Around the Nation: Western Australia

Editor: The Hon Kenneth Martin KC

ANOTHER APPEAL: APPEAL CORAM APPREHENDED BIAS CHALLENGES: WARK v WESTERN AUSTRALIA

An earlier note in this column[1] discussed what was already something of a litigation saga – extending across two lengthy trials (the first before a Judge alone and the re-trial before a jury) and a successful appeal to the Court of Appeal of Western Australia, precipitated a re-trial – at which the accused, Mr Wark (W) was eventually convicted of the manslaughter of a missing person, namely 17 year old Hayley Dodd. Since her disappearance in late July 1999, Ms Dodd's body has not been found. Notwithstanding W's manslaughter conviction at the re-trial the saga has continued.

In April 2021, Hall J resentenced W, (in the aftermath of the jury verdict of guilty of manslaughter at the re-trial), to 18 years imprisonment. As foreshadowed in the earlier note[2] W, at that time had lodged appeals against his conviction for manslaughter and against his 18-year sentence.

W's second appeal to the Court of Appeal of Western Australia was heard in May 2022. In May 2023, a unanimous judgment by the Court (comprising Buss P, Mazza JA and Vaughan JA) delivered 256 pages of joint reasons, explaining their dismissal of W's appeals against conviction and sentence.

The published reserved reasons of the Court of Appeal given in determining W's further appeals, are densely factual. Nowadays, however, that is almost necessarily always the case, where a ground of appeal against conviction invariably complains, as W did at both his appeals, that the conviction should be set aside on the basis it is either unreasonable or cannot be supported upon the trial evidence assessed as a whole. That "kitchen-sink" ground of appeal carries with it, almost inevitably, the need for the wholesale reassessment of all the evidence adduced at the trial – in order for the appeal court to reach a legitimate state of intellectual satisfaction that, what will always be an unreasoned bare jury verdict of "guilty", either is, or is not supportable, when it is measured against all of the trial evidence, so then not to be viewed as being an unreasonable verdict.

The current state of the law where this "kitchen-sink" ground of appeal is raised in a criminal appeal against a jury verdict of guilt, in practice, if not strictly by law, creates the pragmatic need for an intermediate appellate court, in effect, to "start again", while conducting what is supposed to be a re-hearing to correct error, rather than any fresh re-hearing de novo. Inevitably that re-hearing exercise is conducted upon the transcript of the trial evidence – unless augmented by a grant of leave to permit the adducing of further evidence.

At W's second appeal, the unreasonable verdict ground was raised, as it had been at his first appeal, albeit it was ultimately rejected again, after the required meticulous re-examination of all the evidence adduced at the long re-trial.

The other key ground of challenge at W's second appeal, akin to the first appeal, attacked the admissibility and use of some so-called "tendency" evidence, as had been admitted under s 31A of the *Evidence Act 1906* (WA) at the re-trial – concerning a historically subsequent in time conviction of W in Queensland, over his unlawful detention and sexual assault of another young female hitchhiker. This admissibility challenge ground was rejected at the second appeal.

Aside from recording the conclusion to what has been a long litigation saga around the 1999 disappearance of Ms Hayley Dodd, the object of this note is to highlight a novel collateral issue that arose right at the commencement of W's second appeal. This concerned the challenge raised by W's counsel against two of the members of the appeal panel, based on their alleged apprehended bias, arising, it was said, as a

[1] See Justice Kenneth Martin, "Around the Nation: Western Australia: Resolution of a Cold Case?" (2021) 95 ALJ 854.

[2] Martin, n 1, 856.

result of those two Judges having sat as members of W's first appeal court – which court had heard and ultimately allowed W's appeal against his earlier murder conviction-ordering a re-trial.

Apprehended Bias Challenges Raised against Two Members of the Second Appeal Court

At his first appeal, numerous attempted grounds of challenge against the murder conviction in respect of Ms Dodd had been raised and advanced on behalf of W. But at the end, only one ground succeeded, namely ground 3 (which is the subject of the previous note in this journal). This concerned a misdirection (to herself) by the trial Judge, sitting alone without a jury at W's first trial. The trial judge's material error concerned the legitimate use of the tendency evidence, occasioning in the end the need for W's first appeal to be allowed, his murder conviction quashed, and a re-trial ordered.

The apprehended bias challenges raised at the second appeal were premised on the fact that all members of the appeal coram at W's first appeal (Buss P, Mazza JA and Beech JA) had rejected another of W's multiple grounds of appeal. This unsuccessful ground was W's, in effect, "kitchen-sink" (ground 6) challenge – which had contended that the verdict of murder reached by the trial Judge sitting alone, was unreasonable, or could not be supported having regard to all the evidence adduced at that earlier trial.

All members of the first appeal coram rejected ground 6, for various reasons provided. But the rejection of ground 6 at the first appeal provided the platform for it to be contended at W's second appeal, that the hypothetical reasonable observer test, applying the apprehended bias approach used in Australia for determining bias challenges against judicial officers,[3] would be met in respect of Buss P and Mazza JA, who had separately rejected ground 6 at the first appeal.

This apprehended bias submission was put against the two members of the second appeal court coram by W's counsel under an oral motion, moved at the commencement of the second appeal. It was argued that since, essentially, the same body of evidence was being adduced and relied upon to convict W of the unlawful killing of Ms Dodd at both of his trials, that as a result, both Buss P and Mazza JA, in effect, might be viewed to have pre-judged W's s guilt, at the second appeal. The underlying difficulty for these bias challenges, however, was that the evidence adduced at W's two trials, in multiple respects, was different, as both Buss P and Mazza JA came to point out under their separate and later published reasons.

The focus of this note, however, is directed at identifying the correct procedure to be adopted by an appeal court while dealing with such apprehended bias challenges, when raised against one or more members of that court, as transpired at the commencement of W's second appeal.

The Correct Procedure to Follow in Determining an Apprehended Bias Application Raised against Member(s) of an Appeal Court

As mentioned, a bias and recusal application, raised against two members of the coram at his second appeal was articulated by motion through W's counsel at the commencement of the hearing of the second appeal, on 19 May 2022.

After the bias objections were raised, both Buss P and Mazza JA, after hearing those arguments, announced that they would decline the respective applications for them to recuse themselves. Hence, they continued to sit on and to hear the second appeal as part of that appellate coram. At the time they indicated they would publish their individual reasons for rejecting the applications against them, in due course. That occurred on 2 May 2023, contemporaneously then with the publication of the substantive unanimous reasons of that whole Court dismissing W's appeals against conviction and sentence.[4]

[3] See *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, [6], as applied in *Charisteas v Charisteas* (2021) 273 CLR 289, [11].

[4] See *Wark v Western Australia* [2023] WASCA 66; *Wark v Western Australia (No 2)* [2023] WASCA 67 and *Wark v Western Australia (No 3)* [2023] WASCA 68 (being respectively, the substantive reasons of the Court in dismissing W's appeals and, the

Significantly, there was no bias challenge raised against the third member of that appeal coram at W's second appeal, (Vaughan JA). Such a challenge would have been untenable, since Vaughan JA had not sat as a member of the coram at W's first appeal. But it does not seem that Vaughan JA entered upon or gave any reasons of his own concerning his taking of a position on the alleged conditions of apprehended bias, as had been complained of in his two colleagues. It will be remembered that both Buss P and Mazza JA, at least verbally on 19 May 2022, had each declared then that they would not accept the apprehended bias challenges raised against them by W's counsel, and in consequence, would continue to sit as part of that second appeal coram with Vaughan JA.

Whether an otherwise unchallenged member or members of an appeal coram, nowadays, does need to express a view upon such a bias challenge, where a bias impugned colleague or colleagues has declared that they reject it and will sit on, as exposed by the facts around W's second appeal, is the real point of this note.

Appellate Courts and Bias Challenges Raised against Coram Members in the Wake of the Reasons of the High Court in QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs

The coram in W's second appeal eventually published unanimous reasons for decision, rejecting W's appeals against conviction and sentence, on 2 May 2023 (by joint reasons of some 256 pages, delivered then). At the same time, Buss P and Mazza J published their respective reserved reasons, explaining why they had each declined to disqualify themselves from sitting on the second appeal, on their respective applications of the reasonable bystander test to their positions.

Relevantly, Vaughan JA seems not to have entered at all upon the apprehended bias issues raised concerning his two colleagues. A "hands off" approach by an unchallenged member or members, largely reflected the procedural orthodoxy of the day, concerning the manner of resolution of bias challenges by a panel of judges. However, that "hands off" approach looks since to have changed, in the wake of a decision by a seven-member High Court of Australia Bench, published just over a year later, on 17 May 2023.[5]

The outcome of the *QYFM Appeal* looks to alter the former orthodoxy of procedural practice followed by multi-member Appeal Courts in Australia – when dealing with bias challenges raised against one or more members of an appellate coram. Underlying the *QYFM Appeal* are six different sets of reasons, published respectively by Kiefel CJ and Gageler J (in joint reasons), and separately from Gordon J, Edelman J, Steward J and Gleeson J. Jagot J published separate dissenting reasons, addressing limitations she considered other coram members suffered, where a detected condition of apprehended bias was raised, concerning another member of a multi-panel appeal coram.

A majority of the High Court in the *QYFM Appeal* found the existence of a condition of ostensible bias, albeit residing in only one of the three members of what had been a three-member Full Federal Court visa appeal. The majority detected a possible perception of bias, arising from that judge's prior connection to the appellant. The connection arose from events years earlier, when the judge (prior to taking judicial appointment) had been acting as barrister as and for the Commonwealth DPP. In that earlier role the judge had acted in an appeal for the Commonwealth as the respondent, in successfully resisting that appeal against a serious criminal conviction. This was a drug importation conviction later relied upon in seeking to deport the same person (appellant) on adverse character grounds, his visa cancellation and the Full Court appeal over the visa cancellation. The original criminal conviction and the visa appeal were linked by the relevance of the same underlying criminal misconduct of the appellant.

That level of prior connection gave rise, in the eyes of at least four members of the High Court, to an affirmative engagement with the reasonable bystander test, used for objectively determining curial

separate further reasons given by Buss P and Mazza JA, explaining why almost a year earlier, they had rejected the applications made then for them to recuse themselves at the commencement of the hearing of W's second appeal).

[5] See *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 409; [2023] HCA 15.

impartiality, with its so-called "double might" threshold, applied in Australia for identifying apprehended bias in a member of a court.[6]

Upon the views of at least five members of the High Court in the *QYFM Appeal*, the existence of ostensible bias, albeit residing in only one of the three members of the Full Federal Court of Appeal coram on that visa appeal, gave rise to that Full Court's loss of jurisdiction – impacting against the jurisdiction of that court as a whole – irrespective of the merits or demerits of the visa appeal as had been determined by the otherwise unanimous three-person Full Federal Court.

The deficiency assessment concerning the Full Federal Court's loss of jurisdiction for this visa appeal, due to an apprehended bias condition assessed in one of its coram, is found expressed in the joint reasons of Kiefel CJ and Gageler J, Gordon J, and Edelman J.[7]

Based on that jurisdictional deficiency, the appeal was allowed, by majority.

Nevertheless, both Gleeson J and Steward J, by separate reasons, dissented over the issue of detection of an apprehended bias condition in the judge. Their common position was that there was no sufficient causal connection shown with the appellant, properly applying the *Ebner* test, for the judge's position to be validly challenged for apprehended bias.

The QYFM Appeal and a Favoured Procedure for Dealing with a Bias Challenge Put against a Member or Members of a Panel of Judges – The Unresolved Obiter Issue

The more difficult and essentially procedural aspect of the *QYFM Appeal* reasons arose out of obiter components of that decision, concerning the favoured approach by which a multi-member appeal court coram should deal with such bias objections – when raised against one or more members of its nominated coram – given the potentially adverse repercussions arising from finding such a bias condition to exist, bearing then against the Court's loss of jurisdiction as a whole, and so, necessarily bound up in the resolution of the bias challenge.

On this obiter issue, Gleeson J expressly declined to express any view.[8] Jagot J, dissented.[9] Jagot J expressed a very firm view that other members of an appeal court held no power to exclude another of the duly commissioned judges of a court from sitting or voting. Thus, she considered it was the exclusive province of the judge whose independence was the subject of a bias challenge to decide upon the objection. Other members of the coram could not lawfully prevent that judge from continuing to sit and from exercising their judicial power. That, according to Jagot J, was a "well-established convention".[10]

Between the remaining five judges of the High Court, upon the procedural obiter issue, there looked to present something of a conceptual divide. Kiefel CJ and Gageler J by their joint reasons concluded, given the potential adverse ramifications against jurisdiction, that the whole of the Court was concerned in, and so, should hear and resolve any bias objections raised against a member of the coram – since the correct resolution of that issue lay at the heart of affirming the Court's jurisdiction. That was the first obligation of any court to settle. Accordingly, there was a need for *all* the members of an appeal court to resolve the bias complaint, where it was raised and remained contested. That was so, notwithstanding the other members of the coram were not the subject of any suggested bias obstacle.[11]

[6] See *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, [6].

[7] *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 409, [28] (Kiefel CJ and Gageler J), [92] (Gordon J), [188] (Edelman J); [2023] HCA 15. See also [193] (Steward J).

[8] See her reasons in *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 409, [271]; [2023] HCA 15.

[9] See her Honour's reasons, *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 409, particularly [311]–[312], [322]; [2023] HCA 15, adopting observations from the reasons of Jackson J in the United States Supreme Court, see [312] from *Jewel Ridge Coal Corp v Local 6167*, 325 US 897, 897 (1945).

[10] See *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 409, [314]; [2023] HCA 15.

[11] See *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 409, [32]–[33] (Kiefel CJ and Gageler J); [2023] HCA 15.

On the other hand, upon this procedural issue, Gordon J, Edelman J and Steward J, by separate reasons, each look to prefer an approach of allowing the impugned judge or judges who are the subjects of a bias challenge, to hold the first opportunity to personally hear, consider and decide upon an objection raised against them continuing to sit.

Only if the impugned judge's personal decision, as communicated to the other members of the Court after hearing the recusal application, is to continue to sit, with that judge concluding they suffer no ostensible or actual bias deficiency – would it be necessary at that point, for the other members of the coram to direct their personal consideration to the bias objection put against their colleague(s). Of course, that assumes the bias objection is still pressed, after the impugned judge has publicly communicated their decision rejecting the bias objection.

At that point, a joint position for the Court will need to be reached. The need for the involvement of the other members of the coram, who themselves are not a subject of any bias challenges, will then be necessary – given the duty of that coram to resolve at the outset their affirmative retention of jurisdiction, to hear and determine the matter.

So seen, considerations of the highest policy importance, bearing upon judicial ethics and judicial independence present around the obiter issue and manifesting most strongly in Jagot J's dissent.

But broadly speaking, there presently looks to be significant and considered support for the procedural approach suggested by Gordon J, towards how the raising and determining of a bias challenge ought be best managed.[12] That approach looked to enjoy the support of Edelman J[13] and at least in principle, the support of Steward J[14] (but who otherwise concluded there was no underlying bias problem for the judge below on the visa appeal).

Nevertheless, the diversity of views expressed upon the obiter issue in the *QYFM Appeal* reasons by five members of the Court concerning the preferred procedure to be followed on a determination of a bias challenge that is raised against some members only of a panel of three or more, suggests that in years to follow more may be said on this issue by the Court.

Some Conclusions

Returning, however, to the circumstances of the bias challenges as had been articulated against two members of the Court of Appeal of Western Australia at the commencement of W's second appeal, a question to be posed, with the benefit of perfect hindsight, is how the procedural approach followed by that court in resolving W's bias challenges now looks, taking account of the subsequent *QYFM Appeal* reasons.

At this point, I venture to suggest, applying the favoured obiter position, upon a preferred procedure as was expressed by three Justices in the *QYFM Appeal* reasons, that:

(1) the individual reasons of coram members in deciding to reject a bias challenge and so, to continue to hear the appeal, ought to be given immediately, or at least very proximate to the time of that decision and so, not be reserved to be delivered later;
(2) all the members of an appellate coram, in the wake of a declaration by a bias impugned member(s) to continue to sit, must then express their own views on the bias challenge, given the potential adverse ramifications of an established bias condition against that Court's jurisdiction, were the bias challenge to later be made good;
(3) for such circumstances, the desirability of a unanimous position reached by the Court upon the bias objection, if still pressed, is self-evident. Under circumstances where genuine concerns remain as

[12] See Gordon J's reasons in *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 409, [100]–[105]; [2023] HCA 15.

[13] *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 409, [190]–[191]; [2023] HCA 15.

[14] *QYFM v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2023) 97 ALJR 409, [193]; [2023] HCA 15.

held by at least one member of a coram, over the possible bias condition suffered by another member or members of the panel, prudence would seem to suggest that a freshly reconstituted panel is the safer option in the longer term;

(4) a cautious approach by the coram as a whole is desirable towards resolving bias challenges, given the potentially disastrous and wasteful longer-term consequences arising from getting wrong, what is a pivotal issue of jurisdictional fact, especially when the same issue may fall to be looked at all over again through the dispassionate eyes of another court, years later.

KJM