

[COURT OF CRIMINAL APPEAL, NEW SOUTH WALES]

TIMOTHY EDWARD ANDERSON

Gleeson CJ, Finlay J and Slattery AJ

13-17 May, 6 June 1991

Evidence — Discredited accomplice evidence — Crown's substitute hypothesis — Whether hypothesis open — Whether unfairness in putting to jury — Crown failure to recall witness.

Verdict — Whether unsafe and unsatisfactory when reasonable evidence of guilt — Unsatisfactory elements of trial — Misdirection as additional factor — Retrial militations.

Following a lengthy trial, the appellant, as an accessory before the fact, was convicted on three charges of murder. The charges arose out of a notorious occurrence known as "the Hilton bombing" in 1978 during a Commonwealth conference at the hotel. Three people were killed when a bomb, alleged to be targeted for the Indian Prime Minister, exploded in a rubbish bin. The Crown case depended mainly on the evidence of a convicted accomplice, P, who, on a key aspect of the case, was shown to be unreliable. The Prosecutor in his final address advanced a new theory said to explain the accomplice's error. The defence submitted that this theory was not reasonably open on the evidence. Thus the Crown should not have been permitted to put it to the jury, or in particular to invoke the theory to restore the accomplice's credibility. Further, in view of the Crown's failure to question P about the theory, there was serious unfairness in permitting it to go to the jury. The second ground alleged that the verdict was unsafe and unsatisfactory based as it was on the accomplice evidence allegedly corroborated by D a notorious criminal. It was further submitted that the judge's direction on P's sanity was in error.

Held (allowing the appeal): (1) (per Gleeson CJ) Once it was accepted that P's recollection of events was mistaken there were no limits to the nature of the mistakes he might have made except such as are imposed by incontrovertible facts and circumstances.

(2) The theory was not supported by any evidence and should not have been allowed to be put to the jury. It was unfair to allow the Crown to promote it without recalling P and re-opening his evidence in chief. It was not enough to say that the defence counsel could cross-examine him further if they wished. The Crown was given an unfair opportunity to put to the jury that a major weakness in its case was much less serious than it was.

(3) The court must make its own evaluation of the evidence in considering whether the verdicts were unsafe or unsatisfactory. Despite the accomplice's discredited evidence; the lack of weight in D's evidence and reliance on lies as corroboration it was reasonably open to the jury to decide that appellant was guilty.

(4) However, a court may treat a verdict as unsafe, even if it was reasonably open to the jury to convict, if some failure has occurred in observing conditions which are essential to a satisfactory trial. The inherent strength or weakness of the Crown case may be relevant. The Crown case was not strong, and it was

permitted to unfairly resolve its difficulty by resort to submissions that should not have been put and were not reasonably open on the evidence.

Davies and Cody (1937) 57 CLR 170 at 180; *Carr* (1988) 165 CLR 314; 35 A Crim R 387, followed.

(5) The direction relating to P's sanity would not alone constitute a reason for quashing the conviction, but was significant when combined with the other factors. The meaning of the instruction that the law presumed P to be sane was unclear. Further, the law makes no general presumption of that kind.

Falconer (1990) 171 CLR 30 at 61; 50 A Crim R 244 at 266, considered.

(6) The trial miscarried because of a prosecution error. This was compounded by the Crown's unfair attempt to persuade the jury to draw inferences that were not properly open. The Crown should not be given a further opportunity to patch up its case and no new trial should be ordered.

Reid [1980] AC 343 at 351; *DPP v Fowler* (1984) 154 CLR 627, considered.

APPEAL

I M Barker QC and T Molomby, for the appellant.

M A G Tedeschi QC, for the Crown.

Cur adv vult

6 June 1991

GLEESON CJ. In October 1990, following a trial before Grove J and a jury which lasted for more than two months, the appellant was convicted on three charges of murder. He appeals against those convictions. The charges arose out of an occurrence known as "the Hilton bombing", which took place in early 1978. Some months before the trial of the appellant a man named Evan Pederick had been convicted of the same murders. The Crown case against the appellant, which was based in large part upon the evidence of Pederick, was that the murders were actually committed by Pederick but that the appellant was involved as an accessory before the fact.

The atrocity

In the early hours of Monday, 13 February 1978 workers employed by the Sydney City Council emptied a garbage bin which was located near the George Street entrance to the Hilton Hotel in Sydney. The exterior of the bin was a fixed object, but within it was a removable container. As the workers emptied the container into a truck there was an explosion. Two council workers and a policeman were killed. They are the persons referred to as the victims in the three murder charges.

The Crown case was that a bomb had been planted in the garbage bin. At the time a meeting of Commonwealth Heads of Government was being held in Sydney, and many of the principal visitors were staying at the Hilton Hotel. Those visitors included the Prime Minister of India, Mr Moraji Desai, who had arrived at the hotel on Sunday, 12 February 1978. The Crown alleged that the bomb had been placed in the garbage bin by Pederick, for the purpose of assassinating Mr Desai, and that Pederick had done this at the instigation, and with the active assistance, of the appellant. In February 1978 both Pederick and the appellant were members of an organisation known as Ananda Marga. This was a religious movement based in India. The

founder and leader of the movement was an Indian man known to his followers as “Baba”. At least some members of Ananda Marga believed that Baba was the physical embodiment of God. Baba had been imprisoned in India, and during 1977 and early 1978 members of Ananda Marga in Australia were involved in a campaign to secure his release. The Crown alleged that the intended murder of Mr Desai was for the purpose of demonstrating to the Government of India the strength of the campaign, and thereby securing Baba’s release. A consideration of some of the features of the assassination proposal might be thought to lead to a conclusion that this was not a very realistic expectation, but the Crown argued that the persons involved in the plot were not very realistic people.

The appellant as a suspect

Members of Ananda Marga were under surveillance by security authorities, and from the outset the appellant was suspected of complicity in the planting of the bomb near the Hilton Hotel. However, it seems that for many years the prosecuting authorities considered that they did not have sufficient material to charge the appellant.

So far as appears from the evidence at the trial, the principal reasons why the appellant was a suspect were as follows.

First, having regard to the activities that were going on at the Hilton Hotel over the days in question, and to the identity of some of the guests who were staying there, the planting of a bomb near the hotel had the appearance of an act of terrorism. Ananda Marga were considered to be potential terrorists, and the appellant was a very active member of the organisation in Sydney. He went by the Sanskrit name of Govinda, and was prominent in the organisation’s public relations activities. He had visited Baba in India and was in the forefront of the campaign for Baba’s release. This had brought him into conflict with the Indian Government, and with Mr Desai.

Shortly after the bombing, which was followed by widespread publicity, a taxi driver named Mr Trotter told police that, in the early hours of the morning of 12 February 1978, he had seen the appellant in the vicinity of the Hilton Hotel acting in a manner which could have been regarded as suspicious. The appellant was personally known to Mr Trotter. Mr Trotter said that at about 1 am on Sunday, 12 February, whilst driving in his taxi along George Street not far from the Hilton Hotel, he saw the appellant in the driver’s seat of another taxi displaying a “not for hire” sign. (The appellant held a licence to drive taxis.) He also saw another man, who was apparently a passenger in the appellant’s taxi, standing outside the passenger’s door and looking down towards the Hilton Hotel. Mr Trotter recognised the appellant, and remarked to his own passenger that the driver of the taxi in question was a prominent member of Ananda Marga. Mr Trotter’s passenger confirmed the fact that Mr Trotter had made such a remark to him.

Although there was dispute about this evidence, a police officer, Detective Jackson, said that when he was making inquiries about the matter he asked the appellant whether he had been in the vicinity of the Hilton Hotel at the time mentioned by Mr Trotter, and the appellant denied it. (At the trial the appellant did not dispute that he was driving on the evening in question and

could have been seen by Mr Trotter, but he disputed that he had made the denial alleged by Detective Jackson.)

The material referred to above was not sufficient to justify prosecution of the appellant, and no proceedings were taken against him for more than 10 years after the event.

The arrest and charging of the appellant

During the years following 1978 the appellant spent a substantial amount of time in prison as a result of having been charged with and convicted of involvement in certain offences also alleged to have arisen out of Ananda Marga activities. He was ultimately pardoned. It is unnecessary to go into the details. The matter is only relevant because it explains how the appellant came to be in prison.

During 1989 a notorious prisoner named Raymond Denning informed the New South Wales Police that he made the acquaintance of the appellant in prison, and that on certain occasions the appellant had made statements to him which amounted to, or were capable of being regarded as, admissions of complicity in the Hilton bombing. Denning is a person with an extremely bad criminal history. Furthermore, the statements he attributed to the appellant were far from specific, and were allegedly made in circumstances that might be thought to cast some doubt upon Denning's veracity. Further reference to these matters will be made below. Nevertheless, so far as appears from the evidence, on the strength of what Denning told the police, coupled with the material previously available to them and referred to above, the authorities arrested the appellant and charged him with the murders.

It seems fair to comment that a prosecution case based upon the material so far mentioned might be thought to have been fragile. However, following the publicity which resulted from the appellant's arrest, a remarkable event occurred. Pederick, who had long since left Ananda Marga, and was living, in Queensland, the life of a respectable public servant and family man, gave himself up to the Queensland Police and told them that he was the Hilton bomber.

A great deal was made at the trial of significant differences between the account which Pederick initially gave the Queensland Police of the events of 12 and 13 February 1978, and his ultimate evidence. It is not necessary to go into the full detail of these discrepancies. It would be possible to account for at least some of them by reference to the time that had elapsed since the bombing and by the understandable need, on the part of Pederick, to go over the detail of what had happened in the light of other information against which he might wish to check his recollection. Nevertheless, there was one major difference between what Pederick told the police and the evidence as it emerged at his trial, and this constituted a difficulty for the Crown case from beginning to end.

The essence of the story that Pederick told the police was as follows. He said that in 1977 when he was aged 22, he dropped out of university. He was born in Western Australia and had a conservative upbringing. His father was a minister of religion. He had gone to the University of Western Australia where he had enrolled in the Faculty of Science and his academic progress had been good. (Although we have not had an opportunity to see Pederick, a reading of the transcript of his evidence at the trial suggests that he was an

intelligent and articulate witness.) An incident, the detail of which does not matter, occurred which led him to question his values and to look for a new way of life. He travelled in Asia, and then went to live successively in Adelaide and Hobart. In Hobart he became interested in meditation and eastern philosophies. There he took up with Ananda Marga. He joined the organisation and was given the Sanskrit name of "Om Prakash". The Ananda Marga religion became a central part of his life. He came to Sydney where he took further instruction in the course of which he was told of the importance of the campaign to release Baba. He attended meetings or lectures at which the appellant pursued this theme. Ultimately he was posted to Ananda Marga in Brisbane. (It seems that he may have been the only full-time Queensland member of Ananda Marga.) Whilst there he was involved in street marches and campaigns for the release of Baba. He became engaged to a young woman named Carmel Cross who shared his interests. In January 1978 Pederick and Ms Cross attended an Ananda Marga retreat near Galston, just north of Sydney. The appellant was also there, and during the retreat the appellant approached Pederick and persuaded him to become involved in a plot to kill the Indian Prime Minister, Mr Desai, during the course of Mr Desai's forthcoming trip to Sydney. The appellant also told Pederick to postpone his marriage to Ms Cross. He discussed with Pederick details of the method by which the proposed assassination was to take place.

Pederick told the police, and also said in his evidence at the trial, that it was put to him from the outset that the means by which the Prime Minister should be assassinated was to be an explosive device to be used to kill him as he was arriving at the Hilton Hotel.

Pederick gave the police, first in Queensland and later in New South Wales, a detailed account of his movements over the period between the time of the retreat and the date of the bombing. It will be necessary to go into further detail about that information, and some changes in it, in due course. He told the police that he obtained gelignite from the appellant, he equipped himself with, and tested, an explosive device, and he purchased a disguise. He said that late on the evening of Saturday, 11 February 1978, and in the early hours of Sunday, 12 February 1978, he drove around the area of the Hilton Hotel with the appellant in the appellant's taxi, and that in the early hours of the morning of Sunday, 12 February he placed a quantity of gelignite in the garbage bin that was the scene of the ultimate explosion. Then, later on Sunday, 12 February, he planted a detonator in the bin and took up a position on the western side of George Street opposite the Hilton Hotel awaiting the arrival of Mr Desai. Then, so he told police, at about 3 pm on the Sunday afternoon, Mr Desai arrived and, like other visiting dignitaries, was greeted at the George Street entrance of the Hilton Hotel by the Prime Minister of Australia, Mr Fraser, and Mrs Fraser. There was a substantial crowd of people in the area. Pederick said that at that stage he attempted to use a remote control device in order to explode the bomb in the garbage bin. If the bomb had exploded at that stage there would have been carnage. On Pederick's account, not only Mr Desai, but also Mr and Mrs Fraser, other Australian Ministers, and a large number of innocent bystanders would probably have been killed. Nothing happened. The Crown called evidence at the trial to prove that the metal lining of the bin would have intercepted communication between Pederick's device and that which

was in the bin and prevented the explosion taking place. Pederick, however, told police that at the time he attributed the failure of the bomb to explode to supernatural intervention by Baba. He became upset to the point of hysteria and left the scene. He travelled north from Sydney, hitchhiking, and after a few hours arrived at a place on the mid-north coast. He spent the night in a paddock. He later travelled on to Brisbane. The next day he learned of the explosion and of the death of the council workers. This event, and his participation in it, weighed upon his conscience and tortured him for years. After he read of the arrest and charging of the appellant he came forward to give himself up as an act of expiation.

From an early stage it became apparent to the police that there was at least one major problem about Pederick's story. Prime Minister Desai did not arrive at the George Street entrance of the Hilton Hotel. A central feature of Pederick's account of the events of 12 February 1978 could not possibly have been true.

Pederick maintained all along that he and the appellant had selected the arrival of the Indian Prime Minister as the appropriate time for the assassination attempt. Furthermore, both in his statement to the police, and in his evidence at the trial, he went into considerable circumstantial detail about what he described as "the scene of greeting" which was taking place at the time he attempted to explode the bomb that he placed in the garbage bin. He described dignitaries waiting to greet Mr Desai, the Prime Minister of Australia coming forward to shake his hand, and Mr Fraser and others, with considerable ceremony, leading Mr Desai into the Hilton Hotel.

The truth of the matter, as the police knew, was that Mr Desai had arrived at the Hilton Hotel on Sunday, 12 February 1978, not at the George Street entrance, but at the Pitt Street entrance. The Hilton Hotel in Sydney has two main entrances. The entrance at Pitt Street is located alongside a vehicular ramp, and is just as frequently used as the George Street entrance. The reason why it was decided that Mr Desai should arrive at the Pitt Street entrance may have been related to the activities of demonstrators that had been going on in George Street. However that may be, it was indisputably the fact that Pederick's account of what happened was, in this very significant respect, plainly incorrect.

There were a number of other respects in which some matters of important detail told to the police by Pederick were also difficult to reconcile with objective facts. For example, he originally told the police that he put 50 sticks of gelignite in the garbage bin. The police pointed out to him that 50 sticks of gelignite would not fit into the garbage bin, and he seems to have come under some pressure to alter the number 50 to 15. He ultimately settled on an intermediate figure. Again, he originally said he put the gelignite in the bin at about 6 pm on the Saturday, not 1 am on the Sunday. This did not fit in with the information Mr Trotter had given the police, and it also would have produced the odd result that, according to the council's cleaning schedule, the bin would have been highly likely to have been cleared before Mr Desai was due to arrive. After speaking further to the police Pederick put the time forward to about 1 am on the Sunday.

The police looked for an alternative theory as a means of reconciling what Pederick believed he recollected with the objective facts as to Mr Desai's arrival. In the event, they came up with a theory which turned out itself also

to be hopeless. That, however, did not become apparent until well into the trial. It seems to be a theory to which Pederick himself only gave somewhat guarded acceptance. It was as follows. Having considered the various possibilities, the police evidently persuaded themselves that Pederick had mistaken, for Prime Minister Desai, a man who was actually the President of Sri Lanka, President Jayawardene. Both men wore similar white clothing, and both might be thought to have looked Indian, although President Jayawardene seems to be considerably taller than Prime Minister Desai. Photographs of the arrival of President Jayawardene showed that he had arrived, and been greeted by Prime Minister Fraser, at the George Street entrance to the hotel. However, unlike Prime Minister Desai, he was not wearing a white cap, and Pederick said all along that the person he had seen and attempted to kill was, he believed, wearing a white cap. The fact that President Jayawardene arrived at the George Street entrance, and was formally greeted by Prime Minister Fraser, was apparently relied upon by the Crown for the conclusion that what Pederick was saying was generally correct, but that he had made the pardonable mistake of thinking that the President of Sri Lanka was the Prime Minister of India. The truth, as it turned out, was that it was the police who had made a mistake, and one that was much less pardonable than that attributed to Pederick. They had not adequately checked the time at which President Jayawardene had arrived at the George Street entrance to the Hilton Hotel. The evidence that was ultimately produced at the trial clearly established that President Jayawardene had arrived at the Hilton Hotel early in the morning of Sunday, 12 February 1978, many hours before Pederick had said he attempted to explode the bomb. It is the attempt made by the Crown, in the running, at the trial, to recover from this blow to its case that gives rise to one of the principal grounds of appeal.

The Crown case at the trial

The Crown Prosecutor opened to the jury on the basis of the Jayawardene theory. He told the jury that the Crown case was that an agreement had been made between the appellant and Pederick that Pederick would plant a bomb in a garbage bin near the George Street entrance of the Hilton Hotel, at which Prime Minister Desai was expected to arrive on the Sunday afternoon, and he would detonate the bomb as Prime Minister Desai arrived. However, the Prosecutor said, the evidence would indicate that, whilst Pederick believed he was attempting to kill Prime Minister Desai, he had evidently mistaken the Sri Lankan President for the Indian Prime Minister, and the person he was in fact attempting to kill in the course of his arrival at the George Street entrance of the hotel was President Jayawardene. Subject to that significant, but understandable, qualification, the Crown would invite the jury to accept Pederick as a witness of truth.

The Crown accepted that Pederick was an accomplice of the appellant, and the consequent importance of finding corroboration for Pederick's evidence. The principal sources of corroboration were said to be the evidence of Denning as to the admissions made to him in prison by the appellant, the evidence of Mr Trotter and his passenger concerning the sighting of the appellant and a man who could have been Pederick near the Hilton Hotel in the early hours of the morning of Sunday, 12 February 1978

(which was generally consistent with Pederick's evidence at the trial), and the lies about that matter allegedly told by the appellant to Detective Jackson. In addition to evidence that was technically corroborative of Pederick, the Crown also relied upon what it said was a substantial body of material confirmatory of Pederick's evidence. Further reference to that material will be made in the course of considering an argument that the verdicts of the jury were unsafe and unsatisfactory. For present purposes it is sufficient to note that in a number of respects where the objective facts are capable of being tested, they are consistent with Pederick's account of events. To take one example, Pederick had said all along that, while he was waiting for the arrival of the Indian Prime Minister, to his consternation a man came and sat on the garbage bin in question for a lengthy period. A witness was called at the trial who gave evidence that he sat on the bin. Again, Pederick said that, during the retreat at Galston, whilst he and the appellant were discussing the assassination plans, it was arranged that Pederick would obtain a false passport. The evidence showed that Pederick did, at about that time, obtain a false passport in the name of Peter Low, and Pederick said that he wrote the name of Peter Low and a postal address in an address book belonging to the appellant because the appellant had said he wanted to know what the false name was in case he wanted to contact Pederick. The evidence showed that the appellant's address book did have in it, in Pederick's handwriting, the name of Peter Low and a postal address. (Oddly, the address was one which Pederick said was not then used by him.) Again, Pederick gave an account of disposing of some of his explosive materials by putting them in a locker at the University of New South Wales, and materials consistent with what he spoke about, some of which were wrapped in a newspaper published 11 February 1978, had been found in a locker room at the University of New South Wales. These and other matters were relied upon by the Crown to support Pederick.

Pederick gave the whole of his evidence at the trial upon the basis of the Jayawardene theory. He made it clear that he had believed that the person arriving at the hotel was Prime Minister Desai. He also maintained that he thought that the person was wearing a white cap. Subject to that, he was prepared to accept that he could have been mistaken, and that the person arriving could have been the Sri Lankan President.

It is important to note the detail which he gave of the events that occurred at the time he attempted to explode the bomb. His evidence in chief was as follows:

"Q. At some stage after you returned in the afternoon did you see a dignitary driving? A. Yes

Q. And are you able to say, to give your best estimate when it was this dignitary arrived? A. Well I remember it was between 2 and 3 and my estimate, that it would be probably during the early half of that hour because it was not a long time after I arrived. I would say it would be within an hour of when I arrived, so would say probably somewhere between 2 and half past.

Q. And who did you think that dignitary was? A. I recognised that person as Desai.

Q. As Moraji Desai? A. I thought it was Moraji Desai.

Q. And this was at the George St entrance of the Hilton Hotel? A. Yes.

Q. Now, had you seen Moraji Desai previously? A. No.

Q. How was it that you identified this man as Moraji Desai? A. I had seen a number of newspaper quality photographs of him.

Q. Would you have a look at the third page of exhibit M which has got some photographs on it [shown]. You see the photographs there? A. Yes.

Q. Of various Prime Ministers and presidents? A. Yes.

Q. Is that the kind of quality of photograph in a newspaper that you are referring to that you had seen Mr Desai in? A. Yes, of course the photocopy is a bit lower quality than the newspaper itself. That is the sort of photograph.

Q. Was it on the basis of that sort of photograph that you identified the man, between 2 and 3 o'clock as, who you thought was Moraji Desai? A. Yes.

Q. What did this man do and what did you do and where were you? A. When the limousine in which he was travelling arrived in front of the Hilton I was, so far as I can recall, directly opposite the rubbish bin in George St.

Q. Sorry, if I can ask you to pause there, if I can ask you another question about this man. How was he dressed? A. All in white. He had I think a dhoti, that is a Indian skirt like dress men wear, of white material and a white shirt, Indian style shirt and I also recall him as wearing a cap, a white cap.

Q. Was there anything else about him, his skin colour? A. His skin colour was brown, he looked an Indian man. As I say I thought I was looking at Moraji Desai, I recognised him as Moraji Desai.

Q. Would you go on tell us about what he did and what you did? A. So the limousine pulled up and the location of the car when it pulled up was I think about four or five metres north of the bin. So, you have the rubbish bin and then two or three metres, or two metres north west of the escalator and about another two metres or so north of that where the car pulled up. The Australian officials went forward to the car and opened the door.

Q. Did you recognise any of them? A. Yes. I recognised Malcolm Fraser. I think his wife was there also but I was looking mainly at Mr Fraser at that point and of course with him with other Australian officials that I did not recognise.

The back door of the limousine was opened and this man stepped out. As he stepped out of the car he was initially faced away from me so that I saw not a back view but a maybe a quarter of his face, because I was a little bit south of him. I should say before he turned away for a moment, as he alighted I saw I suppose a side on view, then he turned away so that I could only see a quarter view of his face. He was then greeted by Malcolm Fraser with a hand shake and walked in towards the hotel.

Q. Now, what did you do? A. Then, almost immediately once he had alighted from the car, I recognised him or believed I recognised him

and I reached into the airline bag and I moved the left hand toggle of my transmitting device. There was no explosion.

Q. Was that in an attempt to detonate the bomb? A. Yes it was. There was no explosion and with a vague sort of feeling of maybe I had got the wrong toggle switch, I then moved the other toggle switch even though I knew full well that the left hand toggle switch connected. Nothing happened. Again I moved the right hand toggle switch and I moved the left hand toggle switch again.

Q. And again nothing happened? A. And again nothing happened.

Q. Having failed to activate the bomb, what was your state of mind? A. At that point my state of mind I recall as being one of panic, one of panic, one of hysteria.

Q. Are you able to estimate how many people there were in the area, apart from this man you thought was Moraji Desai, and Mr Fraser and possibly Mrs Fraser? A. As I testified a few minutes ago, somewhere between 100 and 200 people. I didn't try to count them but there was quite a number.

Q. Why did you think then the bomb had not gone off? A. At that stage I thought it was because of the intervention of my guru.

Q. Baba? A. Yes.

Q. Can you elaborate on that? A. Yes. Baba, as I have testified previously, to me was God at that point in my life. I felt it was not entirely outside the bounds of possibility that he could intervene, that he could determine whether something like that was going to happen or not. I felt that the fact the bomb did not explode meant Baba did not want it to explode."

Pederick had earlier said, when recounting his initial conversations with the appellant, that the plan was to assassinate Prime Minister Desai in the course of his arrival at the Hilton Hotel. In relation to those conversations he gave the following evidence:

"Q. Was there any particular discussion on this night ... about Desai or the Hilton Hotel or anything like that? A. Yes. He told me that one of my jobs would be to cover intelligence. He had already indicated to me that he thought the best point to attack the man would be one when he left from his limousine and when he goes into the Hilton."

The Crown Prosecutor, in the course of his opening address to the jury, noting the impending difficulty about this aspect of Pederick's evidence, said this:

"At three o'clock approximately a dignitary arrived. Mr Pederick was standing on the opposite side of the road outside the Queen Victoria Building. Mr Pederick thought that it was Moraji Desai. He waited until what he thought was Moraji Desai got out of the car, stepping out on to the footpath and as this man was walking on the footpath he attempted to detonate the device using the remote control device.

He put his hand into the bag. He moved the toggle switch, nothing happened. He thought to himself, 'I must have the wrong toggle switch'. He went to the other toggle switch, moved that, nothing happened. He then tried, I think he tried it a third time, tried the other one another time, nothing happened. The reason why he thought it was Mr Desai, it was a Indian looking man dressed in the way that Mr Pederick was

expecting Moraji Desai to be dressed. In fact it was not Mr Desai, it was this Sri Lankan President, Mr Jayawardene.

Had the bomb gone off not only would Jayawardene have been killed but also our own then Prime Minister, Malcolm Fraser and his wife and perhaps up to 100 other bystanders who were congregated in the area, members of the public, police officers, officials of the Hilton Hotel and the like.

Evan Pederick, having tried to activate this bomb and having failed thought to himself that the reason why the bomb had not gone off was because it was Baba's will that the bomb not go off; that he had proved his worthiness to Baba in trying to activate it but that Baba did not want those people to die. He decided that it was divine intervention by Baba that had prevented that bomb going off, that somehow miraculously Baba had prevented the bomb going off.

So far as we know, so far as we can really guess, the reason why the bomb did not go off was because the remote control receiving device was inside not only the concrete outside part of the bin but also a metal insert of the bin and the metal insert combined with the concrete outside prevented the radio waves from the transmitting device being received by the device in the bin."

Pederick was the first witness called at the trial, and his evidence extended over many days. From the line taken in cross-examination it soon became evident that the defence team had undertaken a more thorough investigation of the circumstances surrounding the arrival at the Hilton Hotel on Sunday, 12 February 1978 of President Jayawardene than had the Crown. The defence case, which turned out to be correct, was that President Jayawardene had in fact arrived at approximately 8 am on that day, and he could not have been the person seen by Pederick at the time Pederick attempted to explode the bomb that was in the garbage bin at the George Street entrance to the hotel. Nevertheless, the Crown persisted with the theory although it became progressively less plausible. We were informed by the Crown Prosecutor, and this is consistent with the way in which the evidence unfolded, that by about the 20th day of the trial it was evident to him that the theory could not be sustained, and that for a number of days thereafter he explored, in evidence, possible alternative explanations. Nevertheless, as senior counsel for the appellant pointed out in the course of argument in this appeal, some of the evidence called by the Crown thereafter is explicable only upon the basis that it still hoped, in some way, to keep the Jayawardene theory alive.

The change in the Crown case

Towards the end of the prosecution case the Crown Prosecutor began, without objection, to ask witnesses questions about, and to tender photographic and other evidence concerning, an event which occurred at the George Street entrance to the Hilton Hotel at about 5 pm on 12 February 1978. There had been a social gathering, to be attended by the various delegates to the Conference, arranged for Sunday evening at Kirribilli House, the Australian Prime Minister's Sydney residence. The evidence showed that at about 5 pm Mr Fraser left the Hilton Hotel from the George Street entrance, to attend that function, and Mr Desai left from the same

place shortly after Mr Fraser. Some amateur photographers had taken photographs of those departures, and those photographs showed, amongst other things, a small number of people standing on the western side of George Street looking across to the entrance of the Hilton Hotel. That was about where Pederick, on the Crown case, had been standing at the time he tried to explode the bomb.

It is not surprising that, at that stage of the case, there was a certain amount of tactical manoeuvring going on and, presumably, some speculation on the part of the defence as to the purpose of the evidence being tendered. The matter is complicated by the circumstance that another Crown witness, Mr Mumme, had given evidence that at about 5 pm on the evening before the explosions, which would have been the Sunday evening, he had been shopping near the Hilton Hotel and he had seen a very strange-looking man whom the Crown suggested was Pederick in disguise. There was, however, by reason of certain other evidence, a deal of confusion as to whether the Crown was suggesting that Mr Mumme was there on the Sunday evening, or the Saturday evening, when, on the Crown case, Pederick had also been in the area and in disguise.

The Crown closed its case, the appellant gave evidence and was cross-examined, and the defence called various other witnesses. By the end of the defence case it was obvious, if it had not previously been obvious, that the Jayawardene theory had been exploded.

It is recorded in the transcript that at the close of the Crown case the Crown Prosecutor asked senior counsel for the appellant whether he wanted Pederick to be recalled for further cross-examination, and that the answer was in the negative. Nothing specific was said about any proposed change in the nature of the Crown case that might lie behind this communication. In particular, nothing was said to the judge, or to the jury, or to counsel for the appellant, which foreshadowed the change about to be mentioned.

When the Crown Prosecutor commenced his final address to the jury (which, in this State, is before the closing address for the defence), he dealt at the outset with the difficulty to which reference has been made. He then acknowledged to the jury, for the first time, that the Jayawardene theory was no longer viable and, referring to the evidence in chief of Pederick, said this:

“On page 208 he is shown Exhibit O which shows the arrival of Mr Jayawardene, these photographs. It is a question by him actually.

‘Q. That is the arrival of Mr Jayawardene is it not? A. Yes.

Q. That is what you saw, you tell us on that day? A. Yes. Well, I am told I saw Mr Jayawardene I saw, yes.’

Now ladies and gentlemen, from that, in my submission, you can only conclude that the appellant and the prosecution, including myself, have led Evan Pederick to make this error.”

It is to be noted that the jury were being told, with the authority of the Crown Prosecutor, that Pederick had made an error but that it was the Crown authorities, including the Prosecutor himself, that were responsible for the error. The significance of this in relation to the jury's ultimate evaluation of Pederick's credibility is manifest. Pederick was said to have made a mistake, but it was not his fault, it was the fault of the prosecuting authorities.

Then the Crown Prosecutor informed the jury of a new theory. That theory was that, on the occasion in question, Pederick had indeed seen Mr Desai, and had acted with the intent of blowing him up, but he had seen him, not in the act of arriving at the George Street entrance to the Hilton Hotel at about 2.30 or 3 pm on Sunday, 12 February 1978 but in the act of leaving the hotel at about 5 pm on the same day.

Before coming to the detail of what ensued at the trial, it is convenient to note three aspects of this new submission. First, as the photographic and other evidence showed, there was a very significant difference between the ceremony and formality attendant upon the arrival of dignitaries at the hotel, and the relative informality of the departures of various people for Kirribilli House. Arriving dignitaries were greeted by the Australian Prime Minister and Mrs Fraser and other senior officials, and were led along a red carpet to the entrance of the hotel. Pederick, it will be recalled, had described what he called the "scene of greeting" in considerable detail. The dignitaries, however, simply departed from the hotel later in the evening, one by one, without ceremony. Secondly, the submission did not agree with Pederick's evidence as to the times at which he did various things. He said that he made his assassination attempt at about 2.30 or 3 pm and then left Sydney, hitchhiking up the Pacific Highway. He said he travelled for about four hours until nightfall and slept in a paddock, probably somewhere near Taree. If his timing were right, he must have been somewhere near Newcastle when Prime Minister Desai was leaving the Hilton Hotel. Thirdly, if Pederick had actually seen, and tried to kill, Mr Desai in the act of departing rather than arriving, it might be thought that he would have remembered this, bearing in mind that the plan was to kill him when he was arriving at the hotel. The Crown Prosecutor sought to anticipate this point by submitting that, as part of his error, Pederick actually thought the man in question was arriving, not leaving.

In his closing address the Crown Prosecutor submitted to the jury that it was open to them to find that Pederick was mistaken or confused about what had been going on when he attempted to explode the bomb, and that his evidence about times was incorrect. Certain other pieces of evidence were mentioned which might have justified a conclusion that a number of things Pederick had said as to his movements during 12 February were erroneous in point of time, perhaps even to the extent of two hours.

The Crown Prosecutor went further. He showed the jury photographs that were taken at the time of the departure of Mr Desai, including photographs taken from the eastern side of George Street near the Hilton Hotel entrance looking across to the western side of George Street, near where Pederick had said he was standing at the critical time. Some of those photographs showed the figure of a man standing behind a car. The Crown Prosecutor invited the jury to draw the inference that the man in the photograph was Pederick. One of the difficulties with this submission was that the man in the photograph had long, almost shoulder-length, hair. Pederick's evidence, which was supported by other evidence in the case, was that at the relevant time he had short hair. There was in evidence a photograph secretly taken by security authorities during the Galston retreat only a fortnight earlier, showing Pederick with short hair. The Crown Prosecutor, undeterred by this, went so far as to suggest to the jury that the way in which the man in the

photograph was standing indicated that he might have been in the very act of attempting to detonate a bomb. (From my observation of the photograph, the man looks to me as though he is leaning against a car with one hand on his hip). The Crown Prosecutor said:

"Now I will ask you in the privacy of the jury room to compare that photograph with this. You will notice a number of things. Firstly, you will notice that Evan Pederick has fairly unmuscular shoulders, he's got fairly thin shoulders, his chest is a little bigger than his shoulders and that might be why the defence were led into error into thinking that this was possibly a woman. His chest does stick out a little bit compared to his shoulders. If you look at the photograph of him at the May camp. Look at the way that he is standing. It is a very distinguished way of standing. He's got his hands by his side in that position, like this, both hands up like this. In a very very similar position to the photograph in Exhibit CD. Look at the shape of his head, look at the shape of his hair. Of course in this photograph he does have a beard because he grew his beard a little time after this. But he is fairly slight man, with very slight shoulders, and certain shaped face. Now look at Exhibit CB, sorry CA2 and compare, look at the shoulders. It is a very slight man, it's a man with very slight shoulders, it's a man whose head shape is very similar if not the same. Not the only feature that doesn't fit in is the length of the hair because Evan Pederick has told us that he had short hair. In fact if you look at the photographs that were taken of him at the January camp he does have short hair. Much shorter than the impression one gets from this photograph. Now all I can say to you ladies and gentlemen, is that if you look at one of these photographs you'd think that this man had a beard. Look at CA1 you'd think he had a beard, possibly it's just a photographic distortion of the hair. It's a matter for you. I ask you to look carefully at these photographs. In my submission you will come to the definite conclusion that it is not a woman, it is a man who is standing in a very strange pose, not hiding behind the car, but he looks almost as if he is leaning on something, or holding something and he's looking straight over towards the dignitaries, cocking his head slightly, just like Evan Pederick does in this photograph, Exhibit R1. Very distinctive sort of stance you might think.

Now the other attack that was made by the defence on these photographs is that this is a woman with a short-sleeved shirt. If you look at CA1 you can quite clearly, just there, see the bulge of a sleeve. It's much wider than the wrist, you see the wrist just above the hand, you can see a bulge there and what I would like to do is on a photocopy of CA1. I would just like to draw an arrow to where I say that bulge is so that you can, I will put an arrow on the right sleeve and you can look at the actual photograph yourself. In my submission there is definitely a sleeve there. There is also an area, ladies and gentlemen, in CA1, there's a dark area down near where the hand is. Now, you might think that it's not down the line where a man's trousers would be and it doesn't appear to be part of the car. It could be a bag. One can't say definitely that it's a bag. But it could be a bag just near where the hand is. The dark area that goes out more than what you would expect the trousers to go. The dark area just there which is not consistent with

being the line of the body it doesn't appear to be part of the car. It could be just the very very edge of the bag. It could, I'm not saying it definitely is. It could and I will draw an arrow to that as well. Now I've drawn an arrow written 'bag question mark'.

Now ladies and gentlemen as I've said to you before I can't say that it is definitely Evan Pederick but you might think there are some very notable similarities and one significant difference. Those photographs match the description which was given by Evan Pederick about the number of people on the eastern and western sides, barricades, presence of the police."

When asked during argument in this appeal what was the point of drawing attention to what were claimed to be similarities between the man in the photograph and Pederick, unless the jury were being invited to infer that the man was Pederick, the Crown Prosecutor was unable to answer the question.

Needless to say, all this provoked a response from senior counsel for the defence. He interrupted the Crown Prosecutor's address and made an application to the trial judge to direct the jury that the hypothesis that had just been put to them was inconsistent with the evidence of Pederick and was not open to them as a matter for their consideration.

The learned trial judge declined that application. In the course of his judgment on the matter he said:

"The Crown Prosecutor has had it recorded that, prior to closing his case but after those final witnesses were called, he indicated to Mr Hidden that he would not be recalling Mr Pederick for further cross-examination unless a request for this was forthcoming from those representing the accused. It was not specified at the time that the Crown case in this regard would explicitly suggest the error that I have described."

The trial judge asked senior counsel for the defence whether he wanted to apply for a discharge of the jury. That question was answered in the negative. In that regard it is to be remembered that the trial had been proceeding for many weeks, and the main Crown witness appeared to have been discredited on a very important issue. It is understandable that a discharge of the jury and a new trial, even if that were available, had little attraction to the defence. His Honour then asked whether it was desired that Mr Pederick be recalled so that he could be further cross-examined by the defence. That question was also answered in the negative.

In the course of his summing up Grove J dealt with the matter in three ways that are relevant to this appeal.

First, far from directing the jury that it was not open to them to consider the hypothesis lately raised by the Crown, his Honour left the case to the jury on the basis that the hypothesis was open. He said, in relation to the photograph earlier referred to and argued to show Pederick standing on the western side of George Street watching Mr Desai depart:

"The Crown called as its final witness Mr Cuthbertson who was another amateur photographer. He took a series of photographs which included the departing of Mr Desai from George Street on the Sunday afternoon. Those photographs have been placed before you by both counsel and each have made submissions to you to whether they are or are not consistent as to what he saw from the western side of George Street on

the Sunday afternoon. Again repetition by me of their submissions is unlikely to advance your ability to resolve the dispute between the parties."

His Honour also told the jury that they should not hold against the defence the fact that Mr Pederick had not been cross-examined about the Desai departure theory. He pointed out that, because the theory was not alive at the time when Pederick was in the witness box, it would be unreasonable to have expected questions to have been put to him in cross-examination concerning the matter.

Finally, having referred the jury to the change in direction of the Crown case upon the point in question, his Honour warned them in the following terms:

"You should, of course, consider the case now proposed by the Crown. You would do so with the greatest of care and no doubt you will in discharge on every facet of your duty weigh the evidence with the greatest of care. But in the circumstances of the sequences of events that I have outlined to you I should give you the special warning, that you would look at the Crown's contention in relation to this matter with special care and with great scrutiny."

A little later his Honour amended the expression "great scrutiny" to "particularly careful scrutiny" and told the jury that they should take "great care" about the Desai departure theory.

The charge of which the appellant was acquitted

In order to put the foregoing into its complete context it is necessary to note that, although there were three charges against the appellant in respect of which he was found guilty, there was one count in the indictment, the first count, in respect of which he was acquitted.

The first count in the indictment charged the appellant, as an accessory before the fact, with the attempted murder of President Jayawardene. Accordingly, the question of the identity of the person who was entering or leaving the hotel at the time Pederick endeavoured to explode the bomb was not only important to the whole of the Crown case against the appellant; it was critical to the first count. As framed, the first count proceeded upon the basis that Pederick had attempted to murder President Jayawardene. With the disappearance from the case of the Jayawardene theory, a question arose as to what was to happen to the first count. The Crown applied to amend it to allege the attempted murder, not of President Jayawardene, but of a person unknown. (It is of interest to note that the Crown did not seek to allege the attempted murder of Prime Minister Desai.) Grove J refused the application to amend the first count, made, as it was, virtually at the end of the trial. That count was formally left to the jury for their consideration, but both the prosecution and the defence put it to the jury that they should acquit, and, in his summing up, his Honour referred to the matter only briefly and endorsed the suggestion that acquittal was inevitable.

The jury were told that the reason why the first count was being left to them at all was that, technically, there was some evidence, although evidence which they would have little difficulty in rejecting, which might have sustained it. I would take leave to doubt whether that was correct. The evidence that was referred to was the evidence of Superintendent

McConville, who had participated in the activities of 12 February 1978, and who had said that it was his recollection that President Jayawardene had arrived between 2 and 3 in the afternoon. It may be that it was Superintendent McConville's belief about that matter, and the failure of the prosecuting authorities sufficiently to check its correctness, that was the origin of the Jayawardene theory. As his Honour pointed out to the jury, nobody invited them, in the end, to treat Superintendent McConville's evidence in that regard as reliable, since it had been demonstrated conclusively that President Jayawardene had arrived early in the morning. There was, however, another flaw in the Crown's case on the first count, and it can be demonstrated by the brief summary the jury were given as to what that case was. His Honour said:

"Timothy Anderson would be equally guilty of [the attempted murder of Jayawardene] if he encouraged or assisted Pederick in those steps knowing what Pederick's aim was and intending to assist him to achieve it. That is the aim of killing Mr Jayawardene. It is an essential ingredient to be proved by the Crown of that offence that Mr Pederick has admitted to murder [President] Jayawardene."

His Honour observed to the jury that, as things turned out, no-one was suggesting that Pederick did in fact attempt to murder President Jayawardene. He might equally well have pointed out, however, that no one at any stage had ever suggested that Anderson knew of any aim of Pederick to kill a person who was in fact President Jayawardene or intended to assist him to achieve it. This is not the occasion to go into the interesting question of the liability of an alleged accessory where the principal, in committing a crime, has made a mistake: see D Lanham, "Accomplices and Transferred Malice" (1980) 96 LQR 110. For present purposes it suffices to say that, as his Honour summarised the Crown case on the first count, it might have been thought that the case was hopeless all along.

When it came to the second, third and fourth counts, the Crown Prosecutor addressed the jury in a manner which endeavoured to minimise the importance for the Crown case of the unreliability of Pederick's account of his attempt to murder somebody on 12 February 1978. It was submitted to the jury that it was understandable that, in the circumstances, Pederick might have been suffering from some kind of mental block about the events of the day, and it was pointed out that he said that, after he found that the gelignite did not explode, he was in a state of hysteria, and decamped. Little wonder, it was argued, that he found great difficulty in giving a coherent account of his activities on an occasion when he was involved in an attempt to commit an act that would certainly have killed, not only his target, but also many other bystanders, and might possibly have taken his own life.

The first ground of appeal

The first ground of appeal arises out of the course of the trial, and the way in which the matter was left to the jury, in relation to what was referred to in this Court as the "Desai departure theory". The ground, as it was argued, comprehended two different, although related, submissions.

First, it was submitted that, in the state of evidence as it existed at the conclusion of the trial, it was not reasonably open to the jury to conclude that Pederick had seen Prime Minister Desai departing from the George

Street entrance of the Hilton Hotel at about 5 pm on the Sunday and had then attempted to detonate the bomb for the purposes of killing Mr Desai, and, therefore, the learned trial judge should not have permitted the Crown Prosecutor to address the jury on that basis or, in particular, to invoke the theory as a means of repairing the damage that had been done to Pederick's credibility as a witness.

Secondly, it was submitted that, in view of the events that had occurred in relation to the conduct of the trial and, in particular, in view of the failure of the Crown Prosecutor to question Pederick about the Desai departure theory, and facts relevant to it, there was serious unfairness to the appellant in permitting the theory to go to the jury.

I consider that there is force in the first submission, and that it is correct in relation to one important aspect of what was put to the jury. As a matter of logic, of course, once it is accepted that Pederick was mistaken in what he said was his recollection of the events of 12 February 1978, there are no limits to the nature of the mistake he might have made except such as are imposed by incontrovertible facts and circumstances. The evidence did not conclusively establish that it was impossible for Pederick to have been standing on the western side of George Street, opposite the Hilton Hotel, at about 5 pm on the Sunday, or that it was impossible for him to have mistaken the scene of Mr Desai's departure for the "scene of greeting" of which he gave such a vivid description in his evidence in chief. However, having viewed the photographs, and in particular those taken by Mr Cuthbertson, relied upon by the Crown Prosecutor, I am of the opinion that it was not reasonably open to the jury to conclude, as was suggested by the Crown Prosecutor, that they showed Pederick standing on the western side of George Street at the time of the departure of Mr Desai. In particular, the person referred to as possibly being Pederick had shoulder-length hair. Pederick, however, said that at the time his hair was cut short and there was other evidence to the same effect. The suggestion that was being made to the jury, therefore, was not positively supported by any evidence, and was contrary to the evidence.

This brings me to the second submission and to the reason why it is related to the first submission. The photograph that was suggested to show Pederick provides a simple and clear example of the unfairness involved in the procedure that was adopted at the trial, and also provides the answer to the suggestion that the proposal to senior counsel for the appellant that Pederick might be recalled to the witness box so that he could be further cross-examined overcame that unfairness. Pederick was never asked by the Crown Prosecutor, in evidence, whether he was, or might have been, the man shown in the relevant photograph. He could have been asked, for example, whether the clothes the man was wearing were consistent with what he was wearing; whether he was standing at or near the place where the man was shown to be standing, whether he remembered seeing, or being part of, the scene depicted in the photographs, and, of course, whether at the time he had hair that was approximately the same length as the hair of the man shown in the photograph. In the light of the evidence Pederick had given in chief, it is not surprising that the Crown Prosecutor might not have relished the prospect of recalling Pederick and asking him questions along those lines. However, he, not the defence, had access to Pederick and was able to

confer with him. The Crown Prosecutor could and should have called Pederick, and could and should have asked him in chief questions such as those just mentioned, relating to various aspects of the Desai departure theory.

It is impossible to imagine that when, towards the end of the trial, the Desai departure theory was fastened upon as a replacement for the discredited Jayawardene theory, the prosecution did not inquire as to what Pederick might have to say about it. Indeed, it was formally conceded in the course of this appeal that at one stage during 1989 Pederick had been shown the critical photograph by the solicitor for the Crown and his comment is recorded in a solicitor's diary note as being that the stance adopted by the man in question "was not his [Pederick's] pose". This was not known to the jury. On the contrary, as was noted above, the Crown Prosecutor specifically put to the jury that the man shown in the photograph had a "very distinctive sort of stance" and that it was like the stance of Pederick in another photograph which showed Pederick in "a very very similar position". Not only was that submission inherently unsound; it was contrary to the one small piece of information which this Court has available to it as to Pederick's views on matters relevant to the Desai departure theory.

It was submitted that the Crown Prosecutor should not have been allowed to put this argument to the jury. I agree. Although as a theoretical possibility part of it was open for consideration, one significant aspect of it, relating to the photograph suggested to show Pederick, was not supported by the evidence and the conclusion which the jury were invited to reach concerning the photograph was one that was not reasonably open to them. Furthermore, it was unfair to allow the Crown to promote the theory without the Crown being put in the position of recalling Pederick and re-opening his evidence in chief. The theory was in the teeth of much of his evidence, and it was not enough to say that the defence counsel could cross-examine him further if they wanted to.

There is one additional feature of the matter that is of particular concern and that is relevant to the second ground of appeal as well as the first. The reliability of Pederick's evidence, and especially of that part of it which implicated the appellant, was of major importance in the case. The Crown Prosecutor was permitted to endeavour to repair the damage that had been inflicted in this regard by a combination of two methods. First, he sought to explain away the acceptance by Pederick of the Jayawardene theory by saying that the Crown authorities, and the Prosecutor himself, had led Pederick into that error. That disingenuous argument, however, proceeds upon the assumption that Pederick's only "error" was that of mistaking the Sri Lankan President for the Indian Prime Minister. Then he promoted the Desai departure theory, unencumbered by anything Pederick might have had to say about it. That theory itself, however, by implication attributed to Pederick a whole new range of errors. In the result, as things turned out, the Crown were permitted to put upon their case a far better complexion than it ever deserved, and whilst it is true that the learned judge warned the jury to exercise special caution about this aspect of the case, and senior counsel for the defence no doubt advanced powerful arguments on the point in address, nevertheless the Crown were given what I regard as an unfair opportunity to put to the jury that a major weakness in the Crown case was much less

serious than in truth it was and to some extent to divert attention from the issue of Pederick's reliability by attributing the blame to themselves.

I consider that this ground of appeal has been made out.

The second ground of appeal

In this ground the appellant contends that the verdicts of the jury are unsafe and unsatisfactory.

As with the first ground of appeal, the appellant's argument in this respect is put in more than one way. The first submission that is made, and which calls for an evaluation of the whole of the evidence, is that, on the material which was before the jury, it was not reasonably open to the jury to conclude beyond reasonable doubt that the case against the appellant had been established.

The Crown case was that the two deceased council workers and the deceased policeman had been killed as a result of the explosion of a bomb which Pederick had placed in the garbage bin near the George Street entrance to the Hilton Hotel, intending at the time that the bomb would be caused to explode and to kill Mr Desai. Further, it was alleged, Pederick had placed the bomb in the garbage bin at the instigation, and with the assistance, of the appellant. Each of those two aspects of the Crown case was in issue at the trial. As Grove J correctly instructed the jury, a conclusion in the Crown's favour in respect of the first aspect still required careful consideration of the second. It was, and is, important to give close consideration to those aspects of the evidence said to justify the conclusion that not only was Pederick the Hilton bomber, but also that he was acting in concert with the appellant.

Plainly enough, the evidence upon which the Crown placed principal reliance was that of Pederick itself. The essential features of Pederick's story have been outlined above, and it is unnecessary to repeat them.

The Crown also relied upon a number of matters said to have been established by the evidence which, although technically not corroboration of Pederick's evidence (because they did not of themselves implicate the appellant in the crimes), were said to be confirmatory of important features of Pederick's evidence. These matters, and comments upon them made by the defence, may be summarised as follows.

First, Pederick gave evidence that, at a time that he described as late in the morning, on the Sunday, whilst Pederick was outside the George Street entrance to the Hilton Hotel awaiting the arrival of Mr Desai, the appellant unexpectedly turned up in George Street and told Pederick that he had found out Mr Desai's estimated time of arrival later in the afternoon, and suggested that Pederick should leave the scene and relax for a while. Pederick did that, and later returned. This was denied by the appellant. However, the Ananda Marga organisation was under surveillance by ASIO, and at about 12.30 pm the appellant received a telephone call (which was intercepted pursuant to a warrant) at Ananda Marga Headquarters, at Queen Street Newtown, from the Australian leader of Ananda Marga, who was at the airport. The appellant was told that the Indian Prime Minister was arriving at 3.50 pm. The evidence indicated that the appellant then took a bus to the Hilton Hotel, and he was photographed with some demonstrators near the entrance to the hotel at a time which, according to expert evidence

and calculations relating to shadows of buildings shown in the photographs, was probably at about 1.40 pm. The Crown submitted that, putting aside the matter of the accuracy of Pederick's timing, this material strongly supported his version of events and contradicted that of the appellant.

In 1982 the appellant had written a book about the Hilton bombing, and in the course of that book he said that he went to the hotel at about midday and later returned to Queen Street, Newtown by which time the people at the airport had discovered the arrival time of the Indian Prime Minister. According to the Crown, especially if its evidence as to the time at which the photographs were taken were accepted, the sequence of events was far more likely to be that described by Pederick than by the appellant. The defence suggested that Pederick, being aware of what the appellant had written in his book, had constructed a story which partly corresponded with what the appellant said. On the other hand, the Crown pointed out that there was a very important difference between the sequence of events related by the appellant in his book, and the evidence of Pederick.

Secondly, the Crown relied upon the appearance, in Pederick's handwriting, in an address book of the appellant, of the name "Peter Low" followed by a postal address. Pederick said that he had written this information in the appellant's address book, at the request of the appellant, at a time when they were planning the murder of Mr Desai, and when they were considering the possibility that Pederick would obtain a false passport and flee overseas following the event. The appellant did not deny that he owned the address book, or that Pederick had written the words in it, but he said that he had no particular recollection of why that had been done, and he denied that it was done for the reason given by Pederick. The evidence indicated that there was something of a practice amongst members of Ananda Marga of using the birth certificates of persons who had died in childhood for the purpose of obtaining false passports. The members of the organisation were aware that they were under surveillance by the authorities. Pederick said that the plan to go overseas was abandoned, but independent evidence confirmed that, in between the time of the retreat at Galston and the events of the weekend of 11 and 12 February 1978 he in fact applied for and obtained a false passport in the name of Peter Low. As was noted, he undoubtedly also wrote that name into the appellant's address book. On the other hand, his account of why he wrote the address was rather puzzling. He said that the address he gave was false, and nobody would have been able to communicate with him by writing to it. He suggested that the only reason he wrote an address following the name "Peter Low" was that the book in question was an address book. He indicated that a name in the book, unless it were followed by an address, might be thought to look suspicious. The address was that of a post office in Queensland, and the defence did not accept that it was, as Pederick alleged, false. It was argued for the defence, on the appeal, that one possible hypothesis was that there was, at some stage, a proposal that the appellant might write to Pederick, in his newly assumed name, at the address given. However, that was not supported by any evidence of the appellant. It should be observed that the appellant said that he did not recollect being aware of the ordinary name of Pederick and knew him only by his Sanskrit name. Bearing in mind the surveillance under which both were operating, it might not be surprising that the appellant would have

contemplated the possibility of communicating with him under the name which appeared in his newly acquired, although false, passport. The entire matter is something of a mystery, especially because it was only brought to light by Pederick at a relatively late stage of the proceedings, and long after he first told his story to the police. It should be added that, although Grove J explained to the jury that this was material that they could treat as confirmatory of the evidence of Pederick, he said that they could not treat it as strictly corroborative because it did not implicate the appellant in the commission of the crimes.

Thirdly, the Crown placed strong reliance upon some material that was discovered, long after the event, at the University of New South Wales, in circumstances consistent with part of the evidence of Pederick. Pederick said that on 10 or 11 February 1978, at the suggestion of the appellant, he went to a building known as the Roundhouse at the University of New South Wales, and deposited there, in a locker, some gelignite, detonators, wire and other material which he had been given by the appellant and which was in excess of his needs for the bombing. Some of the gelignite was packed in a newspaper. In April 1981 the staff of the University of New South Wales found gelignite and other items in a black zip bag. It seemed that the bag had been removed from an unclaimed locker some time between May and September 1980 and had been taken to the Union Office where it remained unclaimed until opened for inspection by a staff member in April 1981. The locker had been hired as a new hiring in July 1978 in the name of M J Melton. No such student attended the University. However, a man named J J Melton was a student at HMAS Creswell at Jervis Bay which was a College associated with the University of New South Wales. Mr Melton had never applied for or used a locker at the University of New South Wales. The bag contained about 50 sticks of gelignite, a quantity of detonators, wire and other items. Newspaper in the bag was dated 11 February 1978. Pederick identified some of the items similar to those which he had left in the locker, although the bag contained some other items (such as identity cards which had been stolen in May 1980) which Pederick could not have put there. The Crown case was that some unknown person had access to the contents of the bag subsequently to Pederick leaving the material in the locker. After he surrendered to police in 1989 Pederick was able to take them to a room at the Roundhouse where lockers had been kept in 1978, even though no lockers were there anymore, and even though the geography and layout of the rooms had changed following building renovations. At the trial the defence suggested that Pederick had never placed gelignite or other items in a locker at the University, and that he had based this evidence on newspaper reports dating from 1981 when the gelignite was discovered at the University.

Fourthly, the Crown relied upon the evidence of a Mr Mumme, to which some reference has been made above. Mr Mumme said that his recollection was that at about 5 pm on the Sunday he saw a very strangely dressed person, looking rather like Pederick would have looked in the disguise he said he was wearing on the occasion, in the vicinity of the Hilton Hotel in George Street. There was, however, a good deal of confusion about whether Mr Mumme was in George Street on the Sunday or the Saturday and, for that matter, about which of these two possibilities the Crown preferred to have the jury accept. It is unnecessary to go into the detail of the reasons for

the existence of that confusion. It suffices to say that the preponderance of evidence seems to suggest that he was there on the Saturday, rather than the Sunday. This, of course, was not inconsistent with the evidence of Pederick, who said that he was there both on the Saturday and the Sunday.

Fifthly, Pederick gave evidence that, whilst he was awaiting the arrival of Mr Desai, he was horrified to see a man come and sit on the bin in which he had placed the gelignite. A man gave evidence at the trial that he had sat on the bin for quite a time. It should be added, however, that newspaper reports on the day following the bombing indicated that a number of people, including journalists, had sat on the bin. Accordingly, anyone who had read those reports might well have been aware of this feature of the matter.

Sixthly, Pederick said in his evidence that, over the days before the proposed assassination, he changed his mind and decided not to go on with it. He later received further encouragement from the appellant and regained his purpose. However, Pederick said that, at the time when he was having second thoughts, he telephoned his mother in Western Australia and asked her to send him money so that he could return to that State. Pederick's mother confirmed that he had made such a request.

Seventhly, the Crown relied upon an extraordinary circumstance relating to the deaths of the three victims. The evidence established that, almost exactly at the time of the explosion, telephone calls were made, apparently by the same man, to the police and to a newspaper warning of the presence of a bomb in the vicinity of the Hilton Hotel. This was in the very early hours of the Monday morning. The Crown linked this circumstance with some evidence of Pederick to the effect that he had made an arrangement with the appellant that if, for some reason, the bombs did not explode at the time of the arrival of Mr Desai the appellant would warn the authorities. The objective of this arrangement, as explained by Pederick, was not a desire to save innocent lives, but to permit the authorities to discover a bomb. Pederick said that the appellant expressed the view that the next best thing, politically, to an actual explosion would be the discovery of an unexploded bomb. One thing that was clear (and the significance of this will be mentioned later) is that it was not intended that the bomb should simply be thrown away, unnoticed, with a pile of garbage.

Eighthly, the Crown relied upon evidence as to the postponement of Pederick's plan to marry Ms Cross. Pederick said that, when the appellant approached him at the retreat at Galston and put to him the proposal to kill Mr Desai he suggested that he should, at least for the time being, sever his relations with Ms Cross. In fact it appears that they did postpone for a time their plans to marry. Ms Cross said in her evidence that she was separately approached by a female member of the organisation who encouraged her to put off her marriage plans for the time being. According to the Crown, this fitted in well with the evidence of Pederick.

Ninthly, the Crown relied upon the inherent unlikelihood of the possibility that Pederick would simply have disappeared from the Ananda Marga scene following the retreat at Galston, bearing in mind the impending arrival in Australia of Prime Minister Desai, which was a matter of considerable importance to the organisation. The defence was apparently unable to give any coherent explanation of what it was suggested might have happened to Pederick after the Galston retreat.

Finally, the Crown said that, consistently with Pederick's account of what was said to him by the appellant as to why the Indian Prime Minister should be assassinated, the appellant had a motive for wanting to see Mr Desai killed. It was a matter of high importance to the Ananda Marga organisation to bring the utmost pressure to bear on the Indian Government to obtain the release of Baba. Additionally, the appellant had personally met Mr Desai and pressed for the release of Baba. The appellant's requests had been rejected, and Mr Desai had spoken vehemently and insultingly concerning Baba and the Ananda Marga organisation.

There were, accordingly, a number of important respects in which the evidence of Pederick was consistent with other known, or undisputed, facts. This is a convenient point at which to mention that the Crown also called some fresh evidence on the appeal which added a further element of confirmation to Pederick's story. He had said all along that one of the memorable things that happened to him on 12 February 1978 was that, in the morning, whilst he was standing in George Street wearing a disguise that included a false moustache, a man had come up to him and asked him why he was wearing a false moustache as a disguise. This caused him some consternation, and he removed the moustache. On the appeal the Crown called a witness, Mr Tsambouris, who said that, on 12 February 1978, he had observed a man, in a clumsy disguise, wearing a false moustache, in George Street, and had walked up to him and made a remark of the kind recounted by Pederick. That evidence was admitted on the basis that it might be relevant, if the question otherwise arose, as to whether there should be a new trial.

On the other hand, as has already been noted, there was a major weakness in the evidence of Pederick. On any view of the matter, his account of the events of 12 February 1978, and in particular of the circumstances relating to his actual attempt at assassination, is clearly unreliable. He is incapable of giving a description of those events which does not involve serious error. The attempts of the Crown to minimise the effect of that error have already been described. For reasons earlier given the error cannot thus be minimised. That then raises question of its consequences. The defence argues that the unreliability of Pederick's evidence concerning the events of 12 February 1978, and in particular, the afternoon of 12 February 1978, is something which affects the Crown case in such a fundamental respect that since he cannot be accepted on this matter, the whole of his evidence must be treated as unreliable and rejected. On the other hand, the Crown submits that the matters about which Pederick has been found to be in error are merely matters of incidental detail not going to the heart of the case against the appellant. I do not accept either of these submissions. Each overstates the case. The evidence of Pederick concerning his attempt to blow somebody up on Sunday, 12 February 1978 relates to a matter that is of high, although not necessarily, critical, importance to the acceptance of his evidence concerning his dealings with the appellant. It cannot be dismissed as a matter of mere incidental detail. On the other hand, the fact that his account of the events of the Sunday has been found to be seriously unreliable does not, as a matter of necessity, mean that his entire story must be disbelieved. Indeed, on any view of the matter, a good deal of what he said in his evidence was undoubtedly true. He was a member of Ananda Marga. He did attend a retreat at

Galston in early 1978. He did postpone his plans to marry Ms Cross. He did obtain a false passport in the name of Peter Low, and he wrote that name in a book belonging to the appellant. Nobody suggests that everything he is saying is untrue, or amounts to some kind of fantasy. At the same time, the Crown case against the appellant depends upon accepting a good deal of his evidence, and especially his evidence concerning his communications with the appellant, as reliable, and the reliability of that evidence must be called into serious question by reason of the evident unreliability of his account of the very act which he undertook pursuant to his arrangement with the appellant.

The defence also draws attention to certain other matters said to cast doubt upon the evidence of Pederick in important respects.

The first matter relates to the City Council's programme for clearing the relevant garbage bin. It stands to reason that it was important to the plan, said to have been conceived by the appellant and executed by Pederick, for there to be some reasonable degree of assurance that the garbage bin was not going to be emptied by council workers in between the time the gelignite was placed in it and the expected time of arrival of Mr Desai. Moreover, it was the evidence of Pederick, and part of the Crown case, that that precise subject was discussed between the appellant and Pederick. The Crown alleged that the appellant told Pederick that he had checked the schedule for emptying the garbage bins in George Street, and Pederick said in his evidence in chief that the appellant said to him that they had to wait to plant the gelignite until after the garbage rounds had been made on the Saturday evening. However, the fact was that there was a further garbage round scheduled for some time not long after 6 am on the Sunday. If, as the Crown alleged, the appellant had taken the trouble to acquaint himself with the relevant schedule, then he would have known that, if the schedule had been adhered to, putting gelignite in the bin in the early hours of the Sunday morning would merely have produced the result that the gelignite would have been emptied from the bin a little after 6 am, and long before the expected time of arrival of Mr Desai. In the events that happened, the garbage truck that came to empty the bin at about 6 am on the Sunday was waived along by police officers and not permitted to stop. The defence argued, however, that the appellant was not to know that this would happen, and therefore, on Pederick's account of the sequence of the relevant events, the gelignite had been placed in the bin at a time when, in the light of the knowledge which the Crown attributed to the appellant as to the programme of garbage collection, it was at least highly probable that it was going to be emptied out of the bin before the opportunity to cause it to explode had arisen.

A second matter relating to the garbage bin was that there appeared to be a marked inconsistency between, on the one hand, the accounts given by various Crown witnesses as to the contents of the bin from time to time during 11 and 12 February 1978 and, on the other hand, the evidence of Pederick as to the contents of the bin. Pederick said that he put the gelignite in the bin at about 1 am on the Sunday, and that, later on the Sunday morning, he then put into the bin a container which comprised the detonator and related equipment. According to Pederick the bin was almost empty at about 1 am on the Sunday. However, the evidence of other witnesses showed

that it was relatively full on the Saturday afternoon and, as was mentioned above, there was no emptying of the bin by council workers between the Saturday afternoon and the fatal collection on the Monday morning. The Crown endeavoured to deal with this problem by suggesting that some officious bystander, perhaps offended by the lack of tidiness, had emptied the bin between the Saturday afternoon and the time on Sunday morning when Pederick said he put the gelignite in it. This, the defence said, was scarcely convincing. It also prompted senior counsel for the appellant to observe that from time to time it was necessary to make a positive effort to remind oneself that this had been a criminal prosecution in which the Crown carried the onus of proof beyond reasonable doubt. He made the remark that, on occasion, it was easy to get the impression that the relevant search was for some hypothesis consistent with guilt.

There was also a difficulty concerning Pederick's evidence as to the size of the package containing the detonator which he said he put in the bin. He said he believed it would have been about the same size as a model tendered as an exhibit, and he also said that, when he put the package in the bin, he did not need to remove the covering of the bin, which was a circular metal lid with a hole in it. However, it was demonstrated that the package, if it had been of the same size as the exhibit, would not have fitted through the hole. Pederick, therefore, would have had to lift the circular lid in order to get it into the bin. The Crown submitted that this was a very minor matter and could easily have been the sort of thing Pederick had forgotten.

It was also emphasised by the defence that there were significant differences between the information which Pederick originally gave to the police when he surrendered himself, and his ultimate evidence at the trial. It was acknowledged that it was understandable that, after the lapse of time involved, Pederick's recollection about matters of detail might have been hazy. However, the defence argument attached considerable significance to important aspects of the evidence of Pederick which appeared to have been modified, under pressure of police interviews, to make his story accord with other evidence upon which the prosecution intended to rely. Reference has been made above to the fact that Pederick originally said that he put 50 sticks of gelignite into the garbage bin, but when it was pointed out to him that such a quantity would not have been able to fit within the bin he modified the information he gave the police. Similarly, his story in relation to the times at which various things occurred altered significantly, and in circumstances where, the defence submitted, it must have become known to him that modification was required in order to make his story fit in with that of other witnesses.

There is one final matter which, although not specifically raised in argument, strikes me as being of concern. It is clear that, from a very early stage after he surrendered himself, the police investigators were well aware that there was a major difficulty about Pederick's assertion that he endeavoured to explode the bomb as he saw Mr Desai arriving at the George Street entrance of the Hilton Hotel on the Sunday afternoon. The police knew that Mr Desai did not arrive at the George Street entrance. That must have led them from the outset to wonder about what exactly it was that Pederick was watching when he tried to detonate the gelignite. We know that they ultimately hit upon the theory that he was in fact watching the arrival of

President Jayawardene, although, surprisingly, they do not appear to have taken a great deal of trouble to check some essential aspects of that theory, including the actual time of the President's arrival in Sydney or at the hotel. He was, after all, not an anonymous tourist who could slip unnoticed into the country. What is noteworthy, however, is that this theory was apparently taken up to the exclusion of all others. In particular, what has been called the Desai departure theory was never even raised before the jury as a possibility until towards the very end of the case. Could it be that the Desai departure theory had earlier been considered and rejected for some reason? There is no evident explanation of why the Jayawardene theory was embraced by the Crown as the exclusive explanation of Pederick's "error", or why, in terms of the presentation of the Crown's case, the Desai departure theory was never even raised as a possibility until the Jayawardene theory had been buried.

It was obviously important to the Crown case to be able to point to evidence which corroborated Pederick. The importance of looking for such corroboration arose not only from the possibility of doubt and uncertainty which the defence argued followed from the considerations referred to above, but also from the fact that, as a matter of law, the learned trial judge was bound to direct the jury, and did direct the jury, that, Pederick being an alleged accomplice of the appellant, it was dangerous to convict the appellant on the evidence of Pederick unless that evidence was corroborated. Of course, even if a jury in a given case were to convict an accused person on the uncorroborated evidence of an accomplice, having been instructed that it was dangerous to do so, it would not necessarily follow that this Court would set the conviction aside on the ground that the verdict was unsafe or unsatisfactory. Nevertheless, the circumstance that the Crown case was largely based upon the evidence of an accomplice is most material, and it required at the trial, and requires on this appeal, close attention to the evidence said to amount to corroboration.

The most significant potential corroboration of the evidence of Pederick came from Mr Trotter, the taxi driver who said that he knew the appellant personally, and that, at about 1 am on Sunday, 12 February 1978, he saw the appellant driving a taxi, displaying a "not for hire sign" standing at a corner in George Street not far from the Hilton Hotel, and that a person who appeared to be a passenger was standing alongside the passenger door gazing down towards the hotel. Mr Trotter came forward with this information not long after the bombing, and he repeated it at the trial. He was supported by the evidence of his passenger who confirmed that, on the occasions in question, Mr Trotter remarked to him that a taxi Mr Trotter pointed out was being driven by a prominent member of the Ananda Marga organisation. Subject to one significant qualification, this fitted in well with the evidence Pederick gave at the trial. Pederick specifically stated that the appellant dropped him off, from his taxi, at a corner near the Hilton Hotel, and that after he alighted from the taxi he stopped and looked along the street for a short time. The qualification is this. Mr Trotter said that the person he thought was the passenger had long shoulder-length unkempt hair. Pederick, in his evidence, said that at the time he had short hair, and was wearing glasses and a false moustache. There was other evidence confirming Pederick's account of the length of his hair. The defence stressed that, to the extent to which Mr Trotter's evidence corresponded with that of Pederick,

and leaving to one side the matter of the hair, this was only because Pederick had modified his own version of what happened over a period of police interviewing and in circumstances where he could well have been made aware of the information which the police had received from Mr Trotter. Pederick had originally told the police he planted the gelignite at about 6 pm on the Saturday. The defence submitted that it should be inferred that his modification of his professed recollection of the events of the Saturday evening and Sunday morning followed upon an awareness of the importance which the police attached to Mr Trotter's information.

The defence also submitted that the "identification" by Mr Trotter of a person the Crown said was Pederick standing alongside the appellant's taxi and looking down towards the Hilton Hotel was extremely unreliable. The appellant did not deny that Mr Trotter might well have seen him on the evening in question, as he was driving a taxi on that occasion. What was in dispute was that he was transporting Pederick, or communicating with Pederick in the vicinity of the Hilton Hotel. Mr Trotter did not profess to know or recognise Pederick, and he did not claim to be able to identify him. Even if he had, identification in such circumstances is notoriously suspect. Moreover, the person he described did not match Pederick in one respect.

The second matter relied upon as corroboration is allied to the first. Whilst the appellant admitted at his trial that he was driving a taxi on the night in question, and could possibly have been the taxi driver seen by Mr Trotter, Detective Jackson said that the appellant, when interviewed back in 1978, had denied driving a taxi on the occasion. The appellant in turn denied that he had been asked about that matter by Detective Jackson, or that he had said that he was not driving a taxi. The Crown said that this was evidence of a lie, reflecting a consciousness of guilt, available to be relied upon as corroboration. The trial judge told the jury, correctly, that if they accepted that the appellant had lied, and that he had lied in circumstances which showed a consciousness of guilt, then it was open to them to treat this as corroboration of the evidence of Pederick. My own views on the use of lies as corroboration are set out in *Heyde* (1990) 20 NSWLR 234, and it is unnecessary to repeat them. It suffices for present purposes to say that reliance upon lies as corroboration is possible, but involves a process of reasoning that is often risky.

Finally, as corroboration of Pederick, the Crown relied upon the evidence of the prisoner Raymond Denning. The general nature of that evidence has been referred to above. Denning said that, on certain occasions when both he and the appellant were in prison together, the appellant admitted to him being involved in the Hilton bombing. There were two major difficulties about that evidence. The first concerns the character and antecedents of Denning. They are such that the jury should properly have regarded his evidence with the most serious reservations. In addition, the objective facts cast substantial doubt upon the accuracy of Denning's evidence. On one of the occasions when the appellant was said to have made an admission to him, the prison records show that the appellant and Denning were not together, and could not possibly have communicated. The Crown Prosecutor sought to meet this difficulty by suggesting that the prison records could have been erroneous. Once again, it was argued on behalf of the appellant, we seem to have embarked upon some search for a hypothesis consistent with

guilt. It was a matter for the jury to make a judgment as to the weight of the evidence of Denning. However, this Court must make its own evaluation of the evidence in considering whether the verdicts were unsafe or unsatisfactory. I consider that a jury, acting reasonably, would give Denning's evidence little or no weight.

Taking all the above considerations into account, it is necessary to address the ultimate problem which arises in relation to this aspect of the case. The main Crown witness was an accomplice of the appellant, and his evidence about important aspects of the matter was demonstrated to be wrong in a number of respects. There were also important aspects of it that were at least shown to be questionable. On the other hand, some parts of what he said were confirmed by other information before the court, and there was, although to a very limited extent, corroboration of his evidence.

Although the Crown case against the appellant was one abounding with difficulties, some of them of the Crown's own creation, but others more fundamental, and although it could not be described as a strong case, I do not conclude that it was not reasonably open to the jury, on the evidence before them, to decide that the appellant was guilty. Although there were numerous matters which might properly have caused them to have a doubt about the appellant's guilt, it cannot be said that, acting reasonably, they were obliged to have such a doubt. In that respect, therefore, this ground of appeal is not made out.

However, it is well-established that a Court of Criminal Appeal may treat a jury's verdict as unsafe or unsatisfactory even if satisfied that it was, on the evidence, reasonably open to the jury to convict: eg *Davies and Cody* (1937) 57 CLR 170 at 180; *Carr* (1988) 165 CLR 314; 35 A Crim R 387. Such a situation may arise if, to use the language of the former case,

"it appears unjust or unsafe to allow [a] verdict to stand because some failure has occurred in observing the conditions which ... are essential to a satisfactory trial".

The inherent strength or weakness of the Crown case may be a factor relevant to such a conclusion. In the present case, for reasons just given, I do not regard the Crown case as presented at the trial as a strong one, and for the reasons discussed in relation to the first ground of appeal, there was one important respect in which, in my view, the proceedings miscarried. The Crown was permitted, in an unfair manner, to obscure a major difficulty concerning the reliability of the evidence of its principal witness. In particular, the Crown was permitted to represent that the difficulty was one resulting from a mistake on the part of the prosecuting authorities rather than one inherent in the witness's story, and it was also permitted to attempt to resolve that difficulty by resort to submissions that should not have been put, and by raising an hypothesis that was not reasonably open on the evidence.

There is a further matter to be considered, which has been raised as a separate ground of appeal but which is more appropriately treated as relevant to the second ground of appeal. It concerns a direction given by the learned trial judge to the jury relating to the "sanity" of Pederick. This direction was the subject of complaint at the trial, but his Honour refused to alter it. If the matter stood alone I doubt that it would constitute an independent reason for quashing the convictions. However, in the context of

the question whether the verdicts of the jury were unsafe or unsatisfactory, it has a significance when considered in combination with other problems referred to above.

As has already been stressed, the reliability of Pederick was a central issue at the trial. Not only was he technically an accomplice of the appellant, he was, according to his own confession, a person who had attempted to assassinate a foreign dignitary in a manner which, had it succeeded, would have caused a great deal of loss of life. Furthermore, in a number of important respects his account of the relevant events had been demonstrated to be unreliable. What the jury were to make of such a man was obviously a question of importance and difficulty. The learned trial judge gave the jury careful instruction concerning their assessment of the honesty and reliability of witnesses, including Pederick. However, having done that, he went on to tell the jury that the law presumed Pederick to be sane. His Honour said this:

“One final comment I make in this regard — and I suppose it is self-evident — is that anyone, any witness can be thoroughly and absolutely honest and thoroughly and absolutely firm but also be wrong. These are matters that you have to determine in the course of discharging your duty.

It is appropriate that I say to you in relation to witnesses one other thing. You may take it that the law presumes the sanity of a witness. You do not do otherwise. Like any presumption a presumption of sanity is rebuttable but must be rebutted by evidence. I mention this because of the cross-examination of Evan Pederick when it was put to him that significant parts of his evidence were a fantasy. I am conscious, and I draw to your attention that [senior counsel for the accused] did not suggest, I repeat, did not suggest, that Pederick was insane nor did he suggest that Pederick was in some way mentally disturbed. If such a suggestion is to be made in any case evidence would be receivable about the defective mental condition of the witness and no evidence of that type was tendered or received here.

As I understand the submissions on behalf of the accused it was contended that as a supplement to a fantasy as it were Mr Pederick has taken some real events and, if I could borrow Mr Hidden's expression, grafted them on to a tale of events which did not happen.

You may find as a fact that Pederick's recounting of events is a reproduction of a fantasy. That finding is open to you. I have taken Mr Hidden to mean by his assertion of fantasy to refer to events which did not happen. You will remember his choice of words on occasions when he was cross-examining Pederick. For example, 'Mr Pederick, that did not happen. Mr Pederick, you were not there'. The finding of fact is for you.

I advert to this matter only to direct you that the law presumes sanity. Specifically in the case of Pederick there is no evidence contradictory of that presumption. Thus any finding that you make that anything believed or spoken about by Pederick as fantasy must be sourced from the evidence and a presumption of his sanity. I am not saying to you that you may not find that he has fantasised in some way, I am merely saying to you that there is a presumption that people are sane and you must

come to any such conclusion as a result of analysis and appreciation of the evidence otherwise than by making a presumption contrary to the one that I have just indicated to you."

In so far as that direction informed the jury that there was no presumption that Pederick was not sane, and that they must form their conclusions about his mental state or condition on the basis of evidence and not otherwise, it is unexceptionable. The problem lies with the instruction that the law presumed Pederick to be sane. There are two difficulties about that instruction. The first is that its meaning is unclear. The second is that the law makes no general presumption of the kind referred to.

There are, of course, specific forensic contexts in which what might fairly be described as a presumption of sanity has a role to play. In these cases the notion of "sanity" takes its practical meaning from the context, and the presumption is allied to considerations relating to burden of proof. Thus, in the context of a question whether a person accused of crime falls within the *M'Naghten Rules*, the jury may be instructed that every man is presumed sane until the contrary is proved. In such a context the meaning of the word "sane" is obviously to be found by a reference to the content of the Rules under consideration, and relates to the capacity of a person to know the nature and quality of his conduct, or that it is wrong. The reference to a "presumption" is simply a method of indicating where the onus of proof lies if an issue as to mental capacity arises. It is, however, one thing to say, in the context of a discussion of the rules of common law or provisions of criminal codes relating to the mental capacity of an accused person, that there is a presumption of law that every person is of sound mind: see, eg *Falconer* (1990) 171 CLR 30 at 61; 50 A Crim R 244 at 266. It is quite another thing to say that the law presumes that every witness in every case is sane.

The word "sane" is one which, when considered apart from some specific context, does not have a precise or fixed connotation. The *Shorter Oxford English Dictionary* gives, as some of its meanings, "sound in mind", "sensible", "rational" and "not mad". One example of a legal context in which the word does take on a more precise meaning is given above. Another example may be found in references to the "sanity" of a person who has made a will. There the reference is to testamentary capacity, and what is at issue is the testator's ability to understand the nature of the business in which he is engaged, to know the property available to him, and to recollect the persons who may have a claim upon his bounty.

A question may arise, in a given case, as to what *Wignmore on Evidence* (3rd ed, 1940), p 583 called the "testimonial qualifications" of a witness, and there may be an issue as to the mental capacity of the witness to give evidence. In such a case the capacity of the witness is presumed, and in that context it is correct to say that witnesses are presumed to be sane. Once again, the meaning of the proposition is to be found from the context in which it is used. However, there was no issue raised in the present case as to Pederick's testimonial qualifications. His evidence was not objected to on that ground, and there was no application to have it struck out. If there had been such an application, the question would have been for the judge, not the jury, to decide.

What were the jury to make of the information that there was a presumption that Pederick was "sane"? There was no charge against

Pederick. He was simply a witness. As it happened, he was a witness who said that on a particular occasion he stood in George Street in Sydney and tried to blow up the Prime Minister of India, the Prime Minister of Australia, and a number of other people besides, and, when his attempt was unsuccessful, attributed its failure to the supernatural intervention of his guru. He seems to have been a person whose reasoning processes were somewhat unorthodox. There was a significant danger of confusing the jurors by telling them that the law presumed him to be sane. This constitutes an additional reason for treating the verdicts as unsafe and the process at the trial as unsatisfactory.

I consider that this ground of appeal has also been made out.

The remaining grounds of appeal

I do not consider it necessary to go into much detail about the remaining grounds of appeal. It suffices to say that I do not consider that they have been made out. They relate in large part to particular rulings of the learned trial judge concerning admission or rejection of evidence, and I am unable to find material error in those rulings. There is also complaint made concerning a decision of his Honour on application for the discharge of the jury, but that decision was, in my view, well within the bounds of his discretion and no error of principle has been shown.

A number of complaints were made about the conduct of the Crown Prosecutor in putting particular matters to the jury in the course of his address. The major complaints in that regard have already been dealt with, and the other complaints seem to me to be matters that, in the total context of the trial, were either not material or not justified.

Fresh evidence was adduced by the appellant in the course of the appeal. It took the form of the evidence of a prisoner named Fletcher, the purpose of which was to contradict the evidence of Denning, and to attribute to Denning statements and conduct which amounted in effect to an admission that Denning was telling lies in his evidence concerning the appellant. The evidence of Fletcher was contradicted by other witnesses, and if it stood alone I would not regard it as a sufficient ground for ordering a new trial. Fletcher was a distinctly unimpressive witness, and not a person to whose evidence I would attach significant weight.

The appellant sought leave to raise an additional ground of appeal to the effect that Grove J should have given the jury a special warning of the danger of accepting the evidence of Denning. No application for such a direction, or for any further direction relating to the evidence of Denning, was made at the trial, and I do not consider that the appellant should have leave to raise this matter on the appeal. I am reinforced in that conclusion by the circumstance that, on a reading of his Honour's summing up, I have the strong impression that he made it clear to the jury that the evidence of Denning was of little importance in the total scheme of the case and he treated it in what I would regard as an appropriately dismissive fashion.

Conclusion

It follows from what appears above that I consider that the appeal should be allowed, and the convictions should be quashed.

There then arises the question whether there should be an order for a new trial. This is a discretionary decision to be made in the light of the principles enunciated in such cases as *Reid* [1980] AC 343 at 351 and *DPP v Fowler* (1984) 154 CLR 627.

If, contrary to what appears above, I had been of the view that this was a case in which it was not reasonably open, on the evidence, for the jury to convict then, in accordance with the established principles, that would be an end of the matter. There would be no new trial. However, this is not such a case, and it becomes necessary to consider the various considerations for and against ordering a new trial.

The principal considerations in favour of ordering a new trial on each of the three counts in question are the public interest in the due prosecution and conviction of offenders, the serious nature of the alleged crimes, and the desirability, if possible, of having the guilt or innocence of the appellant finally determined by a jury which, according to the constitutional arrangements applicable in this State, is the appropriate body to make such a decision.

On the other hand there are considerations that militate against a new trial. The Crown case is not strong, and depends in large part upon the evidence of an accomplice whose account of the relevant facts has been demonstrated to be unreliable in significant respects. The suggested corroboration is, on analysis, flimsy. It is now more than 13 years since the relevant events took place, and this compounds the difficulty of establishing the truth. Moreover, it is far from clear exactly how the Crown would run a fresh trial. What would the Crown Prosecutor open to the jury as to the significance they should attach to the evidence they were going to hear from Pederick as to the events of 12 February 1978? In fairness to the accused, the Crown could hardly fail to elicit from Pederick his recollection of the Sunday, but that recollection is substantially erroneous. Finally, there is a consideration which, in the circumstances of this particular case, I regard as compelling. The trial of the appellant miscarried principally because of an error which resulted in large part from the failure of the prosecuting authorities adequately to check aspects of the Jayawardene theory. This was compounded by what I regard as an inappropriate and unfair attempt by the Crown to persuade the jury to draw inferences of fact, and accept argumentative suggestions, that were not properly open on the evidence and that were in some respects contrary to the evidence. I do not consider that in those circumstances the Crown should be given a further opportunity to patch up its case against the appellant. It has already made one attempt too many to do that, and I believe that, if that attempt had never been made, there is a strong likelihood that the appellant would have been acquitted.

I would order that the appeal be allowed and that the convictions be quashed. On each of the three charges in question the court should direct a judgment and verdict of acquittal to be entered.

FINLAY J. I have read the draft judgment of the Chief Justice.

I agree with the orders he proposes and with the reasons in his judgment.

SLATTERY AJ. I agree with the judgment of the Chief Justice and the orders proposed by his Honour.

Appeal allowed
Acquittal entered

Solicitor for the appellant: *M Richardson*.

RAC