



## HIGH COURT OF AUSTRALIA

Public Information Officer

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RAFAEL CESAN v THE QUEEN  
RUBEN MAS RIVADAVIA v THE QUEEN

On 3 September 2008 the High Court of Australia allowed appeals by two men who had been convicted, in the New South Wales District Court, in June 2004 of conspiracy to import a commercial quantity of ecstasy into Australia. Rafael Cesan and Ruben Mas Rivadavia had been sentenced in March 2005, Mr Cesan to 13 years and six months' imprisonment and Mr Mas Rivadavia to 11 years' imprisonment. The High Court allowed the men's appeals because the trial judge, who had repeatedly fallen asleep during their trial, did not exercise the supervision of the trial required by law. The jury had become distracted and a substantial miscarriage of justice resulted. The Court ordered new trials.

Today the High Court published its reasons for allowing the appeals.

Mr Cesan and Mr Mas Rivadavia were convicted after a 17-day trial. In 2007 they appealed to the New South Wales Court of Criminal Appeal (CCA) against their convictions and sentences, complaining that the trial judge had been asleep when evidence was being given. The CCA received evidence from friends and relatives as well as from Mr Cesan and Mr Mas Rivadavia themselves describing what occurred at the trial. They described episodes of up to 20 minutes' sleep, sometimes accompanied by snoring. Periods of sleep became longer as the trial went on. Members of the jury were visibly detracted and, at times, amused. Mr Cesan said the judge's snoring was disruptive when he was being cross-examined. Prosecutor Geoffrey Bellew SC also swore an affidavit referring to occasions in which the judge appeared to be asleep. Medical evidence showed the judge had been suffering from severe obstructive sleep apnoea. The CCA, by majority, dismissed the appeals on the basis that the judge's conduct did not result in any demonstrated error, omission or misdirection. No complaint had been made at trial about the judge's sleep episodes.

Mr Cesan and Mr Mas Rivadavia appealed to the High Court on a number of grounds including the contention that there had been a miscarriage of justice and no trial by jury as required by section 80 of the Constitution in relation to indictable offences against laws of the Commonwealth. The Court confined argument initially to the question whether there had been a miscarriage of justice. At the end of that argument, on 3 September 2008, the High Court allowed the appeals, set aside the convictions and ordered retrials.

The Court unanimously held that the trial judge had a duty to supervise and control the conduct of the trial. Because the judge was noticeably and repeatedly asleep or inattentive the trial was flawed to such an extent that there was a miscarriage of justice. The CCA could not conclude from the trial transcript alone that each of the accused was guilty beyond reasonable doubt. The High Court held that it could not be said that no substantial miscarriage of justice actually occurred, because the members of the jury were prevented from paying full attention to the evidence and therefore unable to perform their task properly.

- *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.*