causing the victim to fall to the ground and hit his head on the concrete. Although the appellant has a record of prior offending dating back to 1991, including a number of offences involving violence, the appellant has not been in trouble since committing the offence under consideration in July 2002 and has refrained from the consumption of alcohol for three years.

[43] In all the circumstances, and bearing particularly in mind that the appellant is now in stable circumstances and has made good progress in his rehabilitation, in my opinion the period of 30 weeks imprisonment already served by the appellant was sufficient punishment for this crime. For these reasons I was of the view that the sentence imposed by this Court of 30 weeks imprisonment commencing on 24 March 2005 was the appropriate sentence.

**Mildren J:**

[44] I agree with the decision of the Chief Justice and have nothing to add.

**Thomas J:**

[45] I agree with the decision of the Chief Justice and with his Honour's reasons.

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