HIGH COURT OF AUSTRALIA

Public Information Officer

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THE QUEEN v RICHARD BRUCE CORNWELL (two matters)
RICHARD BRUCE CORNWELL v THE QUEEN

An alleged drug trafficker was unable to take advantage of protection against self-incrimination but should nonetheless have his application for an acquittal reconsidered by the Court of Criminal Appeal, the High Court of Australia held today.

Mr Cornwell was charged with conspiracy to import 120kg of cocaine. His first trial, in the New South Wales Supreme Court before Justice Rod Howie, resulted in a hung jury. At the second trial, conducted in the NSW District Court by Judge Anthony Blackmore, Mr Cornwell was convicted on 8 June 2004 and sentenced to 24 years' jail with a non-parole period of 14 years and six months.

In the first trial, Justice Howie admitted into evidence bugged conversations between Mr Cornwell and two other defendants, Juan Diez and John Lawrence, on the basis that the three were involved in supplying drugs to buyers in Australia and that this was highly probative of their participation in the conspiracy. Mr Cornwell sought a certificate against self-incrimination under section 128 of the NSW *Evidence Act* as he wished to object to testifying about the Diez-Lawrence conversations. Justice Howie said he would grant the certificate under section 128(6) after Mr Cornwell answered questions about the drug trade, meaning that that evidence could not be used against him. As it happened the certificate was not actually issued. This was not discovered until the second trial when the Director of Public Prosecutions asked to have Mr Cornwell's testimony at the first trial admitted. Justice Howie then issued a certificate after application by Mr Cornwell and the Crown appealed. Justice Blackmore held that the Diez-Lawrence conversations went to a fact in issue so section 128(8) precluded Mr Cornwell from relying on the certificate to prevent his evidence from the first trial being tendered. Mr Cornwell did not give evidence at the second trial. He successfully appealed against conviction to the NSW Court of Criminal Appeal (CCA) which ordered a retrial. The Crown appealed this decision to the High Court. It also appealed against the CCA's refusal to allow an appeal against Justice Howie's grant of the certificate. Mr Cornwell also sought special leave to cross-appeal against the CCA's order for a new trial instead of an acquittal. This application was argued as on appeal with the two Crown appeals.

The High Court, by a 4-1 majority, allowed the Crown appeal in relation to section 128(8), unanimously dismissed the appeal against Mr Cornwell's conviction being overturned, and unanimously granted his application for special leave to cross-appeal and allowed the cross-appeal. The Court held that if section 128(8) was the controversial issue, it would have been appropriate to reinstate Mr Cornwell's conviction, but four grounds of appeal to the CCA were not dealt with and one ground – that the verdict was unreasonable and not be supported by the evidence – was not fully explored and must be remitted for reconsideration by the CCA. The Court held that section 128 did not apply because Mr Cornwell's testimony at the first trial about drug dealing was that he did an act which was a fact in issue or had a state of mind which was a fact in issue. Section 128 could not apply to Mr Cornwell about the Diez-Lawrence conversations. Justice Howie had erred in granting the certificate. The Court held that the first and second trials formed one proceeding – the prosecution of Mr Cornwell – so his testimony at the first trial was admissible at the second. Section 128 does not ensure that evidence received at a trial cannot be used at a retrial on the same charge. Judge Blackmore was not bound by Justice Howie's rulings on section 128 and had the discretion to receive the evidence at the second trial.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*

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