HIGH COURT OF AUSTRALIA

Dietrich

Vs.

The Queen

(Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and Mchugh JJ.)

13.11.1992

JUDGMENT

MASON C.J. AND McHUGH J.

1. This application for special leave to appeal seeks to raise the question whether the applicant's trial in the County Court at Melbourne miscarried by virtue of the fact that he was unrepresented by counsel. In our opinion, and in the opinion of the majority of this Court, the common law of Australia does not recognize the right of an accused to be provided with counsel at public expense. However, the courts possess undoubted power to stay criminal proceedings which will result in an unfair trial, the right to a fair trial being a central pillar of our criminal justice system. The power to grant a stay necessarily extends to a case in which representation of the accused by counsel is essential to a fair trial, as it is in most cases in which an accused is charged with a serious offence.

2. The applicant is entitled to succeed because his trial miscarried by virtue of the trial judge's failure to stay or adjourn the trial until arrangements were made for counsel to appear at public expense for the applicant at the trial with the consequence that, in all the circumstances of this case, he was deprived of his right to a fair trial and of a real chance of acquittal.

3. The applicant was found guilty by a jury of one count of importing into Australia not less than a trafficable quantity of heroin in contravention of s.233B(1)(b) of the Customs Act 1901 (Cth). The indictment on which the applicant was presented contained three further counts: two counts, which alleged possession of the heroin the subject of the importation charge, were alternatives to the more serious charge and were not considered once a verdict of guilty had been returned on the importation charge; the third additional count alleged possession of a quantity of heroin which was not the subject of the importation offence, and the applicant was found not guilty on this count. The applicant had pleaded not guilty to all counts.

4. The trial before Judge Nixon in the County Court lasted approximately forty days, from presentment of the applicant on 23 May 1988 to the return of the jury's verdicts on 29 July 1988. Throughout the entire course of the trial, the applicant was unrepresented. Prior to trial, he had applied unsuccessfully to the Legal Aid Commission of Victoria for legal assistance and had also been unsuccessful in seeking reconsideration of the Commission's refusal pursuant to the review procedures available under Pt VI of the Legal Aid Commission Act 1978 (Vict.). The Commission's view was that assistance would only be provided for representation for a plea of guilty, this being an approach which the applicant would not consider. Immediately prior to trial, the applicant had also

made an application pursuant to s.69(3) of the Judiciary Act 1903 (Cth) to have counsel appointed. That sub-section provides:

"Any person committed for trial for an offence against the laws of the Commonwealth may at any time within fourteen days after committal and before the jury is sworn apply to a Justice in Chambers or to a Judge of the Supreme Court of a State for the appointment of counsel for his defence. If it be found to the satisfaction of the Justice or Judge that such person is without adequate means to provide defence for himself, and that it is desirable in the interests of justice that such an appointment should be made, the Justice or Judge shall certify this to the Attorney-General, who may if he thinks fit thereupon cause arrangements to be made for the defence of the accused person or refer the matter to such legal aid authorities as the Attorney-General considers appropriate. Upon committal the person committed shall be supplied with a copy of this subsection."

application on the ground that it had been brought out of time, the applicant having been committed for trial on 10 August 1987. An application for legal assistance directed to the Commonwealth Minister for Justice and the Attorney-General for the Commonwealth was also unsuccessful.

5. At the commencement of his trial, the applicant had therefore exhausted all avenues for legal assistance. Nevertheless, one of the grounds of his application to the Court of Criminal Appeal for leave to appeal against conviction was that every indigent accused charged with an indictable offence is entitled to counsel provided at the expense of the State and that the failure of the trial judge to appoint counsel for the applicant was a miscarriage of justice requiring that the conviction be quashed. The Court of Criminal Appeal (O'Bryan, Gray and Vincent JJ.) refused leave.

6. It is from the order refusing leave that the applicant now seeks special leave to appeal to this Court. The sole ground of the application is that the applicant's trial miscarried by virtue of the fact that he was not provided with legal representation. Right to a fair trial

7. The right of an accused to receive a fair trial according to law is a fundamental element of our criminal justice system ((1) Jago v. District Court (N.S.W.) [1989] HCA 46; (1989) 168 CLR 23, per Mason C.J. at p 29; Deane J. at p 56; Toohey J. at p 72; Gaudron J. at p 75.). As Deane J. correctly pointed out in Jago v. District Court (N.S.W.) ((2) ibid., at pp 56-57.), the accused's right to a fair trial is more accurately expressed in negative terms as a right not to be tried unfairly or as an immunity against conviction otherwise than after a fair trial, for no person can enforce a right to be tried by the State; however, it is convenient, and not unduly misleading, to refer to an accused's positive right to a fair trial. The right is manifested in rules of law and of practice designed to regulate the course of the trial ((3) Bunning v. Cross [1978] HCA 22; (1978) 141 CLR 54; Reg. v. Sang [1979] UKHL 3; [1979] UKHL 3; (1980) AC 402, both referred to in Jago (1989) 168 CLR, at p 29.). However, the inherent jurisdiction of courts extends to a power to stay proceedings in order "to prevent an abuse of process or the prosecution of a criminal proceeding ... which will result in a trial which is unfair" ((4) Barton v. The Queen [1980] HCA 48; (1980) 147 CLR 75, at pp 95-96; Williams v. Spautz [1992] HCA 34; (1992) 66 ALJR 585; 107 ALR 635.).

8. There has been no judicial attempt to list exhaustively the attributes of a fair trial. That is because, in the ordinary course of the criminal appellate process, an appellate court is generally

called upon to determine, as here, whether something that was done or said in the course of the trial, or less usually before trial ((5) Reg. v. Glennon [1992] HCA 16; (1992) 173 CLR 592.), resulted in the accused being deprived of a fair trial and led to a miscarriage of justice. However, various international instruments and express declarations of rights in other countries have attempted to define, albeit broadly, some of the attributes of a fair trial. Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the ECHR") enshrines such basic minimum rights of an accused as the right to have adequate time and facilities for the preparation of his or her defence ((6) Art.6(3)(b).) and the right to the free assistance of an interpreter when required ((7) Art.6(3)(e)). Article 14 of the International Covenant on Civil and Political Rights ("the ICCPR"), to which instrument Australia is a party ((8) Australia signed the ICCPR on 18 December 1972 and ratified it on 13 August 1980), contains similar minimum rights, as does s.11 of the Canadian Charter of Rights and Freedoms ((9) Pt 1 of the Constitution Act 1982, enacted by the Canada Act 1982 (U.K.)). Similar rights have been discerned in the "due process" clauses of the Fifth and Fourteenth Amendments to the United States Constitution. The argument of the applicant

9. The primary argument of the applicant relies in part on the explications of the right to a fair trial in the instruments to which we have referred. The argument is that, at least in any indictable matter to be tried before a judge with or without a jury that may result in imprisonment upon conviction, the interests of justice require that an indigent accused who wishes to have legal representation be provided with such representation at public expense. The central proposition in this submission is that the absence of representation for an accused who cannot afford to engage counsel necessarily means that the trial is unfair and that any conviction should be quashed.

10. In the course of argument, counsel for the applicant proposed a less absolute form of this proposition. He submitted that, as an incident of a court's duty to ensure that an accused receives a fair trial, a trial judge has a discretion to stay or adjourn the trial of an unrepresented accused and that, in the absence of exceptional circumstances, this discretion should be exercised in favour of the accused. This contention was proposed in the context of an alternative submission that the trial judge erred in refusing the applicant's application for an adjournment of his trial for the purpose of trying to secure representation.

11. It is little more than one hundred and fifty years since legislation was enacted to provide that all accused persons be permitted to be represented by counsel. Prior to the passage of The Trials for Felony Act 1836 (Imp) ((10) 6 and 7 Wm IV c.114) ("the 1836 Act"), "(a)n Act for enabling Persons indicted of Felony to make their Defence by Counsel or Attorney", the common law of England did not recognize the right of a person charged with a felony to be defended by counsel. This prohibition, which appears to date back beyond the limits of legal memory to the Leges Henrici Primi ((11) Chowdharay-Best, "The History of Right to Counsel", (1976) 40 Journal of Criminal Law 275, at p 275.), had been substantially relaxed prior to the enactment of the 1836 Act. The principal reform effected by the 1836 Act was that it enabled all persons tried for felonies "after the close of the case for the prosecution, to make full answer and defence thereto, by counsel learned in the law" ((12) s.1); it was already common practice for counsel for the defence to be permitted to stand by the accused at the bar and to cross-examine witnesses on his or her behalf ((13) Blackstone, Commentaries, 1st ed. (1769), vol.4, pp 349-350). It has been observed that, despite its significance as a landmark in the history of the right to counsel, the passage of the 1836 Act did not effect as great a change as that made by The Treason Act 1695 (Imp) ((14) 7 and 8 Wm III c.3), which extended the right to the assistance of counsel to persons accused of high treason ((15) Holdsworth, A History of English Law, vol.9, 3rd ed. (1944), p 235.).

12. The advantages of representation by counsel are even more clear today than they were in the nineteenth century. It is in the best interests not only of the accused but also of the administration of justice that an accused be so represented, particularly when the offence charged is serious ((16) McInnis v. The Queen [1979] HCA 65; (1979) 143 CLR 575, per Barwick C.J. at p 579; see also Galos Hired v. The King (1944) AC 149, at p 155 and Foster v. The Queen [1982] FCA 2; (1982) 38 ALR 599, at p 600.). Lord Devlin stressed the importance of representation by counsel when he wrote ((17) The Judge, (1979), p 67):

"Indeed, where there is no legal representation, and save in the exceptional case of the skilled litigant, the adversary system, whether or not it remains in theory, in practice breaks down."

An unrepresented accused is disadvantaged, not merely because almost always he or she has insufficient legal knowledge and skills, but also because an accused in such a position is unable dispassionately to assess and present his or her case in the same manner as counsel for the Crown ((18) McInnis (1979) 143 CLR, per Murphy J. at p 590). The hallowed response ((19) See the reference to Coke's opinion in Powell v. Alabama [1932] USSC 137; (1932) 287 US 45, at p 61) that, in cases where the accused is unrepresented, the judge becomes counsel for him or her, extending a "helping hand" to guide the accused throughout the trial so as to ensure that any defence is effectively presented to the jury, is inadequate for the same reason that self-representation is generally inadequate: a trial judge and a defence counsel have such different functions that any attempt by the judge to fulfil the role of the latter is bound to cause problems ((20) See Foster (1982) 38 ALR, at p 600). As Sutherland J. stated in Powell v. Alabama, when delivering the judgment of the United States Supreme Court ((21) (1932) 287 US, at p 61):

"But how can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that in the proceedings before the court the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional."

13. However, the right to retain counsel and the right to have counsel provided at the expense of the State, the existence of which the applicant asserts, are not the same thing ((22) Reg. v. Rowbotham (1988) 41 CCC (3d) 1, at pp 65-66). Standing in the path of the applicant's argument are certain statements in the judgments in McInnis v. The Queen to the effect that the common law does not recognize the right of an accused to be provided with counsel at public expense. Barwick C.J. stated ((23) (1979) 143 CLR, at p 579):

"It is proper to observe that an accused does not have a right to be provided with counsel at public expense. He has, of course, a right to be represented by counsel at his own or someone else's expense."

Mason J. stated ((24) ibid., at p 581):

"Although I am in agreement with what the Privy Council said in the case of Galos Hired v. The King ((25) (1944) AC, at p 155), concerning 'The importance of persons accused of a serious crime having the advantage of counsel to assist them before the courts', an accused in Australia does not have a right to present his case by counsel provided at public expense."

On the other hand, Murphy J., in his dissenting judgment, stated ((26) (1979) 143 CLR, at p 592.):

"If a person on a serious charge, who desires legal assistance but is unable to afford it, is refused legal aid, a judge should not force him to undergo trial without counsel. If necessary, the trial should be postponed until legal assistance is provided".

14. It is important to appreciate that these statements in McInnis were made in the absence of any argument directed to the existence of a right to be provided with counsel. The issue in McInnis was whether, on the particular facts of the case, there had been a miscarriage of justice by virtue of the trial judge's refusal of an adjournment sought by the unrepresented accused. That issue was resolved in the negative but, in our opinion, the actual decision in the case did not depend upon an acceptance of the proposition, after consideration of argument, that an indigent accused does not have a right to be provided with counsel at public expense and, therefore, the applicant need not seek to convince this Court that the decision should be reconsidered. The most that can be said against the applicant is that McInnis assumed the correctness of that proposition. In these circumstances, there is no strong reason why the Court should not reconsider the statements made in that case.

15. The applicant relies upon three suggested sources for the alleged right for which he contends. The first is s.397 of the Crimes Act 1958 (Vict.) and related provisions in other jurisdictions ((27) Judiciary Act 1903 (Cth), s.78; Crimes Act 1900 (N.S.W.), s.402; Criminal Law Consolidation Act 1935 (S.A.), s.288; The Criminal Code (Q.), s.616; The Criminal Code (W.A.), s.634; Criminal Code (Tas.), s.368; Criminal Code (N.T.), s.360.). Section 397 provides:

"Every accused person shall be admitted after the close of the case for the prosecution to make full answer and defence thereto by counsel."

As soon as one appreciates that this provision is simply the descendant of the section in the 1836 Act, quoted above, it becomes obvious that this branch of the applicant's argument cannot succeed. The section enshrines the right of an accused person to have the assistance of counsel in defending himself or herself at a criminal trial. The meaning of the phrase "to make full answer and defence thereto by counsel" has received scant attention in Australia. In Ibrahim, in the context of a submission similar to the present submission of the applicant, the Victorian Court of Criminal Appeal declined to consider the question whether the right in s.397 should be held to comprehend a right to have counsel appointed by the court ((28) (1987) 27 A Crim R 460, at pp 462-463).

16. The Canadian courts have had occasion to consider the same phrase as it appears in s.577(3) of the Criminal Code. The applicant in this case places reliance on the Canadian cases of Reg. v. Johnson ((29) (1973) 11 CCC (2d) 101), Re Ewing and Kearney and The Queen ((30) (1974) 49

DLR (3d) 619) and Barrette v. The Queen ((31) (1976) 68 DLR (3d) 260) which all considered the relevant statutory provision. These decisions reject the proposition that the legislative right comprehends a right to have counsel appointed by the court; the most that can be extracted from these cases is that an accused should not be forced, by exercise of the judge's discretion, to go to trial unrepresented for reasons that are not well founded in law ((32) Johnson (1973) 11 CCC (2d), at pp 105-106; Barrette (1976) 68 DLR (3d), at p 264). Accordingly, in so far as the applicant's argument relies on s.397 of the Crimes Act, it cannot succeed in the absence of compelling, additional reasons for interpreting it in the suggested manner.

17. The second suggested source of the right for which the applicant contends is to be found in Australia's international obligations, particularly as embodied in the ICCPR to which Australia is a party. Article 14(3) of the ICCPR provides:

"In the determination of any criminal charge against
him, everyone shall be entitled to the following minimum
guarantees, in full equality:
...
(d) To be tried in his presence, and to defend himself
in person or through legal assistance of his own choosing;
to be informed, if he does not have legal assistance, of
this right; and to have legal assistance assigned to him,
in any case where the interests of justice so require, and
without payment by him in any such case if he does not have
sufficient means to pay for it".

Ratification of the ICCPR as an executive act has no direct legal effect upon domestic law; the rights and obligations contained in the ICCPR are not incorporated into Australian law unless and until specific legislation is passed implementing the provisions ((33) Bradley v. The Commonwealth (1973) 128 CLR 557, at p 582; Simsek v. MacPhee [1982] HCA 7; (1982) 148 CLR 636, at pp 641-644; Kioa v. West [1985] HCA 81; (1985) 159 CLR 550, at pp 570-571.). No such legislation has been passed. This position is not altered by Australia's accession to the First Optional Protocol to the ICCPR, effective as of 25 December 1991, by which Australia recognizes the competence of the Human Rights Committee of the United Nations to receive and consider communications from individuals subject to Australia's jurisdiction who claim to be victims of a violation by Australia of their covenanted rights. On one view, it may seem curious that the Executive Government has seen fit to expose Australia to the potential censure of the Human Rights Committee without endeavouring to ensure that the rights enshrined in the ICCPR are incorporated into domestic law, but such an approach is clearly permissible.

18. Although counsel for the applicant accepted that the ICCPR does not form part of domestic law, he submitted that the common law of Australia should be developed in a way which recognizes the existence and enforceability of rights provided for in international instruments to which Australia is a party. In particular, the applicant points to the enactment of the Human Rights and Equal Opportunity Commission Act 1986 (Cth). This Act has scheduled to it the ICCPR, as well as other international legal instruments dealing with human rights, and assigns to the Commission it creates the function, inter alia, of inquiring into and reporting on any act or practice that may be inconsistent with or contrary to human rights as declared in the scheduled instruments ((34) s.11(1)(f)). The evident intention that the establishment of an Australian Human Rights and Equal Opportunity Commission would be one part of an overall programme to incorporate international

human rights obligations into domestic law was made more explicit in the preamble to the former Human Rights Commission Act 1981 (Cth) which stated:

"WHEREAS it is desirable that the laws of the Commonwealth and the conduct of persons administering those laws should conform with the provisions of the International Covenant on Civil and Political Rights, the Declaration of the Rights of the Child, the Declaration on the Rights of Mentally Retarded Persons and the Declaration on the Rights of Disabled Persons and other international instruments relating to human rights and freedoms".

19. In Jago v. Judges of the District Court of N.S.W. ((35) (1988) 12 NSWLR 558, at p 569) Kirby P expressed the view that, where the inherited common law is uncertain, Australian judges may look to an international treaty which Australia has ratified as an aid to the explication and development of the common law. As a suggested example of this approach, the applicant points to the status accorded to the ECHR in English law. In common with the status of the ICCPR in Australian law, the ECHR is not part of English domestic law and thus rights contained in the ECHR cannot be enforced directly in English courts; furthermore, if domestic legislation conflicted with the ECHR, English courts would nevertheless be required to enforce the legislation. However, it is "well settled" ((36) Reg. v. Home Secretary; Ex parte Brind [1991] UKHL 4; (1991) 1 AC 696, per Lord Bridge of Harwich at pp 747-748) that, in construing domestic legislation which is ambiguous, English courts will presume that Parliament intended to legislate in accordance with its international obligations. English courts may also have resort to international obligations in order to help resolve uncertainty or ambiguity in judge-made law ((37) Derbyshire County Council v. Times Newspapers Ltd. (1992) 3 WLR 28, per Balcombe L.J. at p 44).

20. Assuming, without deciding, that Australian courts should adopt a similar, common-sense approach, this nevertheless does not assist the applicant in this case where we are being asked not to resolve uncertainty or ambiguity in domestic law but to declare that a right which has hitherto never been recognized should now be taken to exist. Moreover, this branch of the applicant's argument assumes that Art.14(3)(d) of the ICCPR supports the absolute right for which he contends. An analysis of the views of the Human Rights Committee on communications submitted to it relating to Art.14(3)(d) reveals little more than that the Committee considers that legal assistance must always be made available in capital cases ((38) Pinto v. Trinidad and Tobago, CCPR/C/39/D/232/1987). However, the European Court of Human Rights has approached the almost identical provision in the ECHR by emphasizing the importance of the particular facts of the case to any interpretation of the phrase "when the interests of justice so require" ((39) Monnell and Morris v. United Kingdom (1987) 10 EHRR 205, at p 225; Granger v. United Kingdom (1990) 12 EHRR 469, at pp 480-482). As will become clear, that approach is similar to the approach which, in our opinion, the Australian common law must now take.

21. The third suggested foundation for the absolute right draws upon analogies with the domestic law of other jurisdictions, in particular, Canada and the United States. These analogies do not support the applicant's argument. The current law in the United States is that an accused cannot be sentenced, upon conviction, to a term of imprisonment unless the State has afforded him or her the right to the assistance of counsel ((40) Scott v. Illinois (1979) 440 US 367, retreating from the decision in Argersinger v. Hamlin [1972] USSC 127; (1972) 407 US 25 that the State must provide counsel, even in misdemeanour cases, whenever imprisonment is an authorized penalty.). However,

the development of this right in decisions of the United States Supreme Court is based on the constitutional guarantee of the right to counsel expressed in the Sixth Amendment to the United States Constitution and its incorporation within the right of "due process" enshrined in the Fourteenth Amendment. These constitutional guarantees have no direct parallel in Australian law. The applicant argued that the requirements of "due process" must be observed in Victorian courts by virtue of the statute 42 Edw.III c.3, passed in 1368, which remains in force in Victoria pursuant to s.3 of the Imperial Acts Application Act 1980 (Vict.). The Imperial Act provides that "no man be put to answer without presentment before justices, or matter of record, or by due process ... And if any thing from henceforth be done to the contrary, it shall be void in the law". As it appears in that provision, the expression "due process" can hardly be the "compendious expression for all those rights ... basic to our free society" ((41) Wolf v. Colorado [1949] USSC 101; (1949) 338 US 25, at p 27) that it is in the United States Constitution. As Priestley J.A observed in Adler v. District Court of N.S.W. ((42) (1990) 19 NSWLR 317, at p 351), the Imperial legislation was simply designed to ensure that only in common law courts should persons be tried for crimes and only by recognized procedures.

22. In Canada, there are a number of cases in which it has been argued that provisions of the Charter of Rights and Freedoms, particularly ss.7, 10(b) and 11(d), enshrine a right to counsel at public expense. The right has, however, never been accepted in the absolute form proposed; rather, the issue whether counsel should be appointed by the court for an accused who is unable to afford representation has been approached as one aspect of the accused's right to a fair trial ((43) See also the approach of the British Columbia Court of Appeal in a case based upon a less explicit provision in the Canadian Bill of Rights 1960: Re Ewing and Kearney and The Queen (1974) 49 DLR (3d), at pp 628-629.).

23. In Deutsch v. Law Society of Upper Canada Legal Aid Fund ((44) (1985) 48 CR (3d) 166) the accused brought two applications for judicial review of the refusal of legal aid in respect of criminal charges he was facing. Sitting as the Ontario Divisional Court, Craig J. concluded that the Charter did not entrench any right to publicly funded counsel. He stated ((45) ibid., at pp 173-174):

> "In conclusion as to this issue, under the common law the accused has a right to a fair trial and the trial judge is bound to ensure that an accused person receives a fair trial. Here the accused faces possible imprisonment. Pursuant to s.7 of the Charter, the accused has an entrenched right not to be deprived of his liberty except in accordance with the principles of fundamental justice. Also, pursuant to s.11(d), he has an entrenched right to a 'fair and public hearing'. The right to fundamental justice and a fair and public hearing includes the right to a fair trial. There may be rare cases where legal aid is denied to an accused person facing trial, but, where the trial judge is satisfied that, because of the seriousness and complexity of the case, the accused cannot receive a fair trial without counsel, in such a case it seems to follow that there is an entrenched right to funded counsel under the Charter."

24. In Reg. v. Rowbotham, a number of accused were tried on an indictment containing four counts of conspiracy either to import or traffic in hashish. The trial lasted twelve months. Two of the

accused had been refused legal aid and both proceeded to trial without counsel. On appeal to the Ontario Court of Appeal, one of the two unrepresented accused argued that she had the constitutional right to be provided with counsel because she lacked the means to employ counsel. The Court unanimously rejected the existence of an absolute right ((46) (1988) 41 CCC (3d), at pp 65-66):

"The right to retain counsel, constitutionally secured by s.10(b) of the Charter, and the right to have counsel provided at the expense of the state are not the same thing. The Charter does not in terms constitutionalize the right of an indigent accused to be provided with funded counsel. At the advent of the Charter, legal aid systems were in force in the provinces, possessing the administrative machinery and trained personnel for determining whether an applicant for legal assistance lacked the means to pay counsel. In our opinion, those who framed the Charter did not expressly constitutionalize the right of an indigent accused to be provided with counsel, because they considered that, generally speaking, the provincial legal aid systems were adequate to provide counsel for persons charged with serious crimes who lacked the means to employ counsel. However, in cases not falling within provincial legal aid plans, ss.7 and 11(d) of the Charter, which guarantee an accused a fair trial in accordance with the principles of fundamental justice, require funded counsel to be provided if the accused wishes counsel, but cannot pay a lawyer, and representation of the accused by counsel is essential to a fair trial."

As the last clause of this statement makes clear, the accused has a right to a fair trial and representation by counsel must be considered not on its own but as one relevant element of the broader right. The Court in Rowbotham concluded that, on the particular facts of the accused's case, she was not able to receive a fair trial without representation by counsel.

25. It therefore appears clear that the Charter does not entrench a general right to counsel at public expense irrespective of the circumstances of the particular case. Where an accused has been denied legal aid, the trial judge may direct the appointment of counsel if satisfied that the accused is impecunious and that the nature of the case is such that the accused cannot receive a fair trial without representation ((47) MacFarlane, "The Right to Counsel at Trial and on Appeal", (1990) 32 Criminal Law Quarterly 440, at p 463.). The right to counsel, so called, is inextricably linked to the facts of the case. Accordingly, the Canadian authorities provide no support for the applicant's primary argument.

26. Despite the absence in Australia of any formally entrenched declaration of rights similar to the Canadian Charter, the approach of Australian courts resembles the Canadian approach in rejecting the proposition that an indigent accused has an absolute right to the provision of counsel at public expense. As well as the statements of this Court in McInnis, several decisions of the South Australian Supreme Court support the view that there is no absolute right to counsel provided at public expense. In Reg. v. Hanias ((48) (1976) 14 SASR 137) the Full Court of the Supreme Court

held that a trial judge was not required in all circumstances to assign counsel to an accused who desired but could not afford representation. As Bray C.J. observed ((49) ibid., at p 142), "(m)any circumstances have to be taken into account." The Full Court in the subsequent case of Reg. v. Bicanin ((50) (1976) 15 SASR 20, at p 25) expressed this idea more fully:

"3. There is no rule of law or practice in this State that every accused person should be represented if he so desires - e.g. by means of an order by the trial Judge under the Poor Persons Legal Assistance Act, 1925-1972.
4. Even in circumstances where the lack of representation at the trial weighs with a court of criminal appeal it is not that the lack of representation in such a case itself constituted a ground of appeal, but that the lack of representation - and particularly the circumstances under which the accused person had been unrepresented, including his efforts to obtain representation and/or an adjournment or remand for the purpose - may form part of a composite set of factors leading to the conclusion that there was an overall miscarriage of justice."

27. In addition, recognition of an absolute right to counsel provided at public expense would create its own problems. First, the court would logically be driven to decide whether such a right to counsel entails the right to the "effective assistance" of counsel, as it is called in the United States ((51) See Cuyler v. Sullivan (1980) 446 US 335; Evitts v. Lucey (1985) 469 US 387). That is, if an accused has a right to counsel, does he or she have a right to demand counsel of a particular degree of experience and who can conduct the defence "effectively"? How could such a right be monitored properly by the trial judge?

28. Secondly, if one of the conditions for appointment of counsel for the accused at public expense is the impecuniosity of the accused, will it be the responsibility of the trial judge to assess this? Clearly, if proper guidelines were formulated and all the relevant material put before a trial judge, it would be possible for him or her to decide the matter, but the ad hoc development of such a procedure is unwise and undesirable.

29. Thirdly, recognition of the right to counsel provided at public expense would necessarily entail, and indeed be founded upon, the principle that absence of representation necessarily means that a criminal trial is unfair. However, appellate courts in this country do not interfere with convictions entered at trial purely on the basis that there was unfairness to the accused in the conduct of the trial ((52) cf. McInnis (1979) 143 CLR, per Murphy J. at p 591). The appellate jurisdiction in criminal matters depends upon a conclusion that there was a "miscarriage of justice" ((53) e.g., Crimes Act 1958 (Vict.), s.568(1)) such that the applicant "has thereby lost 'a chance which was fairly open to him of being acquitted' ((54) Mraz v. The Queen [1955] HCA 59; (1955) 93 CLR 493, per Fullagar J. at p 514) ... or 'a real chance of acquittal' ((55) Reg. v. Storey [1978] HCA 39; [1978] HCA 39; (1978) 140 CLR 364, per Barwick C.J. at p 376)", to repeat the expression used by Brennan, Dawson and Toohey JJ. in Wilde v. The Queen ((56) [1988] HCA 6; (1988) 164 CLR 365, at pp 371-372). Unless the recognition of the absolute right sought by the applicant entails the consequence that want of representation necessarily means that a trial has miscarried, the absolute right would lack an adequate sanction. The right would thus appear to be rather hollow. The position in Australia

30. For the foregoing reasons, it should be accepted that Australian law does not recognize that an indigent accused on trial for a serious criminal offence has a right to the provision of counsel at public expense. Instead, Australian law acknowledges that an accused has the right to a fair trial and that, depending on all the circumstances of the particular case, lack of representation may mean that an accused is unable to receive, or did not receive, a fair trial. Such a finding is, however, inextricably linked to the facts of the case and the background of the accused.

31. A trial judge faced with an application for an adjournment or a stay by an unrepresented accused is therefore not bound to accede to the application in order that representation can be secured; a fortiori, the judge is not required to appoint counsel. The decision whether to grant an adjournment or a stay is to be made in the exercise of the trial judge's discretion, by asking whether the trial is likely to be unfair if the accused is forced on unrepresented. For our part, the desirability of an accused charged with a serious offence being represented is so great that we consider that the trial should proceed without representation for the accused in exceptional cases only. In all other cases of serious crimes, the remedy of an adjournment should be granted in order that representation can be obtained. While, in some jurisdictions, judges once had the power to direct the appointment of counsel for indigent accused ((57) e.g., Poor Persons Legal Assistance Act 1925 (S.A.), s.3), this power has been largely overtaken by the development of comprehensive legal aid schemes in all States and, as such, trial judges now cannot be asked to appoint counsel in order that a trial can proceed ((58) Apart, of course, from the related procedure under the Judiciary Act, s.69(3)). However, even in those cases where the accused has been refused legal assistance and has unsuccessfully exercised his or her rights to review of that refusal, it is possible, perhaps probable, that the decision of a Legal Aid Commission would be reconsidered if a trial judge ordered that the trial be adjourned or stayed pending representation being found for the accused. In the absence of more extensive factual, statistical and economic material than was furnished by the parties, it is difficult for this Court to assess the full practical implications which will flow from the procedure of adjourning a criminal trial, on such occasions as may be necessary, to enable an unrepresented indigent person accused of a serious offence to be represented by counsel at public expense.

32. In this respect, we should point out that, after this matter initially came before a bench of three Justices, the applicant, pursuant to a direction given by the Registrar, gave notice to the Commonwealth and the States of the issues to be argued, in particular that the applicant would be asserting that an indigent accused had a right to have counsel appointed at public expense in serious indictable matters. Notwithstanding this notice, only the Attorney-General for the Commonwealth and the Attorney-General for the State of South Australia intervened. But no argument was put to the Court that recognition of such a right for the provision of counsel at public expense would impose an unsustainable financial burden on government. In these circumstances, we should proceed on the footing that, if a trial judge were to grant an adjournment to an unrepresented accused on the ground that the accused's trial is likely to be unfair without representation, that approach is not likely to impose a substantial financial burden on government and it may require no more than a re-ordering of the priorities according to which legal aid funds are presently allocated. Did the applicant's trial miscarry?

33. The alternative argument of the applicant was that the trial judge erred in the exercise of his discretion in refusing an application by the applicant for an adjournment. This argument was not developed fully in submissions, principally because the applicant's case was founded upon the existence of the alleged absolute right. However, it is clear that the issue is before the Court in the alternative form.

34. In approaching this argument, the question before this Court is not merely whether or not an adjournment should have been granted but whether the applicant's conviction should be set aside "on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice", provided that the conviction will stand if "no substantial miscarriage of justice has actually occurred" ((59) Crimes Act, s.568(1); McInnis (1979) 143 CLR, per Mason J. at pp 581-582).

35. The Crown case against the applicant was as follows. On the night of 17 December 1986, the applicant arrived at Melbourne Airport from Bangkok and imported into Australia a quantity of heroin which was packaged in condoms concealed in his body. Members of the Australian Federal Police followed the applicant from the airport to his flat in Hotham Street, East St Kilda. The next morning, the applicant drove from his flat and was arrested some distance away by police. The police returned the accused to his flat and, pursuant to a lawful warrant, conducted a search. Under a rug in the study they found a quantity of heroin in a plastic bag, which became the subject of count four on the indictment, and in a kitchen bin they found a condom containing 3.7 grams of heroin, which became the subject of count one. The applicant was then charged and transferred to an isolation ward in the hospital at Her Majesty's Prison, Pentridge. He remained in that ward until the following morning when condoms containing 66.4 grams of heroin, which the applicant had allegedly passed during the night, were discovered in the ward. This heroin also became the subject of count one.

36. The Crown relied on evidence of Australian Federal Police officers involved in the surveillance, arrest and search procedures, as well as evidence of prison officers, hospital staff and police officers present while the applicant was in hospital. The applicant denied the importation and alleged that the heroin discovered in his flat and in the hospital ward was placed there by police officers or other unnamed persons.

37. As stated earlier, the applicant was unrepresented at all stages of his lengthy trial. It is difficult to gain an accurate impression of the course of the trial from the mere 150 pages, culled from a transcript exceeding 3,000 pages, that have been placed before this Court, but certain important features emerge. The applicant did not wish to go to trial unrepresented. Failing appointment of counsel by the trial judge, who had no power to make such an appointment, the applicant sought leave to be assisted by what is called a "McKenzie friend" after the procedure confirmed in McKenzie v. McKenzie ((60) (1971) P 33). That application was refused. There was also a serious question prior to trial as to the applicant's fitness to plead. On several occasions, the applicant appeared to be emotionally and psychologically overwhelmed, whether genuinely or not, by the prospect of proceeding to trial unrepresented. A clinical psychologist called by the applicant testified that the applicant was an excitable, volatile person who would have great difficulty withstanding the rigours of a trial, although it appears that the opinion of a psychiatrist, who did not give evidence, was that the applicant was fit to plead. From the material before this Court, it appears that the undue length of the trial may well have been occasioned by the applicant's irregular outbursts of volatile behaviour.

38. In this context, and before the trial proper commenced, the applicant made an informal application for an adjournment. As the following exchange shows, this was peremptorily refused:

"HIS HONOUR: I want you to understand this, Mr. Dietrich
- if you will listen to me - that I have no power to
give you legal representation.

ACCUSED: You have the power to adjourn the matter, sir.
HIS HONOUR: I don't propose to adjourn the matter. The matter is an alleged offence, which occurred the year before last, and it is desirable that the matter proceed to trial.
ACCUSED: Desire by whose side?
HIS HONOUR: Desirable to the community.
ACCUSED: The community has got no interest in it. If the community is aware that they're putting people in front of court without representation, the community would be aghast.
HIS HONOUR: Yes. Well, I don't propose to engage in this type of matter; this debate can get us nowhere."

On numerous occasions, the trial judge reiterated his lack of power to appoint counsel to represent the applicant, but on no other occasion did he appear to give any consideration to exercising his discretion to adjourn the matter on the ground that there was a real likelihood that the applicant would not receive a fair trial. In fact, the trial judge did not seem to be aware of the discretionary power he enjoyed; rather than just failing to take into account some material consideration or giving undue weight to one or another factor, his Honour virtually overlooked the possibility of adjourning the matter on the basis suggested. The trial judge erred in this respect.

39. In our view, the trial judge's failure to adjourn the trial resulted in an unfair trial and deprived the applicant of a real chance of acquittal. Central to this conclusion is the not guilty verdict returned by the jury on count four. The evidence against the applicant appears strong on all counts but, in circumstances where the jury found him not guilty on one count, how can this Court conclude that, even with the benefit of counsel, the applicant did not have any prospect of acquittal on count one, of which he was then deprived by being forced to trial unrepresented ((61) cf. McInnis (1979) 143 CLR, per Mason J. at p 583)? It is impossible to know the basis on which the jury found for the applicant on count four; the possibility exists that the jury found credible the alternative explanation of events given by the applicant which involved allegations of impropriety by the police. Judging by the question asked of the trial judge by the jury foreman during deliberations, the jury may also have doubted whether the first count could be made out against the applicant in relation to the heroin found in the hospital ward. If such doubts were present in the jury's mind, how can it be said that competent counsel appearing on behalf of the applicant may not have found further weaknesses in the prosecution case? On the material before this Court, it appears that the applicant's defence was so disorganized and haphazard as to lack cogency. In these circumstances, the conclusion that the applicant may have lost a real chance of acquittal is compelling.

40. In view of the differences in the reasoning of the members of the Court constituting the majority in the present case, it is desirable that, at the risk of some repetition, we identify what the majority considers to be the approach which should be adopted by a trial judge who is faced with an application for an adjournment or a stay by an indigent accused charged with a serious offence who, through no fault on his or her part, is unable to obtain legal representation. In that situation, in the absence of exceptional circumstances, the trial in such a case should be adjourned, postponed or stayed until legal representation is available. If, in those circumstances, an application that the trial be delayed is refused and, by reason of the lack of representation of the accused, the resulting trial is not a fair one, any conviction of the accused must be quashed by an appellate court for the reason

that there has been a miscarriage of justice in that the accused has been convicted without a fair trial.

41. In the result, we would grant special leave to appeal, allow the appeal, set aside the conviction and order a new trial.

BRENNAN J. The applicant, having insufficient resources of his own to fund legal representation for himself at his trial and having apparently exhausted the possibility of obtaining legal aid, had to stand his trial unrepresented. He applied for an adjournment of the trial and the adjournment was refused. He was convicted of importing into Australia a trafficable quantity of heroin. He appealed unsuccessfully to the Court of Criminal Appeal of Victoria on the ground, inter alia, that it was contrary to the unwritten Constitution of the State of Victoria and to the "due process" provisions of (1368) 42 Edw.III c.3 (applied in Victoria by Div.3 of Pt II of the Imperial Acts Application Act 1980 (Vict.)) for the trial judge not to appoint counsel to conduct the applicant's defence. It was submitted "that every person charged with an indictable offence in (Victoria) is entitled to counsel provided at the expense of the State". He seeks special leave to appeal to this Court. The only grounds advanced in support of the application were that the "Court of Criminal Appeal erred in law -

(i) in holding that the Applicant did not have a right to be provided with Counsel at public expense; and/or
(ii) in not holding that by reason of the Applicant being unrepresented, a miscarriage of justice had occurred in the circumstances of this case and of the Applicant."

I agree with the reasons of Dawson J. for holding that these grounds of appeal find no support either in the provisions of (1368) 42 Edw.III c.3 or in the common law of this country as hitherto understood. The Constitution of Victoria, written and unwritten, adds nothing to the applicant's case. There remains the question whether this Court can and should now hold that, by the common law of this country, the trial of a person charged with a serious offence will miscarry if he, unable to afford to retain counsel himself, is not provided with counsel at public expense.

2. It cannot be doubted that a criminal trial is most fairly conducted when both prosecution and defence are represented by competent counsel ((62) As each of Barwick C.J., Mason and Murphy JJ. so forcefully acknowledged in McInnis v. The Queen [1979] HCA 65; (1979) 143 CLR 575: see pp 579, 582, 586-588, 590). What, then, should a court do when an accused person, charged with a serious offence and having insufficient resources to retain legal representation at his trial, wishes to be legally represented at his trial and no counsel is provided? One answer is that the court should adjourn the trial until legal representation is available, at public expense if necessary, and, if it is not made available, the court should adjourn the trial indefinitely. The other answer is that, once every reasonable prospect of obtaining legal representation has been exhausted, the trial must proceed. Neither answer is wholly satisfactory. The first answer sacrifices both the interests of the public and the interests of the victim, if any, in seeing that an alleged offender is brought to justice. The second answer sacrifices the interests of the accused and the interests of the public in the even-handed administration of justice. The problem can be resolved only by providing counsel to represent a person charged with a serious offence and, if he cannot afford to retain counsel himself, to provide counsel at public expense. The entitlement of a person charged with a serious offence to be represented by counsel at public expense if he cannot afford to retain counsel himself (hereafter "an entitlement to legal aid") would be an important safeguard of fairness in the administration of

criminal justice. A society which secures its peace and good order by the administration of criminal justice should accept, as one of the costs of providing a civilized system of justice, the cost of providing legal representation where it is needed to guarantee the fairness of a criminal trial. I respectfully agree with the observations made in other judgments in this case and in McInnis v. The Queen ((63) supra, fn (62)) as to the desirability of competent legal representation for an accused person in a criminal trial ((64) The dangers of incompetent legal representation to an accused are sadly familiar to judges in the criminal jurisdiction.). Although the desirability of according an entitlement to legal aid is manifest, the critical legal question in this appeal is whether this Court can and should translate the desirability into a rule of law or, if there be any difference, into a rule of practice governing the conduct of criminal proceedings. In my respectful opinion, this Court cannot properly create such a rule.

3. The common law has never recognized such a rule. Indeed, in England a person accused of felony had no right to be represented by counsel at his trial ((65) Stephen, A History of the Criminal Law of England, (1883), vol.1, pp 424-425) until 1836 when, for the first time, such an accused was given the right to be represented by counsel ((66) 6 and 7 Wm IV, c.114, s.1). In this country, no common law entitlement to legal aid has been recognized. In this respect, our constitutional law differs from the constitutional law of some of the great common law countries which, by incorporating a Bill of Rights in their Constitutions, have empowered their Courts to construe broadly expressed guarantees of individual rights to include a right to counsel. Having no comparable constitutional foundation, the Courts of this country cannot translate the rights declared by the Courts of those other countries into the municipal law of Australia.

4. In this country, a Court might declare an individual legal right bearing some resemblance to a right conferred by a constitutional Bill of Rights. But such an individual legal right is distinguishable from a right conferred by a constitutionally entrenched Bill of Rights, for it is either (i) an immunity resulting from a limitation on legislative power imposed otherwise than by reference to the scope of the right itself, or (ii) a right amenable to abrogation by competent legislative authority. The only legal sources from which such "rights" may emerge are the text of the Constitution of the Commonwealth and other organic laws governing our legal system ((67) The Commonwealth of Australia Constitution Act 1900, the Statute of Westminster Adoption Act 1942 (Cth), the Australia Act 1986 (Cth) and entrenched clauses of the Constitutions of the several States.), statutes and the common law. Rights can be declared upon a construction of the Constitution ((68) As in Australian Communist Party v. The Commonwealth [1951] HCA 5; (1951) 83 CLR 1; Street v. Queensland Bar Association [1989] HCA 53; (1989) 168 CLR 461; Nationwide News Pty. Ltd. v. Wills (1992) 108 ALR 681.) or other organic laws, upon a construction of a statute ((69) As in Re Bolton; Ex parte Beane [1987] HCA 12; (1987) 162 CLR 514 and Ainsworth v. Criminal Justice Commission [1992] HCA 10; (1992) 66 ALJR 271; 106 ALR 11.), or by judicial development of the rules of the common law. In the present case, there is no constitutional or statutory provision which supports the applicant's case. To hold that the trial of the applicant miscarried solely on the ground that the trial proceeded when he was unrepresented, it is necessary to hold that an accused person is entitled under the common law to have legal representation provided at the expense of the State in a trial for a serious offence if the accused person does not have the funds to secure that representation for himself. It is not suggested that such an entitlement is directly enforceable by, for example, a mandatory order. But, as Dixon C.J. said in Reg. v. The Commonwealth Court of Conciliation and Arbitration; Ex parte Ellis ((70) [1954] HCA 6; (1954) 90 CLR 55, at p 64.) in reference to an entitlement to be represented, "every right or title must be enforced or administered in some forum". An entitlement to legal aid is said to be enforceable by the court before which the trial of an unrepresented accused person is listed. The entitlement is said

to be enforceable by an order, made upon application by the accused person, to adjourn the trial until counsel is provided - indefinitely, if counsel is not provided. Whether it be said that there is a "right" to be provided with counsel or whether it be said that the court is bound to adjourn in the circumstances stated, the only ground advanced for allowing the appeal is that the common law should now accept that an entitlement to legal aid is essential to a fair trial.

5. I do not doubt that the Courts of this country, and especially this Court as the ultimate court of appeal, acting within their respective jurisdictions and in response to the exigencies of particular cases, create new rules of the common law. The common law has been created by the Courts and the genius of the common law system consists in the ability of the Courts to mould the law to correspond with the contemporary values of society. Had the Courts not kept the common law in serviceable condition throughout the centuries of its development, its rules would now be regarded as remnants of history which had escaped the shipwreck of time ((71) Adaptation from Francis Bacon, The Advancement of Learning, (1605), Bk 2, fol.10b.). In modern times, the function of the Courts in developing the common law has been freely acknowledged ((72) See, for example, Myers v. Director of Public Prosecutions (1965) AC1001, per Lord Reid at p 1021; Mutual Life and Citizens' Assurance Co. Ltd. v. Evatt [1968] HCA 74; (1968) 122 CLR 556, per Barwick C.J. at p 563; Geelong Harbour Trust Commissioners v. Gibbs Bright and Co. (1974) AC 810, per Lord Diplock at pp 820-821.). The reluctance of the Courts in earlier times to acknowledge that function was due in part to the theory that it was the exclusive function of the Legislature to keep the law in a serviceable state. But Legislatures have disappointed the theorists and the Courts have been left with a substantial part of the responsibility for keeping the law in a serviceable state, a function which calls for consideration of the contemporary values of the community. Where a common law rule requires some expansion or modification in order to operate more fairly or efficiently, this Court will modify the rule provided no injustice is done thereby ((73) As in L Shaddock and Associates Pty. Ltd. v. Parramatta City Council (No.1) [1981] HCA 59; (1981) 150 CLR 225, or Hawkins v. Clayton [1988] HCA 15; (1988) 164 CLR 539 or David Securities Pty. Ltd. v. Commonwealth Bank of Australia (unreported, 7 October 1992).). And, in those exceptional cases where a rule of the common law produces a manifest injustice, this Court will change the rule so as to avoid perpetuating the injustice ((74) As in Mabo v. Queensland [1992] HCA 23; [1992] HCA 23; (1992) 66 ALJR 408; 107 ALR 1.).

6. The contemporary values which justify judicial development of the law are not the transient notions which emerge in reaction to a particular event or which are inspired by a publicity campaign conducted by an interest group. They are the relatively permanent values of the Australian community. Even if the perception of contemporary values is coloured by the opinions of individual judges, judicial experience in the practical application of legal principles and the coincidence of judicial opinions in appellate courts provide some assurance that those values are correctly perceived. The responsibility for keeping the common law consonant with contemporary values does not mean that the Courts have a general power to mould society and its institutions according to judicial perceptions of what is conducive to the attainment of those values. Although the Courts have a broad charter, there are limits imposed by the constitutional distribution of powers among the three branches of government and there are limits imposed by the authority of precedent not only on courts bound by the decisions of courts above them in the hierarchy but also on the superior courts which are bound to maintain the authority and predictability of the common law. Most significantly, there are limits inherent in the very technique by which the Courts develop the common law - a subject considered below.

7. Changes in the common law are not made whenever a judge thinks a change desirable. There

must be constraints on the exercise of the power, else the Courts would cross "the Rubicon that divides the judicial and the legislative powers" (to adopt Lord Devlin's phrase in his memorable paper "The Judge as Lawmaker" ((75) The Fourth Chorley Lecture, 1975, in The Judge, (1979), p 12.)). In courts of first instance and in intermediate courts of appeal, the constraints are usually found in precedents by which those courts are bound. In ultimate courts of appeal, the chief constraints are found in the traditional methods of judicial reasoning which ensure that judicial developments ((76) "A constant process of innovation and amelioration" to use Lord Wright's phrase: "The Study of Law", (1938) 54 Law Quarterly Review 185, at p 188.) remain consonant not only with contemporary values but also with what I described in Mabo v. Queensland ((77) (1992) 66 ALJR, at p 416; 107 ALR, at p 18.) as "the skeleton of principle which gives the body of our law its shape and internal consistency". The law must be kept in logical order and form, for an aspect of justice is consistency in decisions affecting like cases and discrimination between unlike cases on bases that can be logically explained. The greater the authority accorded to precedent by an ultimate court of appeal, the slower the pace of change. In such a court, there is room for difference in opinion as to the appropriate rate and subject-matter of change. The principles of the law must be adequate to resolve disputes arising in contemporary society but, as Lord Wright said, the ideal of justice "can only be realized in the concrete, and within such limits as the practical conduct of disputes in Courts of law permits" ((78) op cit, at p 188.). In practical terms, the Courts are aware that rejection or discounting of the authority of precedent not only disturbs the law established by a particular precedent but infuses some uncertainty into the general body of the common law. The tension between legal development and legal certainty is continuous and it has to be resolved from case to case by a prudence derived from experience and governed by judicial methods of reasoning.

8. In this case, the legitimacy and the scope of the judicial function of changing the common law call for consideration. There is no common law entitlement to legal aid. Should there be? How can such an entitlement be enforced? Who is to pay for it? The issues to be considered go beyond the question of an entitlement to legal aid; they touch the legitimacy of judicial legislation.

9. If the Courts were competent to reform the law of criminal procedure by conferring an entitlement to legal aid, I would favour the reform. An entitlement to legal aid is a measure which reduces the possibility of injustice and enhances the fairness of the criminal trial. As an abstract proposition, contemporary values favour steps designed to reduce the possibility of injustice and to enhance the fairness of trials, especially criminal trials. And a concrete indication of contemporary values is given by Art.14(3)(d) of the International Covenant on Civil and Political Rights, to which Australia is a party. Article 14(3)(d) declares that:

"In the determination of any criminal charge against him,
everyone shall be entitled to the following minimum
guarantees, in full equality:
...
(d) To be tried in his presence, and to defend himself
in person or through legal assistance, of his own choosing;
to be informed, if he does not have legal assistance, of
this right; and to have legal assistance assigned to him,
in any case where the interests of justice so require, and
without payment by him in any such case if he does not have
sufficient means to pay for it".

Although this provision of the Covenant is not part of our municipal law, it is a legitimate influence

on the development of the common law ((79) See Mabo v. Queensland (1992) 66 ALJR, at p 422; 107 ALR, at p 29.). Indeed, it is incongruous that Australia should adhere to the Covenant containing that provision unless Australian Courts recognize the entitlement and Australian governments provide the resources required to carry that entitlement into effect. But the Courts cannot, independently of the Legislature and the Executive, legitimately declare an entitlement to legal aid.

10. Sir Owen Dixon commended ((80) "Concerning Judicial Method", (Yale 1955), in Jesting Pilate, (1965), pp 153, 154, 157.), as the methodology for judicial development of the common law, "high technique and strict logic". That method guarantees the authority and acceptability of any change in the common law made by the courts. The "strict logic" of which Sir Owen Dixon spoke includes, of course, inductive as well as deductive logic for strict logic is part of the methodology of change. The classic example is to be found in Lord Atkin's speech in Donoghue v. Stevenson ((81) [1931] UKHL 3; (1932) AC 562, at p 580.) where, perceiving the theme common to earlier cases, he reasoned to a unifying principle which, once articulated, governed the host of cases that followed. Inductive reasoning leads to the expression of a normative principle which prescribes with some particularity the character of the facts to which the principle applies. The principle must be more precise than a value or concept, else its content is left for contention in later cases ((82) See Gala v. Preston (1991) 172 CLR 243, at pp 262-263.). Analogical reasoning is the handmaid of strict logic in developing the common law ((83) See per Lord Simon of Glaisdale in Lupton v. FA and AB. Ltd. (1972) AC 634, at pp 658-659.). When a legal rule or result is attached to certain relationships or phenomena, the perception of similar characteristics in another relationship or phenomenon leads to the attachment of a similar legal rule or result. Unless the analogy is close, the applicability of the legal rule or result to the supposedly analogous relationship or phenomenon is doubtful. It is fallacious to apply the same legal rule or to attribute the same legal result to relationships or phenomena merely because they have some common factors; the differences may be significant and may call for a different legal rule or result. Judicial technique must determine whether there is a true analogy. The present case brings out the point.

11. It is possible to construct a syllogism which appears to answer Sir Owen Dixon's methodology of "strict logic". Starting with the premisses that all trials without legal representation for indigent persons accused of serious criminal offences are unfair and that all unfair criminal trials result in a miscarriage of justice, the conclusion can be asserted that all trials without legal representation of indigent persons accused of serious criminal offences result in a miscarriage of justice. But, if the syllogism is used to support that conclusion, it is clear that its validity depends on the existence of a valid analogy between cases of unfairness which result in a miscarriage of justice and cases in which an indigent person charged with a serious offence goes unrepresented. Hitherto, no analogy has been found - and for good reason. Clearly enough, many trials of unrepresented persons do not result in a miscarriage of justice. And, although both categories of cases may exhibit "unfairness" in the sense of falling short of the ideal of fairness, there is a difference between them. Cases of unfairness amounting to a miscarriage of justice have been cases where the Courts failed to do what was needed to secure a fair trial ((84) e.g., in failing to order a separate trial, or to put the prosecution to an election between counts in an indictment, or to exclude evidence that is unduly prejudicial, or to give a warning to the jury where the failure has resulted in the loss of a reasonable prospect of acquittal.). In these cases, the Courts had the capacity to remove the source of the unfairness. But the Courts do not have the capacity themselves to remove unfairness by providing legal aid. The analogy between the two categories of cases is valid only if the incapacity of the Courts to provide legal aid is immaterial. I cannot think that that difference is immaterial.

12. To accord the postulated entitlement to legal aid, public funds must be appropriated to pay for representation or counsel must be required to appear without fee. The Courts do not control the public purse strings; nor can they conscript the legal profession to compel the rendering of professional services without reward. The provision of adequate legal representation for persons charged with the commission of serious offences is a function which only the Legislature and the Executive can perform. No doubt, demands on the public purse other than legal aid limit the funds available. If the limitation is severe, the administration of justice suffers. The Courts can point out that the administration of justice is an inalienable function of the State and that the very security of the State depends on the fair and efficient administration of justice, but the Courts cannot compel the Legislature and the Executive Government to provide legal representation. Nor can this Court declare the existence of a common law entitlement to legal aid when the satisfaction of that entitlement depends on the actions of the political branches of government. In my opinion, to declare such an entitlement without power to compel its satisfaction amounts to an unwarranted intrusion into legislative and executive functions. The common law is the creature of the Courts alone and susceptible of enforcement by the Courts: the common law is never dependent for its effect on action to be taken by the Legislature in exercise of a legislative discretion or by the Executive in exercise of an executive discretion. If the Constitution conferred an entitlement to legal aid, the Courts would be empowered, if need be, to enforce the entitlement against the political branches of government. But we do not live under such a Constitution.

13. If the Court were to declare the existence of a common law entitlement to legal aid, the only remedy available to enforce it would be an order for adjournment until legal aid is provided and, if it were not provided, an indefinite adjournment. Such a remedy at least limits the postulated entitlement so that its enforcement does not depend on the Legislature or the Executive. But an indefinite adjournment is tantamount to a refusal to exercise jurisdiction ((85) See Hinckley and South Leicestershire Permanent Benefit Building Society v. Freeman (1941) Ch 32, at pp 38-39; Robertson v. Cilia (1956) 1 WLR 1502, at p 1507; In re The Corporation of the Town of Port Pirie; Ex parte Executor Trustee and Agency Company of South Australia Limited (1934) SASR 97, at p 100; Reg. v. Whiteway (1961) VR 168, at p 171.). Such a remedy would bring the administration of criminal justice substantially to a halt until public funds were made available. The criminal law could not be carried into effect. Yet it is the duty of the Courts to exercise their jurisdiction to administer the laws of the land ((86) Ashby v. White (1703) 2 Ld.Raym.938, at p 956 [1790] EngR 55; [1790] EngR 55; (92 ER 126, at p 138).), especially the laws which protect the peace and security of the community. The Courts cannot, by declaring a novel rule of the common law, create a justification for refusing to exercise their jurisdiction. To grant an indefinite adjournment in cases where there is no abuse of the process of the Courts is inconsistent with their constitutional duty. Nor can a refusal to exercise criminal jurisdiction be justified on the ground that the unfairness flowing from the absence of legal representation amounts to an abuse of process. Although unfairness is characteristic of an abuse of process, not every case of unfairness amounts to an abuse of process. None of the cases in this Court goes so far. To the contrary, Jago v. District Court (N.S.W.) ((87) [1989] HCA 46; (1989) 168 CLR 23) and Reg. v. Glennon ((88) [1992] HCA 16; (1992) 173 CLR 592) show that it is erroneous to equate the two concepts. When the criminal jurisdiction is invoked for the purpose it is designed to serve, there is no abuse of process. The jurisdiction must be exercised in a way that prevents unfairness as far as possible, but it must be exercised. As a matter of constitutional duty, the Courts cannot indefinitely adjourn a trial to force the provision of legal aid.

14. If the absence of a common law entitlement to legal representation means that the Courts cannot ensure that a criminal trial is fair according to the contemporary values of the community, it is

necessary to remember that the fairness of a trial can be affected by circumstances outside the Court's control, as I pointed out in Jago ((89) (1989) 168 CLR, at p 47). The rhetoric that our system of administering criminal justice ensures a fair trial is comforting, but the reality is that the Courts cannot always eliminate obstacles to a fair trial. Rhetoric does not always correspond with reality. If public funds are not available to provide legal representation in serious criminal cases, the administration of criminal justice will not be, or at least will not be seen to be, evenhanded. But the remedy does not lie with the Courts; the remedy must be found, if at all, by the Legislature and the Executive who bear the responsibility of allocating and applying public resources.

15. The procedure of the criminal courts is designed to produce as fair a trial as practicable in the circumstances of each case. Where an accused person is unrepresented, a particular burden is placed on the trial judge to ensure that the trial is fair ((90) See, for example, MacPherson v. The Queen [1981] HCA 46; (1981) 147 CLR 512, at pp 546-547.). And if, through want of legal representation, some error occurs in the conduct of the trial which occasions a substantial miscarriage of justice, a conviction must be set aside. But the rhetoric that a trial must be fair before a conviction can properly be recorded is true only to the extent that unfairness leads to a miscarriage of justice. The legal question then is not whether a trial has been unfair according to community values but whether it is unfair in the sense that it has not taken place according to law. A miscarriage of justice may consist in a failure to adopt a lawful procedure which would have ensured fairness to an accused person or would have eliminated unfairness to him, but it cannot consist in failing to adopt a procedure which the court has no power to adopt.

16. In the present case, the application for special leave to appeal was founded on the submission that the applicant, who did not have the means of retaining counsel at his own expense, was denied a legal entitlement to counsel at public expense. That argument fails. There was no miscarriage of justice arising simply from the fact that the applicant was not legally represented. Whether there was any miscarriage in the particular circumstances of this case arising from the trial judge's refusal of an adjournment to allow the applicant to renew his application for legal aid is a question that might have been, but was not, argued before the Court of Criminal Appeal. The applicant's argument before the Court of Criminal Appeal that an adjournment should have been granted was not founded on the possibility of his obtaining legal representation in the circumstances of his case; it was founded on his supposed right to be provided with counsel. As the Court of Criminal Appeal was not invited to consider whether an adjournment should have been granted because the applicant might have obtained legal representation in the circumstances actually existing at the time of his trial, it would not be right to grant special leave to raise that question here on the materials available.

17. I would grant special leave to appeal to raise the question of a general entitlement to legal aid but I would dismiss the appeal.

DEANE J. The fundamental prescript of the criminal law of this country is that no person shall be convicted of a crime except after a fair trial according to law. In so far as the exercise of the judicial power of the Commonwealth is concerned, that principle is entrenched by the Constitution's requirement of the observance of judicial process and fairness that is implicit in the vesting of the judicial power of the Commonwealth exclusively in the courts which Ch.III of the Constitution designates. Strictly speaking, the requirement that the trial of a person accused of a crime be fair, being a legal one, is encompassed by the requirement that such a trial be in accordance with law. Nonetheless, it is desirable that the requirement of fairness be separately identified since it transcends the content of more particularized legal rules and principles and provides the ultimate

rationale and touchstone of the rules and practices which the common law requires to be observed in the administration of the substantive criminal law.

2. Traditionally, the law's insistence that a person not be convicted of a crime except after a fair trial has been conveniently, albeit slightly inaccurately ((91) See Jago v. District Court (N.S.W.) [1989] HCA 46; (1989) 168 CLR 23, at pp 56-57.), expressed in terms of a "right to a fair trial". Thus, for example, Isaacs J. in R. v. Macfarlane; Ex parte O'Flanagan and O'Kelly ((92) [1923] HCA 39; (1923) 32 CLR 518, at pp 541-542) referred to "the elementary right of every accused person to a fair and impartial trial" and added some well-known words which merit further repetition:

"That such a right exists as a personal right seems to me so deeply rooted in our system of law and so elementary as to need no authority to support it. It is a right which inheres in every system of law that makes any pretension to civilization. It is only a variant of the maxim that every man is entitled to his personal liberty except so far as that is abridged by a due administration of the law. Every conviction set aside, every new criminal trial ordered, are mere exemplifications of this fundamental principle. And if the right be admitted, it would be an empty thing, unless the law adequately protected it. It seems necessary, however, to adduce authority. Fortunately it is clear and weighty."

Isaacs J.'s statement that the requirement that the trial of an accused person be "fair and impartial" is "deeply rooted in our system of law" was not the stuff of empty rhetoric. It remains an accurate statement of the common law of this country. Thus, two of the critical steps in the reasoning of each of the six justices in Barton v. The Queen ((93) [1980] HCA 48; (1980) 147 CLR 75) were the acknowledgment of an overriding common law requirement that a criminal trial be "fair" and the assertion of the authority of the courts to take the steps - including an order that proceedings be indefinitely stayed - necessary to ensure that an accused person is protected from the unlawfulness of an unfair trial. In the course of their joint judgment, Gibbs A.C.J. and Mason J. (with the concurrence of Aickin J. ((94) ibid., at p 109)) said ((95) ibid., at p 96 (emphasis added)):

"There is ample authority for the proposition that the courts possess all the necessary powers to prevent an abuse of process and to ensure a fair trial. The exercise of this power extends in an appropriate case to the grant of a stay of proceedings."

To similar effect was the opening comment of Stephen J. ((96) ibid., at p 103 (emphasis added)) that he agreed, for the reasons given by Gibbs A.C.J. and Mason J., that:

"the filing of an ex officio indictment by the Attorney-General is not subject to judicial review but ... the courts do have a power to postpone or stay the trial on such an indictment where necessary to ensure that the accused receives a fair trial".

Murphy J. said ((97) ibid., at p 107 (emphasis added)):

"Every court hearing criminal proceedings has power to control those proceedings in order to avoid injustice; where necessary it may stay proceedings."

Murphy J. then referred ((98) ibid.) to his judgment in McInnis v. The Queen ((99) (1979) 143 CLR 575) which had commenced((100) ibid., at p 583) with the equally unqualified statement that "(e)very accused person has the right to a fair trial". Wilson J. stated((101) Barton v. The Queen (1980) 147 CLR, at p 109 (emphasis added).) that he agreed with the conclusion of Gibbs ACJ. and Mason J.:

"to the effect that ... the courts may postpone or stay the trial on any indictment in circumstances where such action is necessary to prevent an abuse of process and ensure a fair trial for the accused person".

More recently, "the entitlement of an accused person to a fair trial according to law" was expressly recognized by the majority of this Court in McKinney v. The Queen((102) [1991] HCA 6; (1991) 171 CLR 468, at p 478) as the "central thesis of the administration of criminal justice" in this country((103) See also, e.g., MacPherson v. The Queen [1981] HCA 46; (1981) 147 CLR 512, per Gibbs C.J. and Wilson J. at pp 523, 524-525; Jago v. District Court (N.S.W.) (1989) 168 CLR, per Mason J. at p 29, per Deane J. at pp 56-57, per Toohey J. at p 72, per Gaudron J. at p 75.). Indeed, the acknowledgment of the entitlement of an accused person to a "fair trial" provided the foundation of the rule of practice which the Court enunciated in that case((104) See below).

3. While the law's insistence that there be no conviction without a fair trial according to law has been long established, the practical content of the requirement that a criminal trial be fair may vary with changing social standards and circumstances((105) See, e.g., Hicks v. The King [1920] HCA 26; (1920) 28 CLR 36, per Isaacs and Rich JJ. at p 48). As O'Higgins C.J. commented in The State (Healy) v. Donoghue((106) (1976) IR 325, at p 350):

"The general view of what is fair and proper in relation to criminal trials has always been the subject of change and development. Rules of evidence and rules of procedure gradually evolved as notions of fairness developed. The right to speak and to give evidence, and the right to be represented by a lawyer of one's choice were recognised gradually. To-day many people would be horrified to learn how far it was necessary to travel in order to create a balance between the accuser and the accused."

Less dramatic illustrations of the point are the change from the view that the evidence of an accomplice was of special cogency to the introduction of a requirement of a special warning in relation to such evidence((107) See Holdsworth, A History of English Law, vol.9, 3rd ed. (1944), p 244, fn.6; and Davies v. Director of Public Prosecutions (1954) AC 378, at p 399.) and the recent recognition by this Court that, in the context of the increased availability of the means of reliable corroboration of confessional statements made by an accused in police custody, the law's insistence that a trial be fair dictated the adoption of a new rule of practice in certain cases where there is no

reliable corroboration of the making of such a statement((108) McKinney v. The Queen (1991) 171 CLR, at pp 473-474). Conversely, a change in community perceptions or standards may lead, on reconsideration, to the modification or abandonment of rules or practices which were, in other times, seen as necessary to ensure that the trial of an accused was a fair one((109) See, e.g., Longman v. The Queen [1989] HCA 60; (1989) 168 CLR 79, at pp 85-88, 91-97, 104-107).

4. That is not to suggest that the determination of what is or is not necessary to satisfy the requirements of a fair trial is unprincipled. While the requirement of fairness provides the ultimate rationale and touchstone for the law's adjudgment of the minimum safeguards which must be observed in the administration of the substantive criminal law, the practical content of the requirement in a particular category of case will primarily fall to be determined by the staple processes of legal reasoning, namely, induction and deduction from earlier decisions and settled rules and practices. Inevitably, however, there will arise the rare case in which those processes of legal reasoning are inadequate in a developing area of the law or in which a court, ordinarily a final appellate court, concludes that the circumstances are such that it is entitled and obliged to reassess some rule or practice in the context of current social conditions, standards and demands and to change or reverse the direction of the development of the law((110) See, generally, Jaensch v. Coffey [1984] HCA 52; (1984) 155 CLR 549, at pp 599-600). It is in such a case that direct reference will necessarily be made to the underlying notion of fairness and that subjective values and perceptions may intrude into the judicial process. Nonetheless, the identification or the reconsideration of the existence and content of the particular rule or practice in such a case is an unavoidable concomitant of the judicial function if the law is not to lose contact with the social needs which justify its existence and which it exists to serve. Thus, for example, in Barton v. The Queen((111) (1980) 147 CLR, per Gibbs ACJ. and Mason J. (Aickin J. concurring) at pp 100-102, per Stephen J. at pp 105-106.), a majority of this Court held that notwithstanding the long-standing practice of the courts to entertain trials on ex officio indictments, a trial judge was entitled and obliged to stay proceedings if, in the circumstances of a particular case, the absence of committal proceedings would give rise to an unfair trial.

5. The background and facts of the present application for special leave to appeal are set out in other judgments. It is unnecessary that I do more than identify three aspects of those facts which are of particular significance. The first is that the crimes alleged against the applicant were serious ones. The second is that, as I followed the argument, it is common ground both that the applicant lacked the financial means to obtain legal representation for himself and that he had exhausted all avenues for obtaining legal representation from other sources. The third is that the applicant made clear at the commencement of his trial his strong objection to being subjected to a trial without legal representation:

"I cannot appear for myself, I'm not legally minded."
...
"I don't understand the system ... I've got no idea."
...
"I'm not emotionally or mentally fit to conduct my own
trial."

In a context where it appeared that the applicant was unable to obtain legal representation either from his own resources or, unless he pleaded guilty, from any other source, the learned trial judge considered that the trial must proceed. His Honour's view in that regard accorded with past practice in that it has been customary in this country to force an indigent person accused of serious crime to

go to trial unrepresented in those fortunately rare cases where no legal representation has been available from any source. It also accorded with some of the comments made in majority judgments in this Court in McInnis((112) (1979) 143 CLR, per Barwick C.J. at p 579, per Mason J. at p 581). The question which the applicant now raises for the determination of this Court is whether, in the context of contemporary circumstances and standards, that practice and those comments are consistent with the common law's fundamental prescript that the trial of a person be fair.

6. It must be stressed that the applicant does not argue that he had a directly enforceable common law "right" to be provided with legal representation at public expense. Clearly, he did not. The common law does not impose upon the government or any section or member of the community an enforceable duty to provide free legal advice or representation to anyone. What the common law requires is that, if the government sees fit to subject an accused person to a criminal trial, that trial must be a fair one. Inevitably, compliance with the law's overriding requirement that a criminal trial be fair will involve some appropriation and expenditure of public funds: for example, the funds necessary to provide an impartial judge and jury; the funds necessary to provide minimum court facilities; the funds necessary to allow committal proceedings where such proceedings are necessary for a fair trial. On occasion, the appropriation and expenditure of such public funds will be directed towards the provision of information and assistance to the accused: for example, the funds necessary to enable adequate pre-trial particulars of the charge to be furnished to the accused; the funds necessary to provide an accused held in custody during a trial with adequate sustenance and with minimum facilities for consultation and communication; the funds necessary to provide interpreter services for an accused and an accused's witnesses who cannot speak the language. Putting to one side the special position of this Court under the Constitution, the courts do not, however, assert authority to compel the provision of those funds or facilities. As Barton v. The Queen((113) (l980) 147 CLR, at pp 96, 103, 107, 109) establishes, the effect of the common law's insistence that a criminal trial be fair is that, if the funds and facilities necessary to enable a fair trial to take place are withheld, the courts are entitled and obliged to take steps to ensure that their processes are not abused to produce what our system of law regards as a grave miscarriage of justice, namely, the adjudgment and punishment of alleged criminal guilt otherwise than after a fair trial. If, for example, available interpreter facilities, which were essential to enable the fair trial of an unrepresented person who could neither speak nor understand English, were withheld by the government, a trial judge would be entitled and obliged to postpone or stay the trial and an appellate court would, in the absence of extraordinary circumstances, be entitled and obliged to quash any conviction entered after such an inherently unfair trial. Again, if the government failed to provide the ordinary facilities necessary to enable an accused held in custody to attend his trial, the trial judge would be entitled and obliged to postpone or stay the trial and, in the absence of such a stay or postponement, an appellate court would be entitled and obliged to quash any conviction. Similarly, if in all the circumstances of the present case the effect of the applicant's inability to obtain legal representation was that the trial would be an unfair one, the learned trial judge should have acceded to the applicant's obvious wish that the trial be postponed or delayed for so long as such legal representation remained unavailable to him.

7. It can be said at once that I consider that the decision of this Court in McInnis should not be seen as decisive of the question whether, either as a general proposition or in the circumstances of a particular case, the inability of an accused person to obtain legal representation on a criminal trial will have the consequence that the trial is an unfair one. The only judgment in McInnis which directly referred to the question whether Mr. McInnis' trial had been unfair by reason of his lack of representation was the dissenting judgment of Murphy J. One explanation of that is that the question had not been raised in argument. Another, and possibly more relevant one for present purposes, is

that McInnis was decided before the Court had had occasion expressly to assert the authority and duty of the courts to take all steps necessary, including a stay of proceedings, to prevent the abuse of process involved in an unfair trial((114) See ibid., per Gibbs A.C.J. and Mason J. at p 97). Nor is there any other decision of the Court which compels a particular answer to that question. The judgments in past cases in the Court do, however, take one a considerable way along the path to the answer to it. In particular, as has been seen, they recognize in unequivocal terms the common law's insistence that a criminal trial be fair. They also now unequivocally assert, to use words which had the express((115) ibid., per Gibbs A.C.J. and Mason J. at pp 96, per Stephen J. at p 103, per Aickin J. at p 109, per Wilson J. at p 109.) or implicit((116) ibid., per Murphy J. at p 107) support of all members of the Court in Barton v. The Queen, "that the courts possess all the necessary powers ... to ensure a fair trial" including, "in an appropriate case ... the (power to) grant ... a stay of proceedings". They also recognize the duty of the courts to determine the essential prerequisites of a fair trial in the context of contemporary standards and circumstances((117) ibid., at pp 100-102; McKinney v. The Queen (1991) 171 CLR, at pp 473-474, 478.).

8. Clearly enough, circumstances can arise in which a refusal of a trial judge to grant an adjournment of a trial by reason of lack of legal representation has the consequence that the whole trial miscarries. If authority is needed for that confined proposition, it is abundant((118) See, e.g., Galos Hired v. The King (1944) AC 149, at p 155; Kingston (1948) 32 Cr.App R 183, at pp 188-189; Reg. v. Sowden (1964) 1 WLR 1454, at pp 1459-1461; Reg. v. Howes (1964) 2 QB 459, at p 466; Reg. v. Green (1968) 1 WLR 673; Reg. v. Hanias (1976) 14 SASR 137, at pp 142, 148-149; Re Ciglen and The Queen (1978) 45 CCC (2d) 227, at p 231; Reg. v. Beadle (1979) 21 SASR 67, at pp 68-70; Reg. v. Rowbotham (1988) 41 CCC (3d) 1, at p 69.). Beyond that, the judgments of the common law courts are discordant in that the approach adopted in intermediate appellate courts in this country, Canada and, to a lesser extent, the United Kingdom((119) And, semble, by the courts of New Zealand: see Parkhill v. Ministry of Transport (1992) 1 NZLR 555, at p 559.) is in conflict with the approach which has prevailed in the final appellate courts of the United States, Ireland and India.

9. In the State courts of this country and in the Provincial courts of Canada, the weight of authority supports the view that there must be something special or extraordinary in the circumstances of a particular case to found a conclusion that a refusal of a trial judge to adjourn or stay the trial of a person accused of serious crime on the ground of unavailability of legal representation gives rise to a miscarriage of justice((120) See, e.g., R. v. Gould (1917) VR 454, at p 455; Reg. v. Bicanin (1976) 15 SASR 20, at pp 22-23, 25; Reg. v. Cox (1960) VR 665, at p 667; Reg. v. Maher (1987) 1 Qd R 171, at pp 178-180; Re Ewing and Kearney and The Queen (1974) 49 DLR (3d) 619, at pp 628-629; Reg. v. Rowbotham (1988) 41 CCC (3d), at p 69 (but cf., Foster v. The Queen [1982] FCA 2; (1982) 38 ALR 599, per Fox J. at p 600; Reg. v. Corak (1982) 30 SASR 404, at p 409; Re Ewing and Kearney and The Queen (1974) 49 DLR (3d), at pp 621-623).). To that extent, the weight of existing authority in those jurisdictions militates against any general proposition to the effect that, at least in the absence of exceptional circumstances, the inability of an indigent accused person to obtain legal representation on a criminal trial on a charge of serious crime will have the consequence that the trial is unfair. With great respect, however, the statements in those cases asserting that legal representation of an indigent person accused of a serious crime is not a prerequisite of a fair trial seem to me to be based either on the mere assertion of unpersuasive propositions such as that it is the function of a trial judge to conduct proceedings in a way which will ensure that an unrepresented accused has a fair trial or on subterranean policy considerations which largely remain unarticulated((121) But cf. the frank acknowledgment of considerations of economic cost and feasibility in S. v. Rudman; S. v. Mthwana (1992) 1 South African LR 343, at pp

387-390.). At the intermediate appellate court level in the United Kingdom, the prevalent approach, while more favourable to an accused((122) See, e.g., Reg. v. Howes (1964) 2 QB 459; Reg. v. Sowden (1964) 1 WLR 1454; Reg. v. Serghiou (1966) 1 WLR 1611.), would also appear to be that lack of representation by reason of poverty does not of itself involve miscarriage of justice.

10. In contrast, the judgments in cases in the Supreme Court of the United States provide powerful and reasoned support for the acceptance of a general proposition to the effect that the inability of a person accused of serious crime to obtain legal representation by reason of lack of means will cause the trial to be an unfair one((123) See, in particular, Powell v. Alabama [1932] USSC 137; (1932) 287 US 45, at pp 68-69; Gideon v. Wainwright [1963] USSC 42; (1963) 372 US 335, at pp 343-345.). It is true that those United States judgments were directly concerned with the effect of constitutional provisions which have no exact counterpart in the Constitution of this country. To disregard them for that reason would, however, be to ignore their substance and to fail to appreciate that their essential concern, like cases in this Court such as Barton v. The Queen((124) See nn.(113) and (114) above.) and McKinney v. The Queen((125) [1991] HCA 6; [1991] HCA 6; (1991) 171 CLR 468), was to identify what is necessary to ensure that an accused receives "a fair trial"((126) See, e.g., Gideon v. Wainwright (1963) 372 U.S, at pp 344-345.). As such, they were concerned to identify the practical content of the notion of a fair trial by reference to standards which are common to the legal systems of this country, the United States and many other common and civil law countries: what Isaacs J. referred to as "the right which inheres in every system of law that makes any pretension to civilization"((127) R. v. Macfarlane; Ex parte O'Flanagan and O'Kelly (1923) 32 CLR, at p 541.); what Douglas J., speaking for the United States Supreme Court, identified as one of the "fundamental rights applicable to all ... criminal prosecutions" where an accused faces deprivation of liberty((128) Argersinger v. Hamlin [1972] USSC 127; (1972) 407 US 25, at p 32.); and what the European Court of Human Rights has described as the right to a fair trial "in a democratic society"((129) Artico v. Italy (1980) 3 EHRR 1, at p 13.).

11. The most important of the relevant passages from the United States judgments are set out in the judgments of Mason C.J. and Gaudron J. in this case or in the judgment of Murphy J. in McInnis((130) (1979) 143 CLR, at pp 586-587). I refrain from also setting them out in this judgment but add to them the comment of Black J. (Douglas and Murphy JJ. concurring) in Betts v. Brady((131) (1942) 316 US 455, at p 476.) :

> "A practice cannot be reconciled with 'common and fundamental ideas of fairness and right', which subjects innocent men to increased dangers of conviction merely because of their poverty."

The reasoning in those United States judgments is, in my view, compelling in its analysis of the significance of lack of legal representation by reason of poverty to the law's fundamental requirement that a criminal trial be fair. Similar reasoning has prevailed in the highest courts of the common law jurisdictions of the Republics of Ireland((132) See The State (Healy) v. Donoghue (1976) IR, at pp 350-351, 354-355, 357, 363-364.) and India((133) See Hoskot v. State of Maharashtra (1979) 1 SCR (India) 192, at pp 204-208; Hussainara Khantoon v. Home Secretary (1979) 3 SCR (India) 760, at p 765.). It should now be accepted and applied in this Court.

12. A criminal trial in this country is essentially an adversarial process. Where the charge is of a serious crime, the prosecution will ordinarily be in the hands of counsel with knowledge and experience of the criminal law and its administration. The substantive criminal law and the rules of

procedure and evidence governing the conduct of a criminal trial are, from the viewpoint of an ordinary accused, complicated and obscure. While the prosecution has a duty to act fairly and part of the function of a presiding judge is to seek to ensure that a criminal trial is fair, neither prosecutor nor judge can or should provide the advice, guidance and representation which an accused must ordinarily have if his case is to be properly presented((134) See, e.g., Richardson v. The Queen [1974] HCA 19; (1974) 131 CLR 116, at p 122; Whitehorn v. The Queen [1983] HCA 42; (1983) 152 CLR 657, at pp 682-683.). Thus, it is no part of the function of a prosecutor or trial judge to advise an accused before the commencement of a trial about the legal issues which might arise on the trial, about what evidence will or will not be admissible in relation to them, about what inquiries should be made to ascertain what evidence is available, about what available evidence should be called, about possible defences, about the possible consequences of cross-examination, about the desirability or otherwise of giving sworn evidence or about any of a multitude of other questions which counsel appearing for an accused must consider and in respect of which such counsel must advise in the course of the preparation of a criminal trial. Nor is it consistent with the function of prosecutor or trial judge to conduct, or advise on the conduct of, the case for the defence at the trial. Nor, in the ordinary case, is an accused capable of presenting his own case to the jury as effectively as can a trained lawyer.

13. An accused is brought involuntarily to the field in which he is required to answer a charge of serious crime. Against him, the prosecution has available all the resources of government. If an ordinary accused lacks the means to secure legal representation for himself and such legal representation is not available from any other source, he will, almost inevitably, be brought to face a trial process for which he will be insufficiently prepared and with which he will be unable effectively to cope. In such a case, the adversarial process is unbalanced and inappropriate((135) See, generally, Powell v. Alabama (1932) 287 US, at pp 68-69; Gideon v. Wainwright (1963) 372 US, at p 344; Galos Hired v. The King (1944) AC, at p 155; Re Ewing and Kearney and The Queen (1974) 49 DLR (3d), per Farris C.J.B.C., dissenting, at p 621; The State (Healy) v. Donoghue (1976) IR, at p 357; Hoskot v. State of Maharashtra (1979) 1 SCR (India), at pp 204-206; Reg. v. Corak (1982) 30 SASR, at pp 408-409.) and the likelihood is that, regardless of the efforts of the trial judge, the forms and formalities of legal procedures will conceal the substance of oppression.

14. In determining the practical content of the requirement that a criminal trial be fair, regard must be had "to the interests of the Crown acting on behalf of the community as well as to the interests of the accused"((136) Barton v. The Queen (1980) 147 CLR, per Gibbs ACJ. and Mason J. at p 101.). There are circumstances in which a criminal trial will be relevantly fair notwithstanding that the accused is unrepresented. The most obvious category of case in which that is so is where an accused desires to be unrepresented or persistently neglects or refuses to take advantage of legal representation which is available((137) See, e.g., Reg. v. Greer, unreported, New South Wales Court of Criminal Appeal, 14 August 1992, per Kirby P at pp 12-15.). Another category of case in which that is so is where the accused has the financial means to engage legal representation but decides not to incur the expense. It is true that, in the context of the current level of legal fees, it is arguable that no accused should be required to devote a substantial part of his possessions to obtaining legal representation in resisting a prosecution for an alleged offence of which the law presumes him to be innocent. Nonetheless, it appears to me that it cannot be said that a trial is unfair by reason of lack of legal representation in a case where the accused possesses the means to obtain such representation but elects not to utilize them. Finally, it is arguable that there are categories of criminal proceedings where inability to obtain legal representation would not have the effect that the trial of an accused person was an unfair one. For example, there is much to be said for the view that proceedings before a magistrate or judge, without a jury, for a non-serious offence((138) e.g. where there is no real

threat of deprivation of personal liberty: see Argersinger v. Hamlin (1972) 407 US, at pp 37-38, 40.) would not be rendered inherently unfair by reason of inability to obtain full legal representation. It is, however, unnecessary to pursue that question for the purposes of the present case where the trial was a jury trial of alleged offences which were, by any standards, serious. It appears to me to be manifest that, in the absence of exceptional circumstances, the inability of an indigent accused to obtain legal representation from any source will have the consequence that such a trial is unfair. At least in relation to such a trial, I would echo the conclusion of the United States Supreme Court in Gideon v. Wainwright((139) (1963) 372 US, at p 344): "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth."

15. It is true that, as has been mentioned, past practice in this country has been to force a person accused of serious crime to trial notwithstanding that, by reason of lack of means, he is unable to obtain legal advice or representation. That past practice and the approach to the poor and disadvantaged which it reflects have, however, long been inconsistent with the standards and circumstances of our community. The validity of the perception that "the availability of legal aid to all who are accused of serious crime and are unable to afford legal representation is an indispensable condition of the fair administration of criminal justice"((140) Reg. v. Corak (1982) 30 SASR, per King C.J. at p 409.) has long been appreciated by the Australian legal profession with the result that, even in the days before governmental legal aid was generally available to persons accused of serious crime, it had become comparatively rare for such a person to be forced, by reason of lack of means, to face trial without legal representation. The present general acceptance of the validity of that perception within the Australian community is evidenced by the expansion of governmental legal aid to the current level where such aid, including representation, is now ordinarily made available for those accused of serious crime who lack the means necessary to obtain it((141) See, e.g., Thirteenth Annual Report of the S.A. Legal Services Commission, 1990-91, p 24, Table 7.). In that regard, it is relevant to note that Australia, as a nation, is a party to the International Covenant on Civil and Political Rights which expressly provides((142) Art.14(3)(d); and see, also, Human Rights and Equal Opportunity Commission Act 1986 (Cth), Sched.2.) that, in the determination of any criminal charge, everyone shall be entitled "to defend himself in person or through legal assistance of his own choosing ... and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it".

16. It follows from the foregoing that, as a general proposition and in the absence of exceptional circumstances, a trial of an indigent person accused of serious crime will be unfair if, by reason of lack of means and the unavailability of other assistance, he is denied legal representation. There was nothing exceptional in the circumstances of the present case which would preclude the applicability of that general proposition. That being so, the applicant has not had a fair trial. His conviction and sentence of imprisonment without such a trial necessarily constituted a miscarriage of justice. It remains to be considered whether the case is one in which the proviso contained in s.568(1) of the Crimes Act 1958 (Vict.) can be applied for the reason that it appears that "no substantial miscarriage of justice has actually occurred" (emphasis added). In my view, it is not.

17. Statutory provisions which enable an appellate court to dismiss an otherwise successful appeal by a convicted person, who maintains his innocence, on the ground that there was no substantial miscarriage of justice do not authorize an appellate court to find that there has been no substantial miscarriage of justice in a case where error, impropriety or unfairness has pervaded the trial and

infected the verdict to an extent that the conviction was not the outcome of a fair trial. In such a case, the conviction without a fair trial necessarily involves substantial miscarriage. Were it otherwise, the injustice of a conviction without a fair trial according to law could, as I pointed out in Wilde v. The Queen((143) [1988] HCA 6; (1988) 164 CLR 365, at p 375.), be effectively made the occasion for a trial of an accused person by appellate judges who had seen no witnesses, heard no evidence and had had no direct contact with the atmosphere, the tensions, the nuances or the reality of the actual trial. Indeed, in a case such as the present where what was involved was a trial upon indictment for alleged offences against a law of the Commonwealth, a statutory provision which purported to enable the effective substitution of an appellate court's verdict of guilt or obvious guilt would contravene the Constitution's((144) s.80.) guarantee of trial by jury. Such statutory provisions providing for dismissal of an appeal on the ground that there was no substantial miscarriage of justice extend only to cases where it can be seen either that any error, impropriety or unfairness did not prejudice the overall trial to an extent that made it an unfair trial or that the residual effect (i.e. viewed in the context of the overall trial) of any such error, impropriety or unfairness could not have relevantly infected the verdict in the sense that it could not have adversely influenced the jury in reaching their verdict on the charge or charges upon which the accused was convicted and in respect of which the appeal to the appellate court is brought.

18. Special leave to appeal should be granted and the appeal allowed. The order of the Court of Criminal Appeal of Victoria refusing leave to appeal to that court should be set aside. In lieu thereof, it should be ordered that leave to appeal to that court be granted, the appeal allowed, the conviction quashed and a new trial ordered.

DAWSON J. The applicant was presented in the County Court of Victoria upon one count of importing not less than a trafficable quantity of heroin contrary to s.233B(1)(b) of the Customs Act 1901 (Cth), two counts of possession of a prohibited import which were alternatives to the first count, and a fourth count of possession of a prohibited import. The applicant pleaded not guilty to all four counts. After a lengthy trial he was found guilty on the first count and was acquitted on the fourth count. He was sentenced to a term of seven years imprisonment with a minimum term of five years.

2. The appeal raises only one issue. That is whether the applicant's conviction can be allowed to stand when, despite his desire to be legally represented at his trial, he was unable to obtain representation and was therefore forced to conduct his defence in person.

3. Before his trial the applicant made application to the Legal Aid Commission of Victoria for legal aid but his application was refused, save that he was offered assistance upon a plea of guilty or upon a finding of guilt. The offences with which he was charged being Commonwealth offences, he also made application to a Judge of the Supreme Court for assistance under s.69(3) of the Judiciary Act 1903 (Cth). That sub-section provides:

"Any person committed for trial for an offence against
the laws of the Commonwealth may at any time within fourteen
days after committal and before the jury is sworn apply to a
Justice in Chambers or to a Judge of the Supreme Court of a
State for the appointment of counsel for his defence. If it
be found to the satisfaction of the Justice or Judge that
such person is without adequate means to provide defence
for himself, and that it is desirable in the interests of

justice that such an appointment should be made, the Justice or Judge shall certify this to the Attorney-General, who may if he thinks fit thereupon cause arrangements to be made for the defence of the accused person or refer the matter to such legal aid authorities as the Attorney-General considers appropriate. Upon committal the person committed shall be supplied with a copy of this subsection."

The applicant's application under s.69(3) was refused because more than fourteen days had elapsed after his committal for trial. The applicant also made unsuccessful applications for legal assistance to the Commonwealth Minister for Justice and the Commonwealth Attorney-General.

4. The Legal Aid Commission of Victoria functions under the Legal Aid Commission Act 1978 (Vict.). Under s.24 of that Act the Commission may provide legal assistance to a person charged with an indictable offence if it is of the opinion that the person is in need of that assistance because he is unable to afford the full cost of obtaining legal services from a private practitioner and either if it is reasonable having regard to all relevant matters to provide the assistance or if the Commission is of the opinion that it is desirable in the interests of justice that the person should have legal representation. In making the decision whether it is reasonable in all the circumstances to provide assistance to a person charged, the Commission is to have regard to whether the proceeding is likely to terminate in a manner favourable to that person. Provision is made in Pt VI of the Act for the review of a decision of the Commission by a legal aid review committee and for a further review by a legal aid appeal committee. The precise steps taken by the applicant do not appear but it is common ground that he did all that he could to obtain legal aid from the Legal Aid Commission and was unsuccessful in obtaining aid to be represented at his trial.

5. The applicant made various submissions to the learned trial judge that the trial should not proceed. At one point it appears that the applicant sought an adjournment, although the precise purpose for which the adjournment was sought does not emerge. What is clear is that the trial judge took the view that there was no prospect of the applicant obtaining legal representation and that an adjournment for the purpose of enabling him to do so would be futile. The trial judge made it apparent that he would have preferred the applicant to have been represented, but pointed out that this was a matter for the authorities responsible for granting legal aid. The trial judge did not give consideration to any course, such as an adjournment, for the purpose of placing pressure upon those authorities to reverse their decision. Nor, in my view, would it have been proper for him to do so.

6. The applicant does not allege any error or defect in his trial save that he was compelled to present his case in person when he wished to be represented. As might be expected, the trial judge gave the applicant such assistance as he could in the presentation of his defence and the prosecutor appearing for the Crown did all that could be done to ensure that the applicant was not at a disadvantage because of his lack of representation. The applicant makes no complaint in these respects. Further, in his charge to the jury the trial judge said:

"In assessing the demeanour and personality of the accused man, it is proper for you to make every allowance for the fact that he has not had any counsel to guide him in the presentation of his case. You should bear in mind what I said, I think more than once during the course of the trial, that you should make due allowance for the accused,

and for the fact that there is considerable stress and strain on any person in any criminal trial, and more, one would imagine, on any unrepresented person in any criminal trial. So, make all due and proper allowances for what he himself, I think, described as his volatile nature. He is, as you would expect, under stress and strain, being an unrepresented person in a criminal trial. As to why he is unrepresented, that is not a matter for your consideration or concern. The fact is he is unrepresented, and you should make whatever allowances you believe appropriate for that fact."

7. The submission made by the applicant is that the failure to provide him with legal representation upon his trial for serious offences of itself resulted in a miscarriage of justice. To avoid that miscarriage, the applicant submits, the court ought to have stayed the proceedings at least until such time as the applicant was provided, at public expense if necessary, with adequate legal representation. That not having been done, he submits that the conviction cannot be allowed to stand.

8. In McInnis v. The Queen((145) [1979] HCA 65; (1979) 143 CLR 575.) the trial judge refused an adjournment of a criminal trial requested by the accused to enable him to obtain legal representation. The accused was convicted upon charges of deprivation of liberty and rape. At the time the application for an adjournment was made there was the possibility that he might obtain financial help from his family and there was also the possibility of a reconsideration of the decision to refuse him legal aid (a decision made on the day preceding the day set for the trial) and, if that did not produce legal aid, there was the possibility of seeking a review of the decision by a review committee. Barwick C.J., with whom Aickin and Wilson JJ. agreed, was not prepared to say that the trial judge erred in refusing to grant an adjournment. Mason J., on the other hand, thought that he did. Murphy J., who was in dissent in the result, found it unnecessary to consider the point. However, Barwick C.J. was prepared to assume that the trial judge was in error in refusing the adjournment and commented that the question then was whether there had been a miscarriage of justice in the conviction of the accused. He said that the question((146) ibid., at p 579.):

"was not simply whether an adjournment of the trial ought to have been ordered. It was whether, assuming the adjournment to have been wrongly refused, that refusal resulted in the miscarriage of justice."

9. Barwick C.J. proceeded to examine the evidence and concluded that the case against the accused was sufficiently strong to enable him to say that the accused was not deprived of a fair chance of acquittal and that there was no miscarriage of justice. In the course of reaching that conclusion, his Honour observed((147) ibid., at p 580.):

"Of course, there may be some cases in which it may be concluded that had counsel conducted the defence the jury may have been less likely to have believed the case made by the prosecutrix but I cannot think that this is such a case."

Mason J. also was of the view that the refusal of the adjournment did not of itself result in a miscarriage of justice; that must appear from the proceedings at trial. Thus he said((148) ibid., at p 583.):

"The question is primarily to be resolved by looking to the nature and strength of the Crown case and the nature of the defence which is made to it. If the Crown case is overwhelming then the absence of counsel cannot be said to have deprived the accused of a prospect of acquittal. If the accused in such a case has presented his defence with skill, that may constitute some confirmation that conviction was inevitable in any event. But if the Crown case is less than overwhelming I have some difficulty in perceiving how in general the conduct of the case by an accused who is without legal qualification and experience can demonstrate that, even with the benefit of counsel, he had no prospect of an acquittal."

Mason J. agreed with Barwick C.J. in the result. The majority were all of the view that in this country an accused person does not have a right to present his case by counsel provided at public expense((149) See, ibid., per Barwick C.J. at p 579, per Mason J. at p 581.). Murphy J., in dissent, held the contrary, at least where the accused person was charged with a serious crime((150) ibid., at p 586.).

10. The course of reasoning adopted by the majority in McInnis was no doubt influenced by the fact that the accused's counsel conceded that he had to show something more than that the adjournment was wrongly refused in order to make out a miscarriage of justice and thereby bring the case within the power to quash a conviction conferred by the Criminal Code (W.A.). It does not appear to have been put that the refusal of the adjournment in effect denied the accused a right which he had and that the denial of that right itself constituted a miscarriage of justice. The right which the accused had is to be found in s.634 of the Code:

"Every person charged with an offence is entitled to make his defence at his trial and to have the witnesses examined and cross-examined by his counsel."

11. Entitlement to appear by counsel is not the same thing as entitlement to have counsel provided at public expense((151) See Reg. v. Rowbotham (1988) 41 CCC (3d) 1, at pp 65-66; Re Ewing and Kearney and The Queen (1974) 49 DLR (3d) 619, at p 626; Reg. v. Robinson (1989) 73 CR (3d) 81, at p 110.). It is a right on the part of an accused person to avail himself of counsel if counsel is available to him or can be made available to him. A legal aid scheme is nowadays a means by which counsel may be made available to an accused person. If, by the refusal of an adjournment, an accused is prevented from pursuing a course which could, with any reasonable prospect of success, enable him to avail himself of counsel, then it seems to me that it should be irrelevant to enquire further whether he lost a chance of acquittal because he was unrepresented. The refusal of an adjournment which would deprive an accused of a reasonable opportunity to obtain representation would effectively deny him the form of trial to which he was entitled by statute - a trial at which he was represented by counsel. In such a case, the refusal of the adjournment would itself and without more cause the trial to miscarry. It is not to the point that the accused would inevitably have been

convicted because that is no answer when a trial is fundamentally flawed((152) See Wilde v. The Queen [1988] HCA 6; (1988) 164 CLR 365, at p 373.). Of course, not every refusal of an adjournment for the purpose of obtaining counsel will amount to a refusal to allow an accused to exercise his right. The accused may previously have had adequate opportunity to pursue his entitlement and have failed to do so. An adjournment may be sought for merely tactical reasons and not for the genuine purpose of obtaining representation. And no counsel may be available because the accused lacks the means to secure representation and all avenues to obtain legal aid have been explored unsuccessfully.

12. In the last set of circumstances, the accused has no right to be represented by counsel at public expense. That is made clear in McInnis. The fact that an accused is unrepresented cannot in those circumstances of itself amount to a miscarriage of justice. If he is convicted, an appeal cannot succeed merely because he was at a disadvantage in being unrepresented. As in other cases, to succeed on appeal he must show that the verdict is unreasonable or cannot be supported having regard to the evidence, that there was an error of law or that for some other reason there was a miscarriage of justice. But there cannot be a miscarriage of justice merely because an accused is unrepresented when he has no entitlement to representation. Obviously, in some trials a defect may be more likely to occur in the course of the trial because of an accused's lack of representation, but it is the defect which must be relied upon on appeal, not the lack of representation. It is, I think, implicit in the decision in McInnis that a form of trial which is contemplated by the law - a trial in which the accused is unrepresented because he lacks the means to obtain representation - cannot of itself be said to be unfair.

13. Any other analysis would, I think, result in an inconsistency between the approach in the case of an accused who, having means, is denied the opportunity to avail himself of counsel and the case of an accused to whom counsel is unavailable because of lack of means. If it were possible to say that the appeal of a person who could afford, but was denied, counsel on his trial may turn upon whether he was deprived of a fair chance of acquittal by reason only of his lack of representation, then it should be open to say the same thing in the case of a person who was unrepresented at his trial because he could not afford representation and representation was not otherwise made available. The only valid distinction which can be drawn between the two cases is that in the former case the accused had a right to be represented whereas in the latter case he did not. And, as I have explained, the denial of a right to representation when it exists is, in my view, of itself sufficient to render a trial defective and to result in a miscarriage of justice.

14. The Victorian equivalent of the right under s.634 of the Criminal Code (W.A.) is conferred by s.397 of the Crimes Act 1958 (Vict.) which provides:

"Every accused person shall be admitted after the close of
the case for the prosecution to make full answer and defence
thereto by counsel."

This provision was derived from The Trials for Felony Act 1836 (U.K.)((153) 6 and 7 Wm IV c.144.), s.1, the enactment of which reflected the gradual relaxation of the old common law rule that an accused charged with a felony could not be defended by counsel. Having regard to the origins of s.397 and the view that I have expressed above, the applicant was correct in conceding that the section does no more than give a right to an accused to retain counsel if he has the means to do so or if counsel is otherwise available.

15. The applicant does, however, contest the view, at all events where the charge is a serious one, that lack of representation of an accused cannot of itself result in an unfair trial. In so doing he necessarily contends that an accused has a right to counsel at public expense. To the extent that McInnis leads to a contrary conclusion, he seeks to reopen that decision.

16. It is only realistic to recognize that an accused who is unrepresented is ordinarily at a disadvantage because of his lack of representation((154) McInnis v. The Queen (1979) 143 CLR, at p 579; Reg. v. Nilson (1971) VR 853, at p 864; Foster v. The Queen [1982] FCA 2; (1982) 38 ALR 599, at p 600; Galos Hired v. The King (1944) AC 149, at p 155; Powell v. Alabama [1932] USSC 137; (1932) 287 US 45, at p 69.). If there are some cases in which lack of representation is not a disadvantage or may even be turned to advantage, they must be exceptional. Commencing with a consideration of the form of the presentment or indictment and ending with the making of any necessary objection to the trial judge's charge to the jury, the proper conduct of an accused's defence calls for a knowledge not only of the criminal law but also of the rules of procedure and evidence. Skill is required in both the examination-in-chief and the cross-examination of witnesses if the evidence is to emerge in the best light for the defence. The evidence to be called on behalf of the accused, if any, must be marshalled so as to avoid raising issues which will be damaging to the case for the defence. A decision must be made whether the accused is to give evidence on oath, is to make an unsworn statement or is to remain mute. Competence in dealing with these matters depends to a large extent upon training and experience. And, as Murphy J. pointed out in McInnis((155) (1979) 143 CLR, at p 590.), an accused in person cannot effectively put some arguments that counsel can, such as an argument that, although on the evidence the accused is probably guilty, he is not guilty beyond reasonable doubt.

17. The assistance which the trial judge can give to an unrepresented accused is limited, but its effect ought to be to redress as far as possible any imbalance in the presentation of the prosecution and defence cases and to ensure that the procedures adopted fairly reflect the case which the accused wishes to put in his defence. That having been said, it is undeniable that if trials were to move closer to the attainment of perfect justice, every accused would be represented by competent counsel. But, as Brennan J. pointed out in Jago v. District Court (N.S.W.)((156) [1989] HCA 46; (1989) 168 CLR 23, at p 47.), although the absence of competent representation is an obstacle in the way of a fair trial, it is an obstacle to be overcome by the trial judge however burdensome the task. He continued((157) ibid., at p 49.):

> "If it be said that judicial measures cannot always secure perfect justice to an accused, we should ask whether the ideal of perfect justice has not sounded in rhetoric rather than in law and whether the legal right of an accused, truly stated, is a right to a trial as fair as the courts can make it. Were it otherwise, trials would be prevented and convictions would be set aside when circumstances outside judicial control impair absolute fairness."

18. The applicant placed reliance upon that part of 42 Edw.III c.3 (1368) which provides:

> "It is assented and accorded, for the good governance of the commons, that no man be put to answer without presentment before justices, or matter of record, or by due process and writ original, according to the old law of the land; And if

any thing from henceforth be done to the contrary, it shall
be void in the law, and holden for error."

That provision is in force in Victoria under s.3 of the Imperial Acts Application Act 1980 (Vict.). The applicant emphasized the words "by due process" and sought to draw an analogy between those words in the English statute and the same words in the Fifth and Fourteenth Amendments to the United States Constitution, where it is provided that no person shall be deprived "of life, liberty, or property, without due process of law". The Sixth Amendment expressly provides that in all criminal prosecutions the accused shall enjoy the right "to have the Assistance of Counsel for his defense". Of course the Sixth Amendment only applies to federal courts. However, the due process clause of the Fourteenth Amendment, which applies to states, has subsequently been held to incorporate the right to counsel afforded by the Sixth Amendment((158) Gideon v. Wainwright [1963] USSC 42; (1963) 372 US 335.). The precise scope of the Sixth Amendment was clarified in Argersinger v. Hamlin((159) [1972] USSC 127; (1972) 407 US 25; see also Scott v. Illinois (1979) 440 US 367.). In that case it was held that, absent a knowing and intelligent waiver, no person could be imprisoned for any offence, whether classified as petty, misdemeanour or felony, unless he was represented by counsel at his trial.

19. As I have said, the words "due process of law" in the United States Constitution form part of the constitutional guarantees contained in the Fifth and Fourteenth Amendments. In relation to the right to counsel, the words "due process" represent, when read with the Sixth Amendment, a rejection of the common law upon the subject((160) cf. Powell v. Alabama (1932) 287 US, at pp 64-67.). Conversely, that part of 42 Edw.III c.3 upon which the applicant seeks to rely was directed to a more limited end. Its purpose, unlike the words "due process" in the Fifth and Fourteenth Amendments to the United States Constitution((161) See, e.g., Wolf v. Colorado [1949] USSC 101; (1949) 338 US 25, at p 27; Bute v. Illinois [1948] USSC 47; (1948) 333 US 640, at p 649.), was not to lay down a broad concept with a flexible application to the changing requirements of different times. Its purpose was more immediate. It was to rid the law of those oppressive inquisitorial proceedings which had developed rapidly during the reign of Edward III((162) See Ex parte Walker (1924) 24 SR(NSW) 604; Adler v. District Court of N.S.W. (1990) 19 NSWLR 317, at pp 345-353; Victoria v. Australian Building Construction Employees' and Builders Labourers' Federation [1982] HCA 31; (1982) 152 CLR 25, at p 150; Mummery, "Due Process and Inquisitions", (1981) 97 Law Quarterly Review 287.). In its use of the words "due process", together with the words which accompany that phrase, it was intended to ensure that no man be put to answer - be put to trial - except in the common law courts according to the recognized procedures of the time. The common law did not then extend any right to counsel to an accused charged with felony and the statute was not directed to the alteration of existing common law procedures; on the contrary, it was intended to ensure their application. It is for these reasons that it is not possible to read into the words "due process" in 42 Edw III c.3 a meaning which is the equivalent of that given to those words in the United States Constitution.

20. Finally, the applicant sought to rely upon Art.14(3)(d) of the International Covenant on Civil and Political Rights which provides:

"In the determination of any criminal charge against him,
everyone shall be entitled to the following minimum
guarantees, in full equality:
...
(d) To be tried in his presence, and to defend himself in

person or through legal assistance of his own choosing;
to be informed, if he does not have legal assistance,
of this right; and to have legal assistance assigned
to him, in any case where the interests of justice so
require, and without payment by him in any such case if
he does not have sufficient means to pay for it".

The applicant pointed to the fact that not only is Australia a party to the Covenant but it is also a party to the First Optional Protocol to the Covenant which recognizes the competence of the Human Rights Committee to receive and consider communications from individuals who claim to be victims of violations of any of the rights set forth in the Covenant.

21. Article 14(3)(d) does not purport to confer an absolute right upon an accused to have legal counsel assigned to him; the right is expressed to arise "in any case where the interests of justice so require". Nevertheless, it is plain that the Article purports to confer a right to representation in circumstances where the common law would not. As I have said, the common law, whilst recognizing the disadvantages which an unrepresented accused may suffer because of his lack of representation, does not accept that those difficulties cannot be overcome and a fair trial held. The Article, on the other hand, presupposes that there are some cases in which justice will necessarily be denied if an accused is tried without representation at public expense. The difference may be illustrated by the case of Robinson v. The Queen((163) (1985) AC 956.).

22. In that case, which was an appeal to the Privy Council from the Court of Appeal of Jamaica, the accused had been refused an adjournment to obtain other counsel after counsel retained by him had failed to appear, at least partly, it seems, because they had not been put in funds. The accused was tried for murder and convicted. Murder was a capital offence in Jamaica. The Jamaican Constitution provided that an accused was to be afforded a fair hearing and that he was to be permitted to defend himself in person or by a legal representative of his own choice. The majority in the Privy Council held that the accused had, in all the circumstances, notwithstanding the refusal of the adjournment, been permitted to exercise his right to counsel. They also held that there was no miscarriage of justice; that is to say, they held that the accused's lack of representation did not prevent his trial being a fair trial. The minority, on the other hand, held that the accused had not been permitted to defend himself by a legal representative of his own choice and that this denial of a constitutional right was sufficient to vitiate the trial even if it was in every other respect fair.

23. The matter was the subject of a communication under the First Optional Protocol to the International Covenant on Civil and Political Rights((164) Frank Robinson v. Jamaica, CCPR/C/35/D/223/1987.). The view taken by the Human Rights Committee was as follows:

"The Committee, noting that article 14, paragraph 3(d)
stipulates that everyone shall have 'legal assistance
assigned to him, in any case where the interests of justice
so require', believes that it is axiomatic that legal
assistance be available in capital cases. This is so even
if the unavailability of private counsel is to some degree
attributable to the (accused) himself, and even if the
provision of legal assistance would entail an adjournment of
proceedings. This requirement is not rendered unnecessary
by efforts that might otherwise be made by the trial judge

to assist the (accused) in handling his defence in the absence of counsel. In the view of the Committee, the absence of counsel constituted (an) unfair trial."

24. Article 14(3)(d) has not been enacted as part of the domestic law of Australia, but the applicant sought to rely upon it by submitting that the development of the common law should, where possible, be in conformity with international obligations. There is authority for the proposition that, in the construction of domestic legislation which is ambiguous in that it is capable of being given a meaning which either is consistent with or is in conflict with a treaty obligation, there is a presumption that Parliament intended to legislate in conformity with that obligation((165) See Reg. v. Home Secretary; Ex parte Brind [1991] UKHL 4; (1991) 1 AC 696, esp. at pp 747-748.). Whether that approach may be extended beyond statutory interpretation to the resolution of uncertainty in the common law is not so clearly established((166) Cf. Attorney-General v. Guardian Newspapers (No.2) [1988] UKHL 6; (1990) 1 AC 109, at p 283; Derbyshire County Council v. Times Newspapers Ltd. (1992) 3 WLR 28.). It is unnecessary to consider the question in this case because to extend to the common law the principle which underlies Art.14(3)(d) - the principle that there are cases in which the absence of representation of itself results in an unfair trial - would not be to resolve ambiguity or uncertainty but to effect a fundamental change. This is, upon any view, sufficient to preclude reliance upon the Covenant. Moreover, not only is the common law free from uncertainty in this respect, but there are also statutory provisions which are predicated upon the position at common law. There is s.397 of the Crimes Act which confers a right to counsel but not a right to counsel at public expense. There is s.69(3) of the Judiciary Act which, in the cases to which it applies, confers a discretion upon the Attorney-General to cause arrangements to be made for the defence of the accused or to refer the matter to a legal aid authority. And there is the Legal Aid Commission Act which lays down the circumstances in which legal aid may be provided, those circumstances involving considerations which extend beyond the interests of justice in the particular case.

25. There is, in any event, some difficulty about speaking of legal representation for an accused in the interests of justice. If, as is the situation, legal representation is an advantage to an accused in practically every case, then it is in the interests of justice that representation be available in practically every case, if necessary at public expense. Not only that, but it is in the interests of justice that the representation be of the highest calibre. If the interests of justice are to be pursued without regard to other considerations, then clearly they require not only a fair trial but the fairest possible trial. But the interests of justice cannot be pursued in isolation. There are competing demands upon the public purse which must be reconciled and the funds available for the provision of legal aid are necessarily limited. The determination of what funds are to be made available is not a function which the courts can or should perform((167) See Jago v. District Court (N.S.W.) (1989) 168 CLR, at p 39; Reg. v. Robinson (1989) 73 CR (3d), at p 119; cf. McInnis v. The Queen (1979) 143 CLR, at p 592.). Nor are the courts equipped to determine how the available funds are to be distributed - for example, whether it is preferable to spread them amongst the largest number of cases possible or to devote them to a smaller number of complex and more costly cases. The function of the courts is to ensure that an accused person receives the fairest possible trial in all the circumstances and those circumstances may include the lack of representation of the accused in some cases. To be sure, the law lays down the requirements for a fair trial and departure from those requirements will result in a miscarriage of justice. But those requirements presently do not, and cannot in a practical world, include the availability of representation for an accused at public expense. That must be something towards which we should aim, at least in cases of a serious nature, but the responsibility for providing the means of realizing that aim lies not with the courts, but

elsewhere((168) See Reg. v. Cormier (1988) 90 NBR (2d) 265).

26. For these reasons I am of the view that special leave to appeal should be granted but the appeal should be dismissed.

TOOHEY J. In opening this appeal, counsel for the applicant said:

"The issue is whether an accused person charged with a serious crime, punishable by imprisonment, who cannot afford counsel, has a right to be provided with counsel at public expense."

2. As the argument developed, although counsel did not cease to contend for such a "right", he also argued that in the circumstances postulated a trial without representation could not be a fair trial. The distinction is important and calls for some analysis. For the moment it is enough to note that, if there is a right to legal representation in absolute terms, the absence of representation of itself constitutes a breach of that right. The concept of a fair trial is more flexible in that all relevant circumstances surrounding the trial have to be taken into account. The facts

3. The applicant stood trial in the County Court of Victoria on an indictment containing four counts under s.233B of the Customs Act 1901 (Cth). After a lengthy hearing he was convicted on the first count of importing not less than a trafficable quantity of heroin (the second and third charges were alternatives to this charge) and acquitted of a charge of possession of a prohibited import, namely, heroin. He was sentenced to imprisonment for seven years with a minimum term of five years.

4. Following his committal for trial, the applicant applied for legal aid to the Legal Aid Commission of Victoria. He lacked the means to engage a lawyer himself. He was refused legal aid to defend the charges but was offered legal assistance to plead guilty. His appeal to a legal aid appeal committee failed. Section 69(3) of the Judiciary Act 1903 (Cth) provides that a person:

"committed for trial for an offence against the laws of the Commonwealth may at any time within fourteen days ... apply to a Justice in Chambers or to a Judge of the Supreme Court of a State for the appointment of counsel for his defence".

The applicant applied to the Supreme Court of Victoria under this provision but, 14 days having expired, his application was refused. An approach for financial assistance to the Commonwealth Attorney-General and to the Commonwealth Minister for Justice met a similar fate. It is clear that the applicant did all that he could to secure legal representation. During his trial he stressed more than once the difficulties he was under in conducting his own defence; the respondent did not dispute that these were real difficulties.

5. There are obvious problems in formulating a "right to counsel"; the problems are discussed later in these reasons. But unless such a right is subject to some qualifications, it means that the absence of counsel is enough to preclude a trial of the accused and, if a trial does take place, to abort any conviction that results. Thus Art.14(3)(d) of the International Covenant on Civil and Political Rights ("the ICCPR"), requires only that an accused:

"have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by

him in any such case if he does not have sufficient means
to pay for it".

The European Convention for the Protection of Human Rights and Fundamental Freedoms contains a similar provision in Art.6(3)(c). The historical background

6. The existence of any right to counsel cannot be divorced from an historical context. In that context the issue was not whether an accused had a right to insist upon legal representation at public expense but whether he or she could even be represented by counsel. Holdsworth has pointed out((169) A History of English Law, vol.9, 3rd ed. (1944), p 235) how The Treason Act 1695 (Imp.)((170) 7 and 8 Will.III c.3.) gave to persons accused of high treason the right to be defended by counsel, a right which was not extended to those accused of felony until The Trials for Felony Act 1836 (Imp)((171) 6 and 7 Will.IV c.114.). That is not to say that those accused of felony had hitherto no assistance from counsel. Counsel were permitted to cross-examine witnesses for the prosecution but as a Royal Commission in 1836 observed((172) Great Britain, Second Report from His Majesty's Commissioners on Criminal Law, 1836 (343), p 2.):

"One of the peculiarities incident to crimes of the
degree of Felony, but not amounting to the offence of High
Treason ... is that the Prisoner is denied his full defence
by Counsel, (or, in other words, that his Counsel is not
allowed the liberty of addressing the Jury,)".

7. Although not directly relevant, it is worth remembering that an appeal against conviction or sentence was unknown to the common law, though a writ of error, a writ of certiorari and the exercise of the royal prerogative in the form of a pardon constituted means whereby a conviction or sentence might be challenged((173) Stephen, A History of the Criminal Law of England, (1883), vol.1, pp 308-313.). It was possible for a judge presiding over a criminal trial, in the event of a finding of guilt by the jury, to refer difficult questions of law to other members of the court. It was this practice of reserving questions of law that led to the establishment of the Court of Crown Cases Reserved in 1848((174) Crown Cases Act 1848 (U.K.) (11 and 12 Vict. c.78).). To that Court, only a judge might reserve a point of law for its consideration((175) Stephen, op cit, pp 311-312. For an historical overview of the right to counsel, see MacFarlane, "The Right to Counsel at Trial and on Appeal", (1990) 32 Criminal Law Quarterly 440, at pp 440-448.). Until the introduction of the Criminal Appeal Act 1907 (U.K.), no right of appeal by a convicted person existed((176) See generally Davern v. Messel (1984) 155 CLR 21, at p 47.).

8. These historical references demonstrate that the general appearance of counsel for an accused and the existence of any general appeal procedures are comparatively recent. In such a setting it would be surprising to find in the common law a right to counsel formulated in absolute terms. And none is to be found. It is more profitable to consider the present appeal by reference to the concept of a fair trial, in particular the extent to which that concept requires legal representation for an accused and the consequences if representation is not available. The right to a fair trial

9. The right to a fair trial is engrained in our legal system((177) Jago v. District Court (N.S.W.) [1989] HCA 46; (1989) 168 CLR 23.). The absence of a fair trial arises most often where procedural irregularities occur, though more and more the extent of media coverage of criminal proceedings prompts applications for a stay of the trial, permanent or otherwise((178) See, by way of illustration, Murphy v. The Queen [1989] HCA 28; (1989) 167 CLR 94 and The Queen v.

Glennon [1992] HCA 16; (1992) 173 CLR 592. As to abuse of process, see Williams v. Spautz [1992] HCA 34; (1992) 66 ALJR 585; 107 ALR 635.). Clearly enough, the concept of a fair trial is one that is impossible, in advance, to formulate exhaustively or even comprehensively. Only a body of judicial decisions gives content to the concept. And when, as in the present appeal, the fairness of a trial is called into question because of the lack of legal representation for an accused, it is not possible to exclude entirely from consideration the role of the State in providing legal aid.

10. How, relevantly, is the concept of a fair trial to be stated? In its most extreme form the submission of the applicant is that the State must provide legal representation to an indigent accused charged with a serious offence and that, if it does not, any trial that follows is necessarily unfair and any conviction that results must necessarily be set aside. The applicant says further that, to ensure that an accused receives a fair trial, the trial judge should, perhaps must, adjourn the trial if the accused is unable to secure counsel. Put that way, the ground of appeal alters form. It becomes a ground that the trial judge erred in refusing to adjourn the trial until the applicant had secured legal representation. The importance of legal representation

11. It is hardly necessary to spend time in this judgment on the advantages to an accused of legal representation. They are well recognised((179) See, for instance, McInnis v. The Queen [1979] HCA 65; (1979) 143 CLR 575, at pp 582, 590; Powell v. Alabama [1932] USSC 137; (1932) 287 US 45, at pp 68-69; Douglas v. California [1963] USSC 85; (1963) 372 US 353, at pp 357-358.). I assume, of course, that representation is competent. Most trial judges have had the experience of a litigant in person who seems able to conduct his or her part in the proceedings with skill and, sometimes, to a successful conclusion. But such situations are exceptional. Any litigant in person is at a disadvantage, above all an accused facing a serious criminal charge. Indeed, the adversary system that prevails in this country assumes the existence of contestants who are more or less evenly matched. Where they are not, the trial judge can lend assistance. But that can only be limited and may interfere with the true function the trial judge is required to perform((180) Richardson v. The Queen [1974] HCA 19; (1974) 131 CLR 116, at p 122; MacPherson v. The Queen [1981] HCA 46; (1981) 147 CLR 512, at pp 546-547; Whitehorn v. The Queen [1983] HCA 42; (1983) 152 CLR 657, at pp 682-683; Powell v. Alabama (1932) 287 US, at p 61; Re Ewing and Kearney and The Queen (1974) 49 DLR (3d) 619, at p 621.). Likewise, while the prosecutor must act fairly towards the accused and can offer some assistance, the prosecutor cannot tell the accused how to conduct his or her defence. Indeed, a prosecutor would need to tread carefully in dealing with the accused in order to avoid compromising the prosecutorial role. It would not be hard, in many cases where an accused has lacked legal representation, to point to the disadvantages that have ensued and to conclude that the accused may have lost thereby the chance of an acquittal.

12. But, that said, the question still remains. Is it part of the concept of a fair trial that, if an accused cannot afford legal representation, the State must provide it? The decision in McInnis suggests otherwise. The decision in McInnis

13. The actual decision in McInnis turned on the refusal of the trial judge to grant an adjournment to an accused charged with unlawful assault, deprivation of liberty and rape, whose barrister had told the accused he would not represent him only the day before the trial began. A majority of the Court held that, even if the trial judge had erred in refusing to grant an adjournment, there had been no miscarriage of justice because of the strong case against the accused and the lack of credibility of his defence.

14. In the course of his judgment, Barwick C.J. said((181) (1979) 143 CLR, at p 579.):

"It is proper to observe that an accused does not have a
right to be provided with counsel at public expense. ...
He has no absolute right to legal aid."

Mason J. said that((182) ibid., at p 581):

"an accused in Australia does not have a right to present
his case by counsel provided at public expense".

Aickin and Wilson JJ. agreed with Barwick C.J. However, Murphy J. took a different approach. He said((183) ibid., at p 583):

"Every accused person has the right to a fair trial,
a right which is not in the slightest diminished by the
strength of the prosecution's evidence and includes the
right to counsel in all serious cases. This right should
not depend on whether an accused can afford counsel."

Later, Murphy J. observed((184) ibid., at p 592):

"If a person on a serious charge, who desires legal
assistance but is unable to afford it, is refused legal
aid, a judge should not force him to undergo trial without
counsel. If necessary, the trial should be postponed until
legal assistance is provided".

15. Once it is appreciated that the decision turned on the refusal to adjourn the trial, McInnis does not stand as an obstacle in the way of the present applicant in the sense that an appeal cannot succeed unless the Court overturns that decision. Nevertheless, the philosophy underlying the judgments of the majority is inimical to the applicant's case, at any rate to the argument that there is a right to counsel at public expense. The difficulties of formulating any right

16. It is important to keep in mind that the present case is not one in which the trial judge denied to the applicant the opportunity to get legal aid or, for that matter, to get someone to represent him. The applicant had exhausted all means then available to him to do either. It is necessary, therefore, to have regard to the consequences of allowing an appeal, quashing the conviction and ordering a new trial. What, if at the commencement of a new trial, the applicant is in precisely the same position he was in at the commencement of his first trial? And there are other difficulties. Obviously the trial judge must make an assessment of the complexities of the trial before it begins. But what is the position of an appellate court when a decision to allow the trial to proceed is made and it is sought to overturn a resulting conviction? Does the appellate court place itself in the shoes of the trial judge at the time the decision was made or does it look at the way in which the trial progressed? An assessment made on the one basis may be different from an assessment made on the other. Perhaps the closest analogy is with the role of an appellate court when a conviction is challenged as being unsafe or unsatisfactory. The court must then make its own assessment in the light of the relevant evidence((185) Morris v. The Queen (1987) 163 CLR 454). And it seems to me that some such approach is inevitable when it is the fairness of the trial that is being considered. I return to this aspect later.

17. Some of these considerations may seem peripheral to the essential aspects of this appeal.

However, not only are they important in themselves, but they also highlight the very real obstacles that confront the applicant in formulating a right to counsel, as opposed to a right to a fair trial, and even in formulating a right to a fair trial, except in the sense that a person may not be convicted as a result of a trial which is unfair. An appropriate remedy

18. One of the best known Latin maxims is ubi jus ibi remedium - there is no wrong without a remedy((186) See Broom's Legal Maxims, 10th ed. (1939), pp 118-136). Holt C.J. observed in Ashby v. White((187) [1790] EngR 55; (1703) 2 Ld Raym 938, at p 953 [1790] EngR 55; (92 ER 126, at p 136)) that "it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal". If there is a "right" to counsel, what is the remedy? Is it an action by the accused against the State to compel the provision of counsel at public expense? The applicant did not contend that he had such a right of action. And no such right of action exists. If there is a "right" to a fair trial, what is the remedy? It can hardly be an action by the accused against the State to compel a fair trial. It is apparent that, at its highest, protection is against conviction of a criminal offence after a trial which is held to be unfair. But, in truth, it is the loss of a chance of acquittal fairly open to an accused which in the end leads to a conviction being set aside((188) Mraz v. The Queen [1955] HCA 59; [1955] HCA 59; (1955) 93 CLR 493, at p 514; Wilde v. The Queen [1988] HCA 6; (1988) 164 CLR 365, at pp 371-372). The inquiry is whether the absence of legal representation for an accused gave rise to a miscarriage of justice((189) See, for instance, The Queen v. Cox (1960) VR 665, at pp 667-668; The Queen v. Hanias (1976) 14 SASR 137, at pp 140-143, 148-150; The Queen v. Bicanin (1976) 15 SASR 20, at pp 24-25; The Queen v. Austin (1979) 21 SASR 315, at p 319; The Queen v. Beadle (1979) 21 SASR 67, at pp 70-71; The Queen v. Corak and Palmer (1982) 30 SASR 404, at pp 408-410, 425-426).

19. The protection referred to in the preceding paragraph does not require a trial to proceed in the absence of counsel and the situation then to be assessed in the light of the outcome of the trial. If it is likely that an accused will suffer prejudice in conducting a defence by reason of lack of counsel (and that will almost inevitably be so where the charge is of a serious offence), the trial judge may adjourn the trial. It is not possible to say that the trial judge must adjourn the trial for there are other considerations to be taken into account. Counsel for the applicant is not right in suggesting that only the interests of the accused are relevant. The situation of witnesses, particularly the victim, may need to be considered as well as the consequences of an adjournment for the presentation of the prosecution case and for the court's programme generally((190) Beadle (1979) 21 SASR, at p 71). But ordinarily the requirement of a fair trial will be the prevailing consideration. Therefore, in the absence of compelling circumstances, a trial should be adjourned where an indigent accused charged with a serious offence lacks legal representation, not due to any conduct on the accused's part. The role of the court

20. In performance of its duty to conduct a trial fairly, a court may stay proceedings as "an incident of the general power of a court of justice to ensure fairness"((191) Jago (1989) 168 CLR, per Mason C.J. at p 31; see also per Deane J. at p 58; per Toohey J. at pp 71-72; per Gaudron J. at pp 77-78.). It may be said that a court cannot control the allocation of government funds such as those provided for a legal aid scheme and that a court is not responsible for the fact that an accused appears unrepresented before it. Those assertions are no doubt true. The organisation of legal aid is a matter for government. Many considerations enter into the provision of legal aid, not the least of which are the many other demands made on the resources of government. However, once an accused appears before a court, the unavailability of legal representation does become a matter for the court, not because the court can remedy the situation by insisting upon the appointment of counsel, but because the court must then assess whether a fair trial may be had by the accused without legal

representation. It cannot be said that the matter is truly beyond the control of the court because it is for the court to decide whether, in all the circumstances, the trial should proceed.

21. In Re Ewing and Kearney((192) (1974) 49 DLR (3d), at p 629) Seaton J.A remarked:

> "If a trial Judge concluded that he could not conduct a fair trial without defence counsel and his requests for counsel were refused, he might be obliged to stop the proceedings until the difficulties had been overcome. Our law would not require him to continue a trial that could not be conducted properly." (emphasis added)

That statement, with respect, rather understates the position. Not only would the law not require the trial judge to continue the trial in the circumstances postulated; it would require the judge to discontinue the hearing, at least in the sense that any conviction resulting from the trial would be liable to be set aside. A legal foundation

22. It is one thing to identify the problems associated with a lack of legal representation for an accused and to postulate the powers of a court in that regard. But it is necessary to ask: is there a legal foundation for the recognition of a right to remedy the situation? Certain statutory and other provisions need to be mentioned, even if an analysis of them leads to the conclusion that they offer no legal foundation for any such right.
1. Section 397 of the Crimes Act 1958 (Vict.) reads:

> "Every accused person shall be admitted after the close of the case for the prosecution to make full answer and defence thereto by counsel."

This provision, which first appeared in England in 1836((193) The Trials for Felony Act; see supra pp 58-59), was designed to overcome the rule at common law which denied legal representation to an accused in cases of felony. It does not enact a right to counsel at public expense((194) Re Ewing and Kearney (1974) 49 DLR (3d), at p 627; see Ibrahim (1987) 27 A Crim R 460, at p 463.). In Deutsch v. Law Society of Upper Canada Legal Aid Fund((195) (1985) 48 CR (3d) 166, at p 171. See also Barrette v. The Queen (1976) 68 DLR (3d) 260) Craig J. commented that the

> "entrenched right to retain and instruct counsel (contained in s.10(b) of the Canadian Charter of Rights and Freedoms) is a matter separate and distinct from the issue of the right to funded counsel".

2. Section 69(3) of the Judiciary Act, which has been mentioned already, enables an accused to apply to a Justice in Chambers or to a Judge of a State Supreme Court for the appointment of defence counsel. The Justice or Judge must be satisfied that the accused "is without adequate means to provide defence for himself and that it is desirable in the interests of justice that such an appointment should be made". The Commonwealth Attorney-General then has a discretion to "cause arrangements to be made for the defence of the accused" or to "refer the matter to such legal aid authorities as the Attorney-General considers appropriate". It is apparent that s.69(3) enshrines no absolute or automatic right to counsel at public expense. In any event, the applicant lost whatever rights it does confer with the expiration of 14 days after committal.

3. Also as mentioned earlier, the applicant applied for legal assistance to the Legal Aid Commission, pursuant to the Legal Aid Commission Act 1978 (Vict.). His attempts to obtain legal assistance failed. He had no right to a favourable determination of his application by the Legal Aid Commission, only a right to have the application considered in accordance with the Act((196) See Esber v. The Commonwealth [1992] HCA 20; (1992) 66 ALJR 373, at p 377; [1992] HCA 20; 106 ALR 577, at p 583).
4. The 1368 enactment, 42 Edw.III c.3, which is still in force in Victoria by virtue of ss.3 and 8 of the Imperial Acts Application Act 1980 (Vict.), provides that:

"no man be put to answer without presentment before justices
... or by due process ...; And if anything ... be done to
the contrary, it shall be void in the law, and holden for
error".

Counsel for the applicant submitted that the words "by due process" should now be interpreted as including the right to appointment of counsel at public expense. He relied upon American authority by which the requirement of "due process" in the United States Constitution now embraces the right to have counsel appointed to an indigent accused charged with a serious crime. However, as Priestley J.A pointed out in Adler v. District Court of New South Wales((197) (1990) 48 A Crim R 420, at p 452), the purpose and intent of the 1368 enactment were:

"to ensure that only common law courts exercised what was
regarded as traditional common law jurisdiction and that
only in those common law courts should persons be tried for
crimes, and then by recognised procedures".

The enactment cannot found the right for which counsel for the applicant primarily contends.
5. Constitutional rights in the United States to have counsel appointed at public expense derive from the express constitutional guarantee of the Sixth Amendment and from the requirement of due process enshrined in the Fourteenth Amendment to the Constitution((198) Powell v. Alabama; Johnson v. Zerbst [1938] USSC 145; (1938) 304 US 458; Gideon v. Wainwright [1963] USSC 42; (1963) 372 US 335; Argersinger v. Hamlin [1972] USSC 127; (1972) 407 US 25; Scott v. Illinois (1979) 440 US 367.). There is nothing directly comparable in Australian law.
6. Article 14(3)(d) of the ICCPR has been mentioned already. The ratification by Australia of the ICCPR on 13 August 1980 did not render it part of Australian municipal law((199) Simsek v. MacPhee ; [1982] HCA 7; (1982) 148 CLR 636, at pp 641-642. See also Kioa v. West [1985] HCA 81; (1985) 159 CLR 550, per Gibbs C.J. at p 570.). The ICCPR is now contained in Sched.2 to the Human Rights and Equal Opportunity Commission Act 1986 (Cth). While the Act confers power on the Human Rights and Equal Opportunity Commission to investigate and conciliate alleged breaches of rights contained in the ICCPR, it does not create justiciable rights for individuals. Likewise, although Australia's accession to the First Optional Protocol to the ICCPR effective as of 25 December 1991 enables Australians to petition the United Nations Human Rights Committee for alleged violations of the rights set out in the ICCPR, it does not make the ICCPR part of Australian municipal law.

23. Counsel for the applicant conceded that the ICCPR has not been incorporated into Australian municipal law. However, he submitted that "Australia has moral and legal obligations at international law under the Covenant". He argued that the ratification of the ICCPR, Australia's accession to the First Optional Protocol, and the annexure of the ICCPR to the Human Rights and

Equal Opportunity Commission Act "all indicate the importance the Australian government places ... on the Covenant and an intention to abide by it in its domestic activities"; that "Australia is morally obliged to accord its citizens and those within its jurisdiction the rights provided for under the Covenant"; and that "the common law in Australia should develop in a way which protects standards of human rights which are broadly accepted by the Australian executive and legislative arms of government and by the Australian community".

24. Where the common law is unclear, an international instrument may be used by a court as a guide to that law((200) Jago v. District Court of New South Wales (1988) 12 NSWLR 558, per Kirby P at p 569.). But the applicant's difficulty is that the common law does not recognise the right to counsel for which he contends. There is no ambiguity or uncertainty to be resolved. And no international instrument upon which the applicant may successfully rely has been incorporated by legislation into Australian municipal law.

25. While there is some English authority tending to support an argument that a court may, perhaps must, consider the implications of an international instrument where there is a lacuna in the domestic law((201) Derbyshire County Council v. Times Newspapers Ltd. (1992) 3 WLR 28, at pp 44, 61.), even this approach does not support the recognition of an absolute right to counsel. Article 14(3)(d) of the ICCPR requires that legal assistance be assigned to an indigent accused "where the interests of justice so require". In other words, the obligation depends on the facts of the particular case((202) See Artico v. Italy (1980) 3 EHRR 1, at pp 13-15; Monnell and Morris v. United Kingdom (1987) 10 EHRR 205, at pp 221-222, 225; Granger v. United Kingdom (1990) 12 EHRR 469, at pp 480-482.).

26. In the end, such support as the applicant may derive from the international instruments mentioned takes him no further than the argument based on the right to a fair trial. As the Solicitor-General for South Australia submitted, the inherent power of the court to prevent its process being used in a manner which gives rise to injustice would be misused if it were employed to declare categorically, in advance and regardless of individual circumstances, that the trial of an unrepresented accused facing a serious charge was necessarily unfair and the conviction unsustainable.

27. In Canada, where the Charter of Rights and Freedoms has been held not to entrench a right to counsel at public expense irrespective of the circumstances, thus reflecting the common law on this point, it has been said that((203) MacFarlane, op cit, at p 463):

"at the trial level, the right to counsel ... is
inextricably linked to the facts of the case and the
background of the accused. It is clearly not a general
right applicable to all cases, irrespective of
circumstances."

In other words, an indigent accused in Canada charged with a serious crime has a right to counsel at public expense where representation of the accused by counsel is essential to a fair trial. The present case

28. The present application clearly calls for a grant of special leave to appeal from the order of the Court of Criminal Appeal refusing the applicant leave to appeal against his conviction. The outcome of the appeal itself turns, not on a right to counsel at public expense, but on what Deane J.

described((204) Jago (1989) 168 CLR, at p 56) as the "central prescript of our criminal law ... that no person shall be convicted of crime otherwise than after a fair trial according to law". The applicant did not have a fair trial according to law. He was facing serious criminal charges((205) The offences were punishable by "imprisonment for life or for such period as the Court thinks appropriate": Customs Act, s.235(2)); he made all the efforts he could to obtain legal representation; and, as appears from other judgments, he clearly suffered considerable disadvantage in trying to conduct his own defence. It is the loss of a chance of acquittal fairly open to an accused, rather than the unfairness of the trial itself, that leads to a conviction being set aside. The judgment of Mason C.J. and McHugh J. demonstrates that in the present case the applicant may well have lost the chance of an acquittal on the charge of which he was convicted. It is unnecessary to repeat what is said by their Honours in that regard. Certainly, in the context of a serious criminal charge, an appellate court would be slow to conclude that the absence of legal representation for an accused is not likely to have led to the loss of a chance of acquittal. Nevertheless, as in the present case, an appellate court must reach a conclusion on that matter if the occasion arises((206) See Wilde v. The Queen (1988) 164 CLR, at pp 371-372, where there is a discussion of some aspects of the loss of a chance of acquittal, though in a different context.). The applicant did ask the trial judge to adjourn the trial; that application was refused. The matter having proceeded, attention necessarily now focuses on the trial and its outcome.

29. I would grant special leave to appeal, allow the appeal from the order of the Court of Criminal Appeal, allow the appeal to that Court, quash the conviction of the applicant and order a retrial. This Court cannot make any orders relating to the circumstances of a retrial. But if there is a retrial and the applicant is unrepresented, through no conduct of his own, it is apparent that the issues which have been agitated on this application may arise again.

GAUDRON J. It is fundamental to our system of criminal justice that a person should not be convicted of an offence save after a fair trial according to law((207) Wilde v. The Queen [1988] HCA 6; (1988) 164 CLR 365, per Deane J. at p 375; Jago v. District Court (N.S.W.) [1989] HCA 46; (1989) 168 CLR 23, per Deane J. at p 56; Reg. v. Glennon [1992] HCA 16; (1992) 173 CLR 592, per Deane, Gaudron, McHugh JJ. at p 623.). The expression "fair trial according to law" is not a tautology. In most cases a trial is fair if conducted according to law, and unfair if not. If our legal processes were perfect that would be so in every case. But the law recognizes that sometimes, despite the best efforts of all concerned, a trial may be unfair even though conducted strictly in accordance with law. Thus, the overriding qualification and universal criterion of fairness]

2. The fundamental requirement that a trial be fair is entrenched in the Commonwealth Constitution by Ch.III's implicit requirement that judicial power be exercised in accordance with the judicial process. Otherwise the requirement that a trial be fair is not one that impinges on the substantive law governing the matter in issue. It may impinge on evidentiary and procedural rules; it may bear on when and where a trial should be held; in exceptional cases it may bear on whether a trial should be held at all. Speaking generally, the notion of "fairness" is one that accepts that, sometimes, the rules governing practice, procedure and evidence must be tempered by reason and commonsense to accommodate the special case that has arisen because, otherwise, prejudice or unfairness might result. Thus, in some cases, the requirement results in the exclusion of admissible evidence because its reception would be unfair to the accused in that it might place him at risk of being improperly convicted((208) McDermott v. The King [1948] HCA 23; (1948) 76 CLR 501, per Dixon J. at pp 511-515; Driscoll v. The Queen [1977] HCA 43; [1977] HCA 43; (1977) 137 CLR 517, per Gibbs J. at p 541.), either because its weight and credibility cannot be effectively tested((209) McDermott v. The King (1948) 76 CLR, per Dixon J. at pp 511-515; R. v. Lee [1950] HCA 25; (1950) 82 CLR

133, at p 144. See Pattenden, Judicial Discretion and Criminal Litigation, (1990), p 233.) or because it has more prejudicial than probative value and so may be misused by the jury((210) R. v. Christie (1914) AC 545, at p 560; Harris v. Director of Public Prosecutions (1952) AC 694, at p 707; Driscoll v. The Queen (1977) 137 CLR, per Gibbs J. at p 541. See Waight and Williams, Evidence Commentary and Materials, 3rd ed. (1990), p 11 and Pattenden, op cit, p 233.). In other cases, the procedures may be modified, for example, to allow evidence to be given through an interpreter((211) See Johnson (1987) 25 A Crim R 433 and R. v. Lee Kun (1916) 1 KB 337.), or to allow for special directions to counteract the effect of pre-trial publicity or even something said or done in the trial itself((212) See Jago v. District Court (N.S.W.) (1989) 168 CLR, per Brennan J. at pp 46-47, 49; Reg. v. Glennon (1992) 173 CLR, per Brennan J. (with whom Dawson J. agreed) at p 614, per Deane, Gaudron, McHugh JJ. at p 623.). Sometimes the venue may be changed to counteract some perceived difficulty in obtaining a fair trial in the area in which the offence was committed; in other cases proceedings may be adjourned, for example, to enable evidence to be checked or to allow for pre-trial publicity to abate. The examples are not exhaustive. They are, however, sufficient to show that the requirement of fairness is, and, in various different contexts, has been recognized as, independent from and additional to the requirement that a trial be conducted in accordance with law.

3. The requirement of fairness is not only independent, it is intrinsic and inherent. According to our legal theory and subject to statutory provisions or other considerations bearing on the powers of an inferior court((213) Grassby v. The Queen [1989] HCA 45; (1989) 168 CLR 1, at pp 10, 16-17.) or a court of limited jurisdiction((214) Reg. v. Forbes; Ex parte Bevan [1972] HCA 34; (1972) 127 CLR 1, at p 8; Jackson v. Sterling Industries Ltd. [1987] HCA 23; (1987) 162 CLR 612, at pp 618-619, 623-624, 630-631.), the power to prevent injustice in legal proceedings is necessary and, for that reason, there inheres in the courts such powers as are necessary to ensure that justice is done in every case((215) Cocker v. Tempest 7 M.and W. 501, at pp 503-504 ; [1841] EngR 242; (151 ER 864, at p 865); Riley McKay Pty. Ltd. v. McKay (1982) 1 NSWLR 264, at p 270; Wentworth v. New South Wales Bar Association [1992] HCA 24; (1992) 66 ALJR 360, at p 364; [1992] HCA 24; 106 ALR 624, at p 630.). Thus, every judge in every criminal trial has all powers necessary or expedient to prevent unfairness in the trial((216) Connelly v. Director of Public Prosecutions (1964) AC 1254, at pp 1301-1302, 1347; Barton v. The Queen [1980] HCA 48; (1980) 147 CLR 75, at pp 96, 107; Jago v. District Court (N.S.W.) (1989) 168 CLR, at p 75.). Of course, particular powers serving the same end may be conferred by statute or confirmed by rules of court((217) See, for example, s.23 of the Supreme Court Act 1970 (N.S.W.) referred to in Riley McKay Pty. Ltd. v. McKay (1982) 1 NSWLR, at pp 269-270.).

4. The notion of a fair trial and the inherent powers which exist to serve that end do not permit of "idiosyncratic notions of what is fair and just"((218) Pavey and Matthews Pty. Ltd. v. Paul [1987] HCA 5; (1987) 162 CLR 221, per Deane J. at p 256.) any more than do other general concepts which carry broad powers or remedies in their train. But what is fair very often depends on the circumstances of the particular case. Moreover, notions of fairness are inevitably bound up with prevailing social values. It is because of these matters that the inherent powers of a court to prevent injustice are not confined within closed categories((219) Tringali v. Stewardson Stubbs and Collett Ltd. (1966) 66 SR(NSW) 335, at p 344; Jackson v. Sterling Industries Ltd. (1987) 162 CLR, at p 639; Hamilton v. Oades [1989] HCA 21; (1989) 166 CLR 486, at p 502; Jago v. District Court (N.S.W.) (1989) 168 CLR, at pp 25-26, 74.). And it is because of those same matters that, save where clear categories have emerged, the enquiry as to what is fair must be particular and individual. And, just as what might be fair in one case might be unfair in another, so too what is considered fair at one time may, quite properly, be adjudged unfair at another.

5. The question in this case can be put in various ways, including whether an accused person who cannot provide for his own defence has a right to be provided with counsel at public expense. No right of that kind is conferred by statute; nor has it been recognized by the common law. Indeed, there are passages in McInnis v. The Queen((220) [1979] HCA 65; (1979) 143 CLR 575, per Barwick C.J. (with whom Aickin J. and Wilson J. agreed) at p 579: "It is proper to observe that an accused does not have a right to be provided with counsel at public expense."; per Mason J. at p 581: "an accused in Australia does not have a right to present his case by counsel provided at public expense". But cf. Murphy J. at p 583: "Every accused person has the right to a fair trial, a right which ... includes the right to counsel in all serious cases. This right should not depend on whether an accused can afford counsel."; and later at p 592: "If a person on a serious charge, who desires legal assistance but is unable to afford it, is refused legal aid, a judge should not force him to undergo trial without counsel.") which deny the right exists. Accordingly, if put in terms of a right to be provided with counsel at public expense, the question is whether a right of that kind should now be recognized. The question whether public funds should be allocated for the legal representation of persons charged with criminal offences is one for governments, not the courts. But, as already indicated, courts are duty bound to ensure that trials are conducted fairly.

6. A trial is not necessarily unfair because it is less than perfect((221) Jago v. District Court (N.S.W.) (1989) 168 CLR, per Brennan J. at p 49.), but it is unfair if it involves a risk of the accused being improperly convicted((222) See fn.(208)). If the only trial that can be had is one that involves a risk of that kind, there can be no trial at all((223) Jago v. District Court (N.S.W.) (1989) 168 CLR, per Mason C.J. at pp 30, 31, 34, per Deane J. at pp 56-58, per Toohey J. at pp 71-72, per Gaudron J. at p 75; Reg. v. Glennon (1992) 173 CLR, per Deane, Gaudron, McHugh JJ. at p 623.). If an accused person declines to be legally represented, then he may be taken to accept that, in the circumstances, fairness does not depend on legal representation. But that situation aside, if fairness requires legal representation there can be no trial without it.

7. If fairness requires representation in a particular case, in a particular class of case, or, even, in all cases, that will have consequences - probably in relation to the administration of legal aid schemes. There may also be consequences for governments in relation to the funding of those schemes. But whatever the consequences and whatever the cost, it is for the courts to decide what is or is not fair in a criminal trial. And it is the duty of the courts to ensure that only fair trials are had, either by tempering the rules and practices to accommodate the case concerned or, if that not be adequate, by staying the prosecution.

8. Mr Dietrich stood trial in the County Court of Victoria on four charges under s.233B of the Customs Act 1901 (Cth). The first was a charge of importing a trafficable quantity of heroin. The second and third charges were charges of possession of that heroin and were alternative to the first charge. The fourth charge was also a charge of possession of heroin, but it was separate from the others. The offences are punishable by life imprisonment or "for such period as the Court thinks appropriate".((224) Customs Act 1901 (Cth), s.235(2).) Obviously, they are serious offences.

9. Mr Dietrich was arrested and charged on 18 December 1986. He was refused bail. On 10 August 1987, he was committed for trial and was again refused bail. He remained in custody until presented for trial on 23 May 1988. He was not legally represented. His case was that the heroin, including that in the fourth charge, had been "planted" on him; in other words, that the evidence had been fabricated. Notwithstanding that the burden of proof is with the prosecution, a defence of that kind poses considerable forensic difficulties((225) See, as to the difficulties with respect to records of interview, Carr v. The Queen [1988] HCA 47; (1988) 165 CLR 314 and McKinney v. The Queen;

Judge v. The Queen [1991] HCA 6; (1991) 171 CLR 468.).

10. After a trial lasting several weeks, Mr Dietrich was convicted on the first charge and, notwithstanding the difficulties inherent in the defence case, acquitted on the fourth. No verdicts were taken on the second and third charges, for, as already mentioned, they were alternative to the first. An appeal to the Full Court of the Supreme Court of Victoria was unsuccessful. He now seeks special leave to appeal to this Court on the ground that he should not have been required to stand trial without legal representation.

11. Mr Dietrich was unrepresented because he had neither means nor money to secure a lawyer and because he was refused legal aid. He applied for legal aid following his committal for trial. He first applied to the Legal Aid Commission of Victoria ("the Commission"), a body established pursuant to the Legal Aid Commission Act 1978 (Vic.) ("the Act") for the provision of legal aid. That body has power to grant legal aid in cases arising under the laws of the Commonwealth((226) Legal Aid Commission Act 1978 (Vic.), ss.3, 10.), provided that regard is had to the recommendations of the Commonwealth Legal Aid Commission.

12. The Commission indicated that legal aid would be available should Mr Dietrich plead guilty, but his application for legal representation to defend the charges was refused. An appeal to a legal aid review committee was unsuccessful. He had no further right of appeal for, by s.36(3) of the Act, "(t)he decision of a legal aid appeal committee is final and conclusive." Mr Dietrich then applied to the Supreme Court of Victoria pursuant to s.69(3) of the Judiciary Act 1903 (Cth) which relevantly provides:

"Any person committed for trial for an offence against
the laws of the Commonwealth may at any time within fourteen
days after committal and before the jury is sworn apply to a
Justice in Chambers or to a Judge of the Supreme Court of a
State for the appointment of counsel for his defence."

Unfortunately, more than fourteen days had passed before Mr Dietrich made his application and it was refused.

13. As earlier indicated, Mr Dietrich was presented for trial in the County Court of Victoria on 23 May 1988. There was a preliminary discussion about the indictment, during which the trial judge said:

"Mr Dietrich, you are appearing for yourself; is that
correct?"

Mr Dietrich replied:

"I cannot appear for myself, I'm not legally minded."

He added:

"I don't understand the system, what is going to happen to
me, and I've got no idea."

Later he said:

"I don't want to show any disrespect to this court. I'm not emotionally and mentally fit to conduct my own trial, and I don't want to take the brunt of ... I know my own character, I know what's going to happen, and it's going to look bad in front of the jury and I'm not prepared to take that chance. I'll just sit here mute."

14. This exchange is eloquent of the central and inevitable problems confronting an accused person who must present his own defence. He is doubly disadvantaged, first by lack of knowledge and, then, by the stress of the occasion. There are often other problems, some of which may be seen in this case. Mr Dietrich asked permission for a fellow prisoner to be present in court, if for no other purpose, to take notes for him. The trial judge ruled:

"You can take your own notes. A table will be provided, or facilities will be provided; paper will be provided; a pen will be provided; and you can take your own notes."

Mr Dietrich also complained that, by reason of his having been held in custody, he had been unable to investigate matters bearing on his defence and to speak to persons whom he wished to call as witnesses. Different cases may raise different or additional difficulties and, as is pointed out by Steytler((227) The Undefended Accused on Trial (1988), p 1.), the difficulties of an unrepresented person "may be exacerbated by problems such as illiteracy, language difficulties, and class or cultural differences".

15. There are many expressions of the importance of legal representation in a criminal trial((228) See, for example, McInnis v. The Queen (1979) 143 CLR, per Barwick C.J. at p 579, per Mason J. at p 582, per Murphy J. at pp 586-591; Powell v. Alabama [1932] USSC 137; (1932) 287 US 45, at pp 68-69; Gideon v. Wainwright [1963] USSC 42; (1963) 372 US 335, at p 344.). Perhaps the best known is to be found in Galos Hired v. The King((229) (1944) AC 149, at p 155) where it was said:

"The importance of persons accused of a serious crime having the advantage of counsel to assist them before the courts cannot be doubted by anybody who remembers the long struggle which took place in this country and which ultimately resulted in such persons having the right to be represented by counsel".((230) The rule in England until 1836 was

that, although a person might be represented in civil proceedings, in criminal proceedings for misdemeanours and, from 1695, for treason, there was no right of representation on a charge of felony except on a question of law which the unrepresented accused himself raised. See Holdsworth, A History of English Law, vol.9, 3rd. ed. (1944), p 235. For an account of the "long struggle", see Chowdharay-Best, "The History of Right to Counsel", (1976) 40 Journal of Criminal Law 275.)

16. There are now statutory provisions conferring a right on an accused person to be represented on his trial((231) See, s.78 Judiciary Act 1903 (Cth); s.402 Crimes Act 1900 (N.S.W.); s.402 Crimes Act 1900 (N.S.W.) as it applies to the A.C.T.; s.360 Criminal Code (N.T.); s.616 Criminal Code (Qld); s.288 Criminal Law Consolidation Act 1935 (S.A.); s.368 Criminal Code (Tas.); s.397 Crimes Act 1958 (Vic.); s.634 Criminal Code (W.A.).). That right is conferred in cases involving federal jurisdiction, as this case does, by s.78 of the Judiciary Act which relevantly provides:

"In every Court exercising federal jurisdiction the parties may appear personally or by such barristers or solicitors as ... are permitted to appear therein."

17. It has been the case, almost since the right to legal representation was first acknowledged, that accused persons have generally been legally represented in jury trials. In part, that may have been because legal representation was more affordable than is now the case; in part, it may have been because of various schemes for legal assistance which have operated at various times, ranging from "the Dock Brief"((232) See Halsbury's Laws of England, 4th ed., vol.3, par.1141; Borrie and Varcoe, Legal Aid in Criminal Proceedings, (1968), p 3. The English Bar Council abolished the rules for Dock Briefs in 1980.) or other early attempts to provide financial assistance((233) For a history of the origins of legal aid see Ross, "A Legal Assistance Scheme", (1948) 22 Australian Law Journal 51; Cranston and Adams, "Legal Aid in Australia" (1972) 46 Australian Law Journal 508. As early as 1876 in South Australia, for example, a person accused of a capital offence could apply to the judge for assistance: s.373 Criminal Law Consolidation Act 1876 (S.A.). By the first years of this century all States and the Commonwealth had provisions for legal assistance for persons committed for trial on an indictable offence; see Cranston and Adams, ibid., at p 515. These schemes were based on the English Poor Prisoners' Defence Act 1903 (3 Edw.VII c.38) and were entirely discretionary. The subsequent history of criminal legal aid varied widely from State to State but culminated with modern statutory schemes in all States and Territories; see National Legal Aid Advisory Committee, Legal Aid for the Australian Community, (1990), pp 32-36.) to modern statutory schemes((234) Modern comprehensive statutory schemes began with the enactment of the Commonwealth Legal Aid Commission Act 1977 (Cth) and from the same year, beginning in Western Australia, legislation establishing State or Territory Legal Aid Commissions, independent statutory bodies with the responsibility of providing legal aid in accordance with the respective Act and controlling and administering the legal aid fund, was enacted throughout Australia. By 1981 New South Wales, Victoria, Western Australia, South Australia, Queensland and the A.C.T. had Legal Aid Commissions; see Legal Aid for the Australian Community, ibid., p 36. Tasmania and the Northern Territory followed in 1990.), funded, in large measure, by public moneys and directed to the provision of legal aid in those cases where the relevant Legal Aid Commission considers that a person is in need of assistance and it is reasonable to provide it.

18. The fact that, since the right was first acknowledged, persons have generally been represented in criminal trials may or may not have had a direct influence on the subsequent development of the criminal law and the laws and procedures governing criminal trials. But it may be assumed that the law and procedures would not have developed with quite the same degree of technical complexity if the position had been that accused persons were expected to represent themselves in any but the isolated case.

19. Once it is acknowledged that an accused person has a right to be legally represented, that legal representation is the norm, and that a person who is not represented is bound to face difficulties arising from his lack of knowledge and from the stress of the occasion - difficulties which are probably exacerbated by his personal circumstances - it is difficult to accept that trial without representation does not involve a risk of the accused being improperly convicted, at least for serious offences. In other words, it is difficult to accept that, these matters notwithstanding, trial without legal representation is a fair trial. And that is so even if the trial judge makes every effort to assist by explaining the procedures, the issues and the law. As was said in Powell v. Alabama((235) (1932) 287 US, at p 61.):

"But how can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that in the proceedings before the court the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional."

20. There are two features of the criminal trial that strongly challenge the assumption that a trial may be fair notwithstanding that the accused, contrary to his wishes, is not represented. The first is the adversarial nature of the proceedings. The second is the nature of the forensic contest involved.

21. The adversary system has been described by Brouwer as "party oriented"((236) "Inquisitorial and Adversary Procedures - a Comparative Analysis", (1981) 55 Australian Law Journal 207.), signifying that, to a large extent, it is the parties who determine the area of dispute and the evidence presented in that dispute. Decisions as to the evidence to be called and as to the course of cross examination determine the factual account on which the jury must reach its verdict. And it must be expected that that evidentiary account will, on occasions, differ from the underlying facts((237) ibid., at pp 208, 221.). Further, as Certoma((238) "The Accusatory System v. The Inquisitional System : Procedural Truth v. Fact" (1982) 56 Australian Law Journal 288, at p 291. See also Ziedler, "Evaluation of the Adversary System: As Comparison, Some Remarks on the Investigatory System of Procedure (1981) 55 Australian Law Journal 390, at p 391.) points out, the factual account that emerges does so as a product of collaboration between the parties, whether overt or otherwise. Thus, in any given case, the way in which the case is conducted may affect its outcome. And, of course, that means that the knowledge and forensic skills which legal representation would bring to bear might also affect its outcome.

22. The forensic contest in a criminal trial is whether guilt has been proved beyond reasonable doubt. That contest occurs in a context in which the jury is free to disbelieve all or any of the evidence or, more pertinently, not to be satisfied as to the truth of matters the burden of proving which, almost invariably, rests on the prosecution((239) See Wilde v. The Queen (1988) 164 CLR, at pp 384-385.). Bearing in mind the presumption of innocence, it is simply not possible to say that, in that contest and in that context, the absence of legal representation does not involve a risk of the accused being improperly convicted.

23. In the United States of America, the right to counsel is a constitutional right deriving, to the extent that it is not comprehended in the Sixth Amendment, from the "due process of law" clauses of the Fifth and Fourteenth Amendments((240) The Fifth Amendment of the Constitution of the U.S.A. relevantly states: "No person shall ... be deprived of life, liberty, or property, without due process of law". The Fourteenth Amendment states: "... (No State shall) deprive any person of life, liberty or property, without due process of law".). It was held to be an aspect of "due process" in Powell v. Alabama((241) (1932) 287 US, at pp 68-69) for these reasons:

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for

himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

That analysis, though undertaken in a different legal context, confirms my view that, at least insofar as serious offences are concerned, legal representation, where it is desired, is essential for a fair trial.

24. The conclusion that legal representation, if desired, is necessary for a fair trial of serious offences may not sit comfortably with the decision in McInnis. In that case Murphy J. considered that legal representation was essential for a fair trial. His Honour also held that the absence of legal representation constituted a serious miscarriage of justice and, on that account, would have quashed the convictions involved. The other Justices concluded that no miscarriage of justice had been involved and that the application for special leave to appeal should be refused. None of their Honours positively asserted that the trial had been fair, but a finding to that effect is implicit in the judgment of Barwick C.J. (with whom Aickin and Wilson JJ. agreed) in so far as his Honour was not prepared to find that the trial judge erred in refusing an adjournment to enable the accused to seek legal representation((242) (1979) 143 CLR, at p 579). Thus, it is necessary to turn to the question whether, so far as it bears on the present matter, the decision in that case should be reconsidered.

25. There are three matters which, in my view, favour reconsideration of McInnis. The first is the fundamental importance of the trial within our system of criminal justice. In cases where the investigation is less than perfect - and in many cases, perfect investigation is impossible - a fair trial according to law is the only protection that our system provides against a person being convicted of an offence that he did not commit.

26. The second matter which favours reconsideration of McInnis is that the notion of "fairness" is not one that is absolute. As earlier indicated, it is one that may have different content in different cases and at different times. And in this regard, it is not without significance that, since McInnis was decided, the position with respect to the provision of legal aid has been secured by statute in every State and Territory of the Commonwealth. When Mr McInnis stood trial in 1978, modern statutory legal aid schemes were in their infancy((243) See supra fn.(234)), developing along the lines of the Commonwealth Legal Aid Commission which was established by statute only in 1977. Schemes of the same kind were established in Western Australia and Victoria in 1977 and 1978 and, by 1981, they existed in all mainland States and the Australian Capital Territory. In 1990 similar schemes were established in Tasmania and the Northern Territory. The establishment, development and spread of these comprehensive legal aid schemes, which now operate throughout the Commonwealth, constitute strong evidence of current and widespread community expectation that an accused person who cannot afford a lawyer should not be forced to stand trial unrepresented.

27. The third reason for reconsidering McInnis is the importance of legal representation - an

importance which is not only recognised in our legal system but in those of other advanced countries. There are, of course, special problems with developing and third world countries((244) See Steytler op cit, pp 18-22, 238-242. And see S v. Rudman; S v. Mthwana (1992) 1 South African LR 343. In that case the Appellate Division of the Supreme Court of South Africa decided legal representation was not essential for a fair trial, holding that it was impractical to oblige the State to provide counsel to indigent accused when such an obligation would result in an intolerable burden on the organization and financial status of the legal aid system.), but most advanced countries proceed on the view that a person accused of a serious offence should be legally represented at his trial. In the United States, constitutional provisions have been construed as comprehending the right of an indigent accused person to have counsel appointed for his defence((245) Gideon v. Wainright [1963] USSC 42; (1963) 372 US 335. See also Argersinger v. Hamlin [1972] USSC 127; [1972] USSC 127; (1972) 407 US 25, at p 37 where it was held that an indigent person who does not have the benefit of counsel may not be deprived of his liberty.). Member countries of the European Community are bound by the European Convention for the Protection of Human Rights and Fundamental Freedoms which provides for legal representation in these terms((246) Art.6(3)):

"Everyone charged with a criminal offence has the
following minimum rights:
...
(c) to defend himself in person or through legal assistance
of his own choosing or, if he has not sufficient means to
pay for legal assitance, to be given it free when the
interests of justice so require".

In England, a member country of the European Community, a statutory scheme provides for representation at public expense((247) Under the Legal Aid Act 1988 (U.K.) legal representation may be granted to a person who meets the financial requirements where the court to which the application is made considers it to be desirable in the interests of justice. The Act specifies factors which are to be taken into account in making this determination and they include the likelihood of the deprivation of liberty or damage to livelihood or reputation of the accused. In some cases (such as murder trials) representation must be granted.). And the countries which are parties to the International Covenant on Civil and Political Rights - and they include Australia - have assumed an obligation as specified in Article 14(3)(d), which is as follows:

"In the determination of any criminal charge against
him, everyone shall be entitled to the following minimum
guarantees, in full equality:
...
(d) ... to have legal assistance assigned to him, in any
case where the interests of justice so require".

28. Quite apart from the three matters to which I have already referred, the decision in McInnis is comparable with the decisions that were overruled in John v. Federal Commissioner of Taxation((248) [1989] HCA 5; (1989) 166 CLR 417). In that case, there were several features of the overruled decisions which also attend the decision in McInnis, including that "the earlier decisions did not rest upon a principle carefully worked out in a significant succession of cases", that "the earlier decisions had achieved no useful result but on the contrary had led to considerable inconvenience" and that "the earlier decisions had not been independently acted on in a manner which militated against reconsideration"((249) ibid., at pp 438-439).

29. One other factor was present in John v. Federal Commissioner of Taxation, namely, that "there was a division of opinion among the justices of the Court constituting the majority" in one of the earlier decisions((250) ibid., at p 440). As earlier indicated, in McInnis Barwick C.J. was not persuaded that the trial judge erred in refusing an adjournment to enable the accused to seek legal representation. However, Mason J., who agreed with Barwick C.J. that special leave to appeal should be refused, was of the view that "the adjournment should have been granted" and "the (accused) should not have been forced on with very little opportunity given to him to prepare personally the conduct of his defence".((251) (1979) 143 CLR, at p 582)

30. The difference in approach in the majority judgments in McInnis and the other factors to which I have referred combine, in my view, to require that, to the extent that it is authority for the proposition that legal representation is not essential for the fair trial of a serious offence, McInnis should no longer be followed. Instead, legal representation should be seen as essential for the fair trial of serious offences unless the accused chooses to represent himself.

31. This application raises a further question as to the nature of the enquiry to be undertaken in an appeal based on a decision requiring an accused to stand trial notwithstanding that, contrary to his wishes, he is unrepresented. Mr Dietrich's appeal to the Full Court was, by force of s.79 of the Judiciary Act, governed by s.568(1) of the Crimes Act 1958 (Vic.). That sub-section provides:

"The Full Court on any such appeal against conviction shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice and in any other case shall dismiss the appeal:
Provided that the Full Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

32. Once it is accepted that legal representation is essential for the fair trial of serious offences, it follows that the trial judge was in error in allowing the trial of Mr Dietrich to proceed. What makes a trial without representation unfair is the possibility that representation might affect the outcome of the case. That same matter reveals the nature of the error involved in this case and the consequence of that error. If an accused who is forced to represent himself is convicted, the prima facie position is that, had he been represented, he might have been acquitted. In other words, the prima facie position is that the accused has "lost a chance which was fairly open to him of being acquitted"((252) Mraz v. The Queen [1955] HCA 59; (1955) 93 CLR 493, per Fullagar J. at p 514.) and that, in terms of the proviso to s.568(1) of the Crimes Act, there has been a "substantial miscarriage of justice".

33. As a general rule, little is to be gained by approaching a proviso of the kind found in the common criminal appeal provisions on the basis that one side or the other bears a persuasive burden as to some or all of the matters in issue. A persuasive burden is one that arises, if at all, from the

nature of the error or the nature of the particular case. A burden of that kind has been recognized in cases involving a misdirection of law so that, generally, it is for the prosecution to establish that, even if there had been no misdirection, the jury would have come to the same conclusion((253) Quartermaine v. The Queen [1980] HCA 29; (1980) 143 CLR 595, at pp 600-601. See also Wilde v. The Queen [1988] HCA 6; (1988) 164 CLR 365.). And, where the prima facie position is that, had the accused been represented, a different result might have been achieved, it must also be the case that, generally, it is for the prosecution to establish that, even with representation, conviction would have been inevitable.

34. An approach which would generally require the prosecution to show that, even with legal representation, conviction would have been inevitable may not accord exactly with the approach taken in McInnis. In that case, counsel for the applicant conceded that "he had to show something more than that the adjournment was wrongly refused"((254) (1979) 143 CLR, at p 582) in order to bring himself within s.689(1) of the Criminal Code (W.A.), which, for all practical purposes, is the same as s.568(1) of the Crimes Act. That concession may have been made by reason that much of the evidence at the trial, which was for rape and related offences, was uncontested and the substantial issue was whether it resulted from the matters alleged by the prosecution or from earlier consensual intercourse. Whatever the basis of the concession, it is clear that, as a general rule, where the accused has not been legally represented, the starting point on appeal must be that representation might have made a difference to the outcome of the case.

35. The present case is not one in which it can be said that the conviction sustained by Mr Dietrich was inevitable. The charges against him related to three quantities of heroin, one located in a condom in a kitchen tidy, one in a plastic bag in a study and the other, also in a condom, found in Pentridge prison. The primary case against Mr Dietrich was that he imported the heroin found in the condoms. As an alternative to this case were two separate charges of possession of the heroin found in the condoms in the kitchen and the prison, respectively. The final charge was possession of the heroin found in the study.

36. The prosecution case was undoubtedly a strong one, but it was not without its difficulties. Proof of importation depended largely on an inference to that effect being drawn from other evidence, including the finding of heroin in the condoms in the kitchen tidy and at Pentridge prison. If the jury were not satisfied as to possession of one or other of those lots of heroin, it could not be satisfied as to importation. And, if it were not satisfied as to possession of one or other of the lots, that might bear on its finding as to possession of the other, particularly as the defence case was that all three lots of heroin had been "planted" on the accused. It seems that the jury may have had some difficulty in accepting the prosecution case with respect to the heroin in the kitchen tidy, for clarification was sought with respect to the importation charge in these terms:

"We want it clarified in regard to if, say, for instance,
that we maybe do not agree, or could not reach a verdict,
in regard to the condom found at the flat, but we did agree
on what was found at the prison, does that still class it as
importation or must it be on both."

Given the doubt with respect to the heroin in the kitchen tidy that is implicit in that request for clarification, and given that the jury rejected the prosecution case with respect to the heroin found in the study, it cannot be said that conviction with respect to the heroin found in Pentridge prison was inevitable, whether on a charge of importation or of possession.

37. One other matter should be noted. This case is one in which the accused was unrepresented because he lacked means to provide for his defence and because he was refused legal aid. It is not a case where the decision of the trial judge denied the accused an opportunity to obtain legal representation or, for that matter, to apply for legal aid. In a case involving the denial of an opportunity to obtain legal representation, whether through a legal aid scheme or privately, there would be a denial of the right to trial with representation. Like Dawson J., I am of the view that a denial of that kind would result in the trial being fundamentally flawed so that, without further enquiry, a conviction entered against the accused would have to be set aside. The present case is not a case of that kind. It is a case to be determined by application of s.568(1) of the Crimes Act.

38. The application for special leave to appeal should be granted. The appeal should be allowed and the conviction set aside. A new trial may be had if Mr Dietrich is able to obtain legal representation.

ORDER

Application for special leave to appeal granted.

Appeal allowed.

Set aside the order of the Court of Criminal Appeal of Victoria. In lieu thereof:

(i) allow the application to that Court for leave to appeal
against conviction;
(ii) allow that appeal;
(iii) quash the conviction; and
(iv) order that there be a new trial.

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