PARTIES:	THE QUEEN AND CATHY DELAND PHILLIP KEITH DREDGE and BRUCE MALCOLM GRANT EX PARTE BILLY JABANARDI WILLIE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AS2 of 1996
DELIVERED:	31 October 1996
HEARING DATES:	22 February, 1 March 1996
JUDGMENT OF:	Kearney J

CATCHWORDS:

Prerogative writs - mandamus prohibition and certiorari - writs and orders - certiorari - time limit for application - nature of 'special circumstances' -
Supreme Court Rules (NT), Rule 56.02(3) -
Stone v Law Society of the Northern Territory (1992) 108 FLR 332, followed.
Minister for Community Services and Health v Chee Keong Thoo (1988) 78 ALR 307, followed.

Beadle v Director-General of Social Security (1985) 60 ALR 225, followed.

Prerogative writs - mandamus, prohibition and certiorari - writs and orders - certiorari - statutory ‘ouster’ provision excludes certiorari except where defect of jurisdiction or fraud by party procuring the order below is manifest -

Justices Act (NT) s164 -
The Colonial Bank of Australasia v Willan (1874) LR 5 PC 417, applied.

Prerogative writs - mandamus, prohibition and certiorari - writs and orders - certiorari - grounds - excess or want of jurisdiction - fact that incorrect person is charged does not go to jurisdiction -
Justices Act (NT) s43(1), s49, s67 -
R v Newell (1927) 27 SR (NSW) 274, considered.
R v Liberti (1991) 55 A Crim R 120, considered.

Prerogative writs - mandamus, prohibition and certiorari - writs and orders - certiorari - grounds - meaning of ‘fraud on the court’ - certiorari lies to quash wrongful conviction when prosecution recklessness analogous to a fraud on the court -
The Colonial Bank of Australasia v Willan (1874) LR 5 PC 417, applied.
Craig v State of South Australia (1995) 184 CLR 163, applied.
Hallahan v Campbell; ex parte Campbell (No.2) [1964] Qd. R. 337, applied.
Philipson v The Earl of Egremont (1844) 6 Q.B. 587; 115 E.R. 220, approved.
R v Gillyard (1848) 12 Q.B. 527; 111 E.R. 965, approved.

Prerogative writs - mandamus, prohibition and certiorari - writs and orders - certiorari - discretionary nature and circumstances precluding relief - absence of adequate alternative to remedy manifest injustice - factors relevant to exercise of discretion to grant certiorari to quash conviction following plea of guilty -
Supreme Court Rules (NT), Order 56 -
R v Liberti (1991) 55 A Crim R 120, considered.
R v Campbell; ex p. Nomikos [1956] 1 WLR 622, not followed.
Kimmorley v Atherton; ex p. Atherton [1971] Qd. R. 117, approved.

REPRESENTATION:

Counsel:

Plaintiff:	K.E. Judd
First Defendant:	G.J. Stirk
Second Defendants:	A. Fraser

Solicitors:

Plaintiff:	CAALAS
First Defendant:	McBride & Stirk as agents for
Solicitor	for the Northern Territory
Second Defendants:	Office of the Director of Public Prosecutions

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kea96018

IN THE SUPREME COURT OF
THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

AS No.2 of 1996

THE QUEEN

AND:

CATHY DELAND SM
First Defendant

AND
PHILLIP KEITH DREDGE
and **MALCOLM BRUCE GRANT**
Second Defendants

EX PARTE
BILLY JABANARDI WILLIE
Plaintiff

CORAM: KEARNEY J

REASONS FOR DECISION

(Delivered 31 October 1996)

The application

This is an application under Order 56 of the Supreme Court Rules for judicial review in the nature of an order for certiorari, to bring up and quash certain convictions of the plaintiff by the first defendant sitting as

the Court of Summary Jurisdiction at Alice Springs on 29 September 1994 and 25 May 1995, in separate proceedings in which the second defendants were the respective complainants.

The application was instituted on 18 January 1996. It was argued before me in Alice Springs on 22 February and 1 March. I thereupon ordered that two convictions recorded against the plaintiff on 29 September 1994 and a conviction recorded against him on 25 May 1995, be quashed; and that the penalties imposed as a result of those 3 convictions be set aside. I said that I would publish written reasons for that decision in due course; I now do so.

The facts

On 25 December 1993 a person who identified himself as 'Billy Jabanardi Willie' was apprehended by police for having allegedly committed certain traffic offences. These included driving a motor vehicle while the concentration of alcohol in his blood exceeded 0.08% (0.020%), and driving whilst disqualified. This person was known to the police as 'Simon Jagamara Yungut' and 'Simon Jagamara Young'. The charge of driving whilst disqualified was founded upon a disqualification in the prior criminal history of that man, contained in a Police file under the name of 'Simon Jagamara' (PICS ID 154851).

On 15 March 1994 a summons was served on one Billy Jabanardi Willie at Kintore. It is not known on which person this summons was

served - whether it was served on the man apprehended on 25 December 1993, or on the plaintiff, or on someone else.

On 28 April 1994 the person on whom the summons was served on 15 March 1994 failed to appear in the Court of Summary Jurisdiction at Alice Springs, as required; a warrant for his arrest was issued, in the name of 'Billy Willie'.

On 25 September 1994 the plaintiff, Billy Jabanardi Willie (PICS ID 171857), was arrested in execution of the warrant of 28 April 1994. He is an Aboriginal man from Kintore, a remote desert community in the Territory. He was brought before the Court of Summary Jurisdiction (Ms Deland SM) at Alice Springs on 29 September 1994 and charged with the offences of 25 December 1993. I should say it is now crystal clear that he was not the man apprehended on 25 December 1993, but that never came to light at the time. He was represented by counsel. He pleaded guilty to the two offences of 25 December 1993 (driving whilst disqualified, and while exceeding 0.08%); the facts relied on by the police in relation to those offences were admitted by his counsel as accurate, as was an alleged record of his prior offending. This was in fact the record in the name of 'Simon Jagamara' (PICS 154851) which, it is now clear, did not relate to the plaintiff.

It is clear that there was a total lack of effective communication between the plaintiff and his counsel, a further illustration that the need for competent interpreters in the criminal justice system is not confined simply to the courts. It is also clear that the police led the court into error by tendering a record of prior offending (PICS 154851) which was not the plaintiff's record (PICS 171857), and which contained a notification that one 'Simon Jagamara' had been disqualified from driving. The plaintiff was convicted of the 2 offences. For the former he was sentenced to 2 months imprisonment, service of which was suspended on his entering into a 12 months good behaviour bond. For the latter, he was fined. He was also disqualified for 18 months from holding a driving licence; this followed from his conviction of exceed 0.08%.

As a result of his arrest on 25 September 1994, the plaintiff had been finger-printed. Clearly, his fingerprints were not those of the man in PICS 154851. The Police created a new PICS 171857 for the plaintiff under his name Billy Jabanardi Willie. The wrongful convictions of 29 September 1994 were recorded against the plaintiff on his PICS record 171857. This was to be expected, in light of what had happened on 29 September; it led to further trouble for the plaintiff shortly afterwards.

2½ months later, on 17 December 1994, the police at Yulara apprehended the plaintiff and charged him with driving whilst disqualified and whilst the concentration of alcohol in his blood exceeded

0.08% (0.208%). This charge of driving whilst disqualified was based on his (wrongful) disqualification on 29 September 1994, which in turn flowed from his (wrongful) conviction that day of the offence of exceed 0.08% of 25 December 1993.

The plaintiff was bailed to answer these charges at the Yulara Court of Summary Jurisdiction on 9 March 1995. He failed to appear on that day; a warrant for his arrest was issued. He was arrested in execution of this warrant on 24 May 1995 and brought before the Court of Summary Jurisdiction at Alice Springs (Ms Deland SM) on 25 May 1995.

On that day he was convicted on his plea of guilty, of the two offences of 17 December 1994 (driving whilst disqualified, and while exceeding 0.08%). The latter offence is not in issue; the former was a wrongful conviction, since his disqualification of 29 September 1994 was wrongful. He was fined for both offences, and disqualified from holding a driver's licence for a further 18 months; that stems from his conviction for exceed 0.08% on 17 December 1994, and is not in issue.

He was represented on 25 May 1995 by different counsel, who admitted on his behalf that the facts relied on by the police in relation to the offences of 17 December 1994 were correct. Apart from the fact that the plaintiff did not admit the accuracy of the notification on his record (PICS 171857) that he had been convicted on 29 September 1994 for

driving while disqualified, his counsel admitted on his behalf that the other prior offending disclosed on that record was accurate. Her Worship treated him as having been convicted on 29 September 1994 of the exceed 0.08% offence of 25 December 1993, and as having been disqualified on that day from driving. It is clear that once again there was a total lack of effective communication between the plaintiff and his counsel. Further, it is clear that the police had handed up to the Court the plaintiff's PICS 171857 which recorded the offences of 25 December 1993 of which he had been wrongly convicted, despite the fact that they must have been well aware, had they checked their fingerprints, that the man whom they had apprehended on 25 December 1993 for those offences was a different man, 'Simon Jagamara' PICS 154851.

Subsequent investigations brought the true state of affairs to light. It revealed that the plaintiff's convictions of 29 September 1994 for the offences of driving whilst disqualified on 25 December 1993, and for exceeding 0.08% on that day, were erroneous, in that he had been wrongly identified as the man who had committed those offences. Clearly enough, one cause of this fiasco was that the police must have failed to match the plaintiff's fingerprints (PICS 171857) with those on record of the man they had arrested on 25 December 1993 (PICS 154851); that they had the latter's fingerprints is clear from the fact that they had produced the record of 'Simon Jagamara' (PICS 154851) at the hearing on 25 September 1994, stating (wrongly) that it was the plaintiff's record.

It is also clear that there had been a complete failure of adequate communication between the plaintiff and his respective counsel on both 29 September 1994 and 25 May 1995. The result of the interplay of these 2 factors was that the plaintiff was wrongly convicted on 29 September 1994 of both offences of 25 December 1993; and, consequently, was wrongly convicted on 25 May 1995 of the offence of driving on 17 December 1994 whilst disqualified, since he never should have been disqualified on 29 September 1994.

This application was brought by the plaintiff to correct these errors. It was very properly supported by the respondents, to remedy the obvious injustice. The first question which arose was whether in these undisputed circumstances it was competent for the Court to grant the relief sought: did certiorari lie to quash the wrongful convictions?

Availability of Certiorari

Two questions arise for consideration in this regard.

Extension of time

The exercise of this Court's jurisdiction to grant relief in the nature of certiorari is governed by Order 56. Rule 56.02 specifies a time limit within which an application for certiorari must be instituted, viz:

> "56.02 TIME FOR COMMENCEMENT OF PROCEEDING
>
> (1) A proceeding under this Order shall be commenced within 60 days after the date when grounds for the grant of the relief or remedy claimed first arose.

> (2) Where the relief or remedy claimed is in respect of a … conviction, … the date when the grounds for the grant of the relief or remedy first arose shall be taken to be the date of the … conviction, …
>
> (3) The Court shall not extend the time fixed by subrule (1) *except in special circumstances*."
> (emphasis added)

These proceedings were commenced on 18 January 1996, some 16 months and 8 months respectively after the dates of the convictions of 29 September 1994 and 25 May 1995, and so well outside the 60 day time limit in r56.02(1). The plaintiff accordingly seeks an extension of time pursuant to r56.02(3).

The question whether for the purposes of r56.02(3) special circumstances exist "can only be assessed taking into account all the facts and circumstances of the particular case"; see *Stone v Law Society of the Northern Territory* (1992) 108 FLR 332 at 335. As Burchett J put it in *Minister for Community Services and Health v Chee Keong Thoo* (1988) 78 ALR 307 at 324: "the core of the idea of 'special circumstances' is that there is something unusual or different to take the matter out of the ordinary course …". Further, "… special circumstances must include events which would render [the time specified by the legislature] unfair or inappropriate"; see *Beadle v Director-General of Social Security* (1985) 60 ALR 225 at 228. It is not possible to enumerate exhaustively the circumstances which may amount to special circumstances; the

circumstances relied on should be viewed as a whole, and may comprise matters related to the commission of the offence and/or to the offender.

In this case the plaintiff stands convicted of offences which it is now clear he did not commit. In the circumstances I have related he had wrongly pleaded guilty when charged, and accordingly was wrongly convicted and penalized. It is not suggested that the plaintiff deliberately and knowingly pleaded guilty for some motive of his own; it is frankly acknowledged that this man from Kintore suffered an injustice from what occurred. That there has been a miscarriage of justice is now manifest. This miscarriage was not detected until well after the expiration of the time period in r56.02(1). No avenue other than Order 56 by which to approach the Court to seek justice is now open to the plaintiff; the period specified in s171(2) of the *Justices Act* as the time within which an appeal under s163(1) must be instituted has long expired, and it is common ground that the conditions for the exercise of the dispensing power in s165 in relation to that time limit, cannot be met. See generally on that aspect *Federal Commissioner of Taxation v Arnhem Aircraft Engineering Pty Ltd* (1987) 47 NTR 8 at 13-19.

In the light of these matters it is sufficient to say that I am satisfied that special circumstances exist, for the purposes of r56.02(3). Pursuant to r56.02(3) the time fixed by subrule 56.02(1) for the commencement of these proceedings should be extended to 18 January 1996.

(b) The 'no certiorari' clause

Section 164 of the Act purports to oust the jurisdiction of the Court to grant the type of relief now sought, viz:

> "164. NO APPEAL ON (SIC, OR) REMOVAL INTO SUPREME COURT TO BE ALLOWED EXCEPT UNDER THIS ACT
>
> No appeal shall be allowed from any conviction, order, determination, or adjudication of the kind mentioned in section 163(1), *nor shall any such conviction*, order, determination, or adjudication *be removed into the Supreme Court, except as provided by this Act*."
> (emphasis added)

It may be noted that until an amendment in 1983 the wording was "… into the Supreme Court *by certiorari or otherwise*, except as …" (emphasis added). However, the effect of s164 is not altered by the amendment. It is clear that a litigant may be deprived of the remedy of certiorari, by the use of express ousting words in a privative clause; see, for example, *The Queen v Commissioner of Police for the Northern Territory; Ex parte Holroyd* (1965) 7 FLR 8, where the relevant provision was in terms similar to the *Justices Act* in its pre-1983 form, though extending to purported convictions. As the Privy Council said in *The Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417 at 442, the effect of ousting words such as those emphasized above in s164 -

> "… is not absolutely to deprive the Supreme Court of its power to issue a writ of certiorari to bring up the proceedings of the inferior Court … [I]n any such case *that Court will not quash the order removed, except upon the ground either of a manifest defect of jurisdiction in the Tribunal that made it, or of manifest fraud in the party procuring it*". (emphasis added)

I consider that there being no clear intention expressed in s164 wholly to deprive this Court of its power to grant relief in the nature of certiorari, the Court still has power to issue certiorari but only, in the language of *Willan* (supra), "upon the ground either of a manifest defect of jurisdiction in the tribunal that [recorded the convictions], or of manifest fraud in the party procuring [those convictions]".

The submissions

The plaintiff, supported by Ms Fraser for the second defendants, sought relief on the grounds indicated by *Willan* (supra) as being alternatively available.

(a) Defect of jurisdiction

As to jurisdictional error, see generally *Craig v State of South Australia* (1994-1995) 184 CLR 163 at 176-180.

Ms Judd of counsel for the plaintiff submitted that there was a 'manifest defect of jurisdiction' in the Court of Summary Jurisdiction on both 29 September 1994 and 25 May 1995, in that there was a failure of a condition precedent to the exercise of the learned Magistrate's jurisdiction. She identified this implied condition precedent as a requirement that the correct person be before the court as the defendant to the charge.

This submission is inconsistent with both the role of a Magistrate sitting as the Court of Summary Jurisdiction, and the effect of a plea of guilty. A complaint may be made in any case where a person has committed, *or is suspected to have committed*, any "simple offence" as defined in s4 of the *Justices Act*; see s49. A magistrate sitting as the Court has jurisdiction to hear and determine "every matter of complaint"; see s43(1) of the Act. In hearing and determining the subject matter of a complaint, it is for the Magistrate as trier of fact to be satisfied beyond reasonable doubt that all the elements of the simple offence charged have been established. Identification of the person charged before the court as the person who committed the offence is an element of the offence charged. Proof that he is the offender is therefore a matter for the trier of fact. See *R v Newell* (1927) 27 S.R. (N.S.W.) 274 at 276.

Further, when a person charged with an offence before the Court pleads guilty under s67 of the Act the effect of his plea is that he admits against himself all the necessary legal ingredients of the offence charged; see *R v Liberti* (1991) 55 A Crim R 120 at 122. This necessarily includes an admission that he is the person who committed the offence.

In this case, the plaintiff was brought before the Court of Summary Jurisdiction on 29 September 1994, having been wrongly identified by police as the person who had committed the offences of 25 December 1993. He was charged before the Court with those offences, which were

offences within its jurisdiction. By his (incorrect) pleas of guilty he admitted the truth of the offences charged against him; since he did not seek to show cause why he should not be convicted, the Magistrate was by s67(2) of the Act required to "convict him". That is what occurred. Similarly, on 25 May 1995. As can now be seen the convictions were erroneous; but they did not involve an error which went to the jurisdiction of the Court to hear and determine the charges before it.

I reject the submission that the convictions involved jurisdictional error. The first of the two exceptions in *Willan* (supra) is not established.

(b) Fraud on the court

The alternative ground in *Willan* (supra) on which both Ms Judd and Ms Fraser relied was that the convictions should be set aside, as the circumstances in which they had occurred involved 'a fraud on the court'. 'Fraud', in this context, is used in a broad sense; see *Craig v State of South Australia* (supra) at 176. Actual fraud or dishonesty is not required, but there must be something analogous to fraud.

That fraud is a ground for setting aside convictions is well established. 150 years ago, in *Philipson v The Earl of Egremont* (1844) 6 Q.B. 587; 115 E.R. 220, a civil case, Lord Denman CJ said at 604 (227):

> "Fraud, no doubt, vitiates everything; and the Court, upon being satisfied of such fraud, has a power to vacate, and would vacate, its own judgment … ".

The Queen v Gillyard (1848) 12 Q.B. 527; 116 ER 965, was a certiorari case arising from the conviction of a servant, resulting from collusion between the servant and his employer to enable the employer to avoid being charged for a brewing offence. The Court ruled that in those circumstances certiorari lay to quash the conviction. Erle J said at 530 (966):

> "This Court has authority to correct all irregularities in the proceedings of inferior tribunals, which in this case have been resorted to for the purpose of fraud. In quashing this conviction, we are exercising the most salutary jurisdiction which this Court can exercise."

In *Hallahan v Campbell; ex parte Campbell (No.2)* [1964] Qd. R. 337 the appellant appealed to the Supreme Court by way of order to review. He had pleaded guilty and had not denied matters then alleged against him; he was convicted of vagrancy. He failed to establish before the Supreme Court his contention that he had been induced to plead guilty so as to avoid a more serious statement against him by the police. However, it sufficiently appeared that he was in fact in employment when arrested, contrary to what the magistrate had been told by the police. The Court held that the statement to the magistrate was a fraud on that court, and certiorari to quash should issue instanter. Stanley J said at p347:

> "I have come to the conclusion that whether *by* deliberate intention or *mere recklessness*, the statement submitted to the magistrate in this case amounted to a fraud on the court." (emphasis added)

The fraud on the court which founds the power to issue certiorari to quash a conviction upon a plea of guilty, must be established on the balance of probabilities; see *R v The Justices of Biloela; ex parte Marlow (No.2)* [1983] 1 Qd.R. 552, as understood in the light of *Rejfek v McElroy* (1965) 112 CLR 517.

No complaint can be made as to the conduct of the magistrate in these proceedings; but certiorari is not restricted to cases where the tribunal is at fault.

The Court's jurisdiction to intervene by certiorari may found on conduct by the prosecution - "the party procuring [the conviction]", in terms of *Willan* (supra) - which is analogous to fraud. This appears to extend to "mere recklessness" on the part of the prosecution, as Stanley J put it in *Hallahan* (supra). However, it is a limited jurisdiction; whether prosecution conduct is properly categorized as "recklessness" is a matter for judgment, on the facts of the particular case. In the present case, it is clear that both the prosecution and the defence lawyers contributed to the miscarriage of justice which occurred. I do not consider that certiorari is available, where fraud on the court is attributable to the "recklessness" of defence lawyers; whether their actions contributed to the outcome to a significant degree is a matter to be taken into account when deciding whether the miscarriage of justice was caused by conduct by the prosecution which can fairly be categorized as "recklessness". This is

clearly a difficult case, in that regard. I am conscious that hard cases can make bad law, and this is clearly a hard case.

Nevertheless, where there is a conceded miscarriage of justice, as here, the maxim 'ubi jus ibi remedium' should be borne in mind. On the particular facts of this case I am satisfied that the convictions were recorded in part as a result of an erroneous understanding of the facts by defence counsel; this resulted in pleas of guilty being wrongly made. The plaintiff came from one of the most remote communities in Australia; communication problems no doubt lay at the root of defence counsels' difficulties. The fiasco was also contributed to in a material way by a record of the prior convictions of the wrong man being handed up by the police on 29 September 1994, after they had wrongly brought the plaintiff before the court due to a misidentification which should never have occurred in light of their fingerprint records. The police compounded their error on 25 May 1995. On the whole, and with considerable diffidence, I characterize the outcome of what occurred before her Worship as attributable to 'recklessness' by the police, compounded by the defence lawyers; in that sense, what occurred was analogous to a 'fraud' on the court, by "the party procuring [the conviction]", in terms of *Willan* (supra). Accordingly, those proceedings are exposed to review by certiorari.

I am fortified in this conclusion by noting that in a case involving a very similar factual situation - A charged by police with an offence in the name of B, B later being brought before the court charged with that offence pleading guilty and being convicted of it, and no appeal being lodged in time - Mildren J quashed the conviction on an application under Order 56; see *Nunn v McCormack and Riley* (unreported, SC35/1995, 6 September 1995).

I should add that I respectfully agree with certain observations of Hoare J in *Kimmorley v Atherton; ex p. Atherton* [1971] Qd. R. 117. His Honour said:

pp138-9 "On the argument of counsel for the respondent, where there is a conviction from a plea of guilty made, in effect, by mistake, and even where it is proved that the appellant was in fact not guilty, an appeal court is powerless to set the matter right.

> *I would be most reluctant to accept the proposition that it is the law that a citizen who mistakenly pleaded guilty to an offence, but who was in fact not guilty, must nevertheless throughout his life carry the stigma of a conviction; that this Court*, the Supreme Court of Queensland, *is powerless to rectify such an injustice.*
>
> Leaving aside for the moment the legal machinery necessary to reach the result, I am satisfied that *when a citizen has been shown*, according to the proper standard of proof, *to be in fact not guilty of a simple offence for which he has been convicted, and there has been no disentitling conduct on his part, he is entitled as a matter of justice to have the conviction set aside*. It is true that in such cases the magistrate is required to enter a conviction after a plea of guilty (*The Justices Act*, s145(2)) but that is not the end of the matter. I leave for the moment the appropriate legal machinery requisite to enable the Court to exercise its power to rectify such an injustice.

The fact that the alleged offender has pleaded guilty is a most important circumstance which may well impel the court to decline to take further action but I am satisfied that it is not a circumstance which automatically prevents the court from rectifying the injustice.

The courts have been prepared to act by way of certiorari where fraud has been used to secure a plea of guilty (*Halsbury* (3rd ed.) vol.11, p70 and in Queensland see *R v Stipendiary Magistrate at Cloncurry and Corbett, ex parte Page* [1959] Qd. R. 75). *I can see no reason on principle why, if a plea of guilty has been entered due to a mistake on the part of the alleged offender, the Court cannot similarly interfere*. In this regard I agree with respect with the dictum of Stable J in *R v The Stipendiary Magistrate at Toowoomba and Jessen, ex parte McAllister* [1965] Qd.R. 195, at p198: "On the analogy of *R v Stipendiary Magistrate at Cloncurry and Corbett, ex parte Page* (supra) it appears to me that the jurisdiction there mentioned need not necessarily stop at fraud".

If one considers for a moment some of the possible circumstances under which a plea of guilty may be entered by mistake e.g. a person under hypnosis or a person who is otherwise mentally normal but has suffered some other delusion and wrongly believes that he should plead guilty to an offence which he had not committed, it will be apparent that *there are some circumstances where it would be utterly unjust if the law were to insist upon a rigorous adherence to the notion that whenever a person pleads guilty that is the end of the matter and nothing can be done to rectify even an injustice*. Questions of infancy may also arise. On the other hand from a practical point of view, there is much to commend the proposition that if a person of mature age elects to plead guilty, the Court, as a matter of expedience, if nothing else, usually will not enter into a hearing by way of appeal to set aside the conviction following the express plea of guilty. However to consider first the objections to granting relief, even though they would apply in most cases, is hardly the correct sequence to follow in resolving the question whether or not there is power in the court to rectify an injustice which has arisen inter alia, from a mistake on the part of the supposed offender, leading to a conviction.

I have not found any case where the courts have held that certiorari to quash has lain in the case of a mistaken plea of guilty. However, this may, to some extent, be explainable by the fact that the courts have consistently held that certiorari only lies where the error

appears on the face of the record. Nevertheless, the setting aside of a conviction obtained by fraud thereby rectifying an injustice is an instance where the courts have granted certiorari though the error does not appear on the face of the record. Thus it will be seen that, in order to rectify an injustice, the courts have been prepared to grant certiorari even though the error does not appear on the face of the record (eg *R v Gillyard* (1848) 12 Q.B. 527; 111 E.R. 965; *R v Recorder of Leicester, ex p. Wood* [1947] K.B. 726).

It is difficult to see on principle why the Courts would not have rectified an obvious injustice even though it arose from mistake on the part of the appellant, if the circumstances were such that he had not been debarred by some conduct of his own from seeking relief. In the case of a suggested injustice arising from a conviction following a plea of guilty said to have been made by mistake, the difficulty of proving the injustice (ie the actual innocence of the alleged offender) would always be most formidable."

p142 "If a magistrate records a conviction against a person as for an offence which he did not commit it is surely an "error or mistake" on the part of the magistrate. To take a different view is surely an exercise in extreme cynicism. The fact that he may have been led into error by the defendant himself is irrelevant when considering whether or not the act of the magistrate constituted an "error or mistake" although it is highly relevant to the question whether or not an appellate court will interfere. Notwithstanding an array of dicta to the contrary (eg *Halfpapp v Bateman* [1951] Q.W.N. 19; *Fursman v Blackman* [1953] St.R.Qd.33; *Di Camillo v Wilcox* [1964] W.A.R. 44; *Thompson v Marilyn* [1964] W.A.R. 136; *Hallahan v Campbell* (supra) it seems to me that a straightforward approach such as that adopted by Scott LJ in *Dick v Piller* ([1943] K.B. 493 at 500) surely gives the sensible answer that every miscarriage of justice involves an error or mistake. It would be repugnant to common-sense to assert that a conviction recorded against an innocent man is not "an error or mistake".

p144 "*Should it be considered that the Court cannot proceed under s209 of The Justices Acts, I would be prepared to join in ordering a writ of certiorari to quash returnable instanter*, but I do not consider this course necessary. Instances of prerogative writs returnable instanter include *Hallahan v Campbell* (supra)."

(emphasis added)

It must be noted, however, that the Court was there dealing with the 'order to review' provision in s209(1) of the Justices Act (Q'land), which provides for review in cases of "error or mistake in law or fact", as well as lack of jurisdiction. The procedure under s209 is a practical substitute for certiorari - see *Sharpley v Sharpley* [1950] VLR 151 - though certiorari also lies; see, for example, *R v Esplin; ex p. Stewart* [1908] QWN 1.

Though an order in the nature of certiorari may be made in this case, it does not follow that the Court will exercise its discretion to make the order.

The discretion to grant relief

The final question is whether this Court should exercise its discretion to grant the relief sought.

The grant of the remedy sought is inherently discretionary. There are strong policy grounds for refusing to exercise the discretion in favour of a person who has pleaded guilty. As Kirby P (as his Honour then was) said in *R v Liberti* (supra) at 122:

> "For good reasons, courts approach attempts at trial or on appeal in effect to change a plea of guilty, or to assert a want of understanding of what was involved in such a plea, with caution bordering on circumspection. This attitude rests on the high public interest in the finality of legal proceedings and upon the principle that a plea of guilty by a person in possession of all relevant facts is normally taken to be an admission by that person of the necessary legal

> ingredients of the offence: see *O'Neill* [1979] 2 NSWLR 582; (1979) 1 A Crim R 59; *Sagiv* (1986) 22 A Crim R 73 at 81."

I comment that in this case it is not suggested that the plaintiff was "in possession of all relevant facts"; undoubtedly, lack of effective communication by both police and lawyers lay at the root of what occurred. The reluctance of the courts to exercise the discretion where there is a plea of guilty is also illustrated by the remarks of Lord Goddard CJ in *R v Campbell; ex p. Nomikos* [1956] 1 WLR 622 at 627-628:

> "Another ground for refusing certiorari in the present case is that I know of no case where a plea of guilty has been entered and certiorari has been granted. No one can suggest that the magistrate did anything wrong. … As competent counsel was before her and entered a plea of guilty for his client, she naturally proceeded to record a conviction and to consider what penalty should be imposed. In my opinion it would be quite wrong to issue certiorari after that has been done, and also in my view the court has no power to order certiorari in this case. Certiorari is always, it should be remembered, a discretionary remedy. … In this case the whole difficulty was caused by the deliberate entering of a plea of guilty on the part of the plaintiff.
>
> … It is true that two penalties have been inflicted. It is also true that it was entirely owing to the action of the plaintiff that they were inflicted.
>
> For these reasons the application for certiorari must be refused."

I bear in mind that the prime historical object of certiorari was to supervise summary criminal convictions; see *Commissioner of Motor Transport v Kirkpatrick* (1988) 13 NSWLR 368, per Mahoney JA at 373.

It can be seen that there is authority to the effect that the discretion ought not to be exercised in favour of the plaintiff in this case, in light of his plea of guilty. In considering that on 1 March I also bore in mind the following matters: the obvious injustice suffered by the plaintiff, an unsophisticated Aboriginal man from a remote community, who cannot meaningfully be said to have participated in the sequence of errors which led to the wrongful convictions of which he now complains; the absence of any adequate alternative remedy to Order 56 to remedy a manifest injustice; the lack of opposition by the respondents, and their support of the application; the nature of the decision under review; the utility of granting the relief sought; and the need for the supervisory jurisdiction of this Court to prevent injustice in the courts of summary jurisdiction, to be effective (s14(b), *Supreme Court Act*). In the light of those matters, I considered that the discretion should be exercised in favour of the plaintiff and the orders sought should be made.

These are the reasons for the following orders made on 1 March 1996:

1. Order that:

    (a) the requirements of Rules 5.03(1) and 8.02 be dispensed with and the plaintiff be authorised to commence this proceeding by originating motion in Form 5C;

(b) the parties be at liberty to rely upon affidavit material made according to information and belief; and

(c) pursuant to Rule 56.02(3), the time fixed by Rule 56.02(1) be extended.

2. Order that the convictions recorded against the plaintiff on 29 September 1994 be quashed, and the penalties and disqualification imposed as a result of those convictions be set aside.

3. Order that the plaintiff's conviction of 25 May 1995 on a charge of driving on 17 December 1994 whilst disqualified be quashed, and the penalty imposed as a result of that conviction be set aside.

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