

Dear Law Students,

The Faculty of Law is excited to be hosting the inaugural Miscarriages of Justice moot competition.

Here you will find the materials for the first *Bond Law Miscarriage of Justice moot*. The moot competition will take place in week 10 of semester 113. You can sign up (in teams of two) on the sign-up sheet which can be found on Joel Butler's office door. Full details of the moot will be found in the Rules.

Two workshops will be held to help you prepare. The first will be held next week (WEEK 7) in Moot Court 1 on WEDNESDAY from 12pm-2pm. If you've never mooted before, this workshop will give you all the information you need to prepare your moot. The second workshop will be held in week 9 – and will concentrate on mooting technique.

Further details will be circulated via these pages, and to law students emails in the coming weeks.

The aim of the competition is to encourage those students who have not mooted before to get involved and try it out. We always need good mooters, and it is surprising how many students leave it until very late in their studies to give it a try and then regret not having got involved earlier! This is an opportunity for you to try out (and develop) your mooting skills before first semester's prestigious LSA Brian Orr Mooting competition - Bond's oldest and most contested competition.

PRIZES

- Winning team: \$700;
- Runner up: \$400;
- Two non-final-qualifying semi-finalist teams: \$200 (each);
- Best oralist in the preliminary rounds: \$300;
- Law Students Association/ Asian Law Students Society prize for best NESB oralist in the preliminary rounds: \$200.

The details on how to sign up will be circulated shortly, and the problem (and rules) will be made available this week - both on the Faculty and LSA websites. Teams will consist of two members. The actual competition rounds will be held across WEEK 10 of this semester.

WHO IS ELIGIBLE?

If you think "There's no point in me trying, those expert mooters who've mooted 10 times and won in the Hague, Beijing, Hong Kong will take this one!" well this is a *restricted* competition! Sorry to those of you who have mooted before - but you can ONLY enter if you have NOT been involved in competitive mooting at Bond before! In other words, we've taken out the big-time competitors for you. No Tom Harrison, not Katherine Mansted, no James Graham etc. It's an even playing field.

Any queries, please contact Louise Parsons on lparsons@bond.edu.au or jbutler@staff.bond.edu.au.

Kind Regards,

Joel Butler
Director of Mooting

Miscarriage of Justice Moot Competition

November 14-18, 2011

RULES

1. Team composition

- 1.1 The competition is open to all law students at Bond who have not participated in a competitive external mooting competition during the time of their enrollment.
- 1.2 Each team shall consist of two members who must be enrolled as full-time or part-time LLB or JD students.

2. The problem

- 2.1 The forum is the Bond Moot Court of Appeal. That is, for the purposes of applying the rules of precedent, it may be assumed that the forum is the Queensland Court of Appeal.
- 2.2 The problem will involve the criminal law of Australia, Australian laws of evidence and the law pertaining to criminal procedure. Particularly, the issue outlined in the problem will relate to a miscarriage of justice.
- 2.3 The same problem will be used for all rounds of the Competition, including semi-finals and the final.
- 2.4 The problem, the cases to be referred to as precedents, and guidance material will be made available during week 6 of the 113 semester, on both the faculty website and the LSA website.

3. Outline of Argument

- 3.1 Each team must develop an outline of argument of no more than two pages.
- 3.2 The outline must be exchanged with the team's competitor team by no later than midday on 9 November.
- 3.3 It is the responsibility of each team to make arrangements for the exchange of the outline. The exchange may be undertaken in physical form or electronically, at the agreement of the teams.

- 3.4 Outlines must be typed in no smaller than 10-point Arial font or 12-point Times Roman font and must be no more than 2 pages in length. They should consist of numbered paragraphs. They may be single-spaced, but must have double spacing between paragraphs.
- 3.5 The written outline of argument will: (1) briefly identify the issues said to arise for determination on the appeal, (2) set out the arguments for the appellant or respondent, and (3) give references of any authorities (including cases) relied upon.

4. The Moot

- 4.1 All preliminary round moots in the Competition (apart from the Final) will be held in the Faculty of law moot courts on Monday 14 November. If there are sufficient teams enrolled to compete, additional moots may be run on Tuesday 15 and/or Wednesday 16 November.
- 4.2 Each team has twenty minutes in which to present its arguments. Each speaker must speak for at least ten minutes.
- 4.3 A period of up to two minutes will be allowed to the appellant for rebuttal. The two minutes is in addition to the twenty minutes allowed for the presentation of the substantial submissions.
- 4.4 A judge may interrupt Counsel at any time to ask a question. Judges are expected to ask sufficient questions to test Counsels' understanding of matters relating to the problem, while allowing them fair opportunity to present their argument.
- 4.5 Counsel must not, except in response to questions, introduce arguments not contained in their outline, but should be prepared to answer questions on all points relevant to the problem, whether contained in their outline or not.
- 4.6 A bailiff/timekeeper will be present in the court, and display a card showing the time remaining when there is 5 minutes, 1 minute and no time left, after which Counsel must stop unless allowed to proceed by the bench. The bailiff/timekeeper must again show the TIME card at the end of any extra time allotted to counsel.
- 4.7 The Appellant may waive rebuttal time at the close of the Respondent's argument. However, the Appellant may not reallocate rebuttal time after the start of the moot.
- 4.8 A speaker for the Respondent is not allowed time for surrebuttal.

5. Judges and Judging Criteria

- 5.1 Each moot will be held before a panel of up to three judges.
- 5.2 Judges will be provided with a copy of the problem, the outlines of argument and the relevant cases before the hearing of each moot.
- 5.3 Each Judge must complete an individual marking sheet for each participant in a moot. A copy of that sheet is Attachment A at the end of these Rules.

- 5.4 The presiding judge will add up the marks awarded by all judges using the marks totalling sheet (a copy of which is Attachment B at the end of these Rules).
- 5.5 The winning team in each moot is the team that has the highest total marks. A draw is possible, but judges are asked to reconsider the marks before announcing a draw. Judges will not tell teams who won after each moot.
- 5.6 A verdict on the issues of law raised by the problem is not expected, but each judge may provide a short oral critique of the mooters' performance at the end of each moot.
- 5.7 At the conclusion of the general round, the teams will be ranked according to the marks they received.
- 5.8 The four highest-ranked teams from the first round will participate in the semi-finals. The top-ranked team will moot against the fourth-ranked team, and the second-ranked team will moot against the third-ranked team. The team with the higher ranking will be the Appellant in each semi-final.
- 5.9 The winners of each semifinal will moot in the final. In the final, the team with the highest semi-final marks will appear for the Appellant.
- 5.10 The semi-finals and finals shall occur on Friday 18 November in Moot Court 1.

6. Prizes

- 6.1 The following prizes shall be awarded based upon the results of the competition:
 - (i) Winning team: **\$700**;
 - (ii) Runner up: **\$400**;
 - (iii) Two non-final-qualifying semi-finalist teams: **\$200** (each team);
 - (iv) Best oralist in the preliminary rounds: **\$300**;
 - (v) Law Students Association/Asian Law Students Society prize for best NESB oralist in the preliminary rounds: **\$200**.

7. Miscellaneous

- 7.1 Any matter not addressed in these rules may be determined by the sole discretion of the organizers. There shall be no appeal from a determination made under this section.

Attachment A
Bond University Faculty of Law
 Miscarriage of Justice Moot

INDIVIDUAL MOOT MARKING SHEET

MOOT No.....,

between Team (appellant) and Team (respondent)

Name:.....(Senior/Junior* counsel for Appellant/Respondent*)
*strike out whichever is not applicable

Criteria		Comments	Score
Relevant part of team's written outline	<ul style="list-style-type: none"> • Clear and concise • Correct citations • Logical/easy to follow • Persuasive legal argument 		/10
Content of oral argument	<ul style="list-style-type: none"> • Logical structure, effective overview and conclusion • Understanding of legal issues, their interrelationship • Legal arguments relate to the facts, are based on a sound knowledge of the law, and are reasonably arguable in the current state of the law • Understands, addresses and rebuts points of opponent 		/30
Speaking ability and delivery (including formal aspect of answering questions)	<ul style="list-style-type: none"> • Courtroom style and manner of delivery – 'conversation' with the bench while sufficiently formal and professional • Overall persuasiveness • Speaks with conviction and sincerity 		/30
Substantive aspect of answering questions from the bench	<ul style="list-style-type: none"> • Understands object of questions • Answers questions correctly, concisely and without evasion • Sufficiently flexible to the needs of the bench, while effectively integrating answers into argument • Remains composed under stress 		/30
		TOTAL	/100

General comments:

Miscarriage of Justice Moot Competition

November 14-18, 2011

INSTRUCTIONS

Assume that the defendant John Michael Harris has been granted special leave to appeal this decision to the High Court.

The sole ground of appeal is that the Queensland Court of Criminal Appeal misapplied s668E(1A) Criminal Code Queensland ('the proviso').

You are acting either for the prosecution or the defence at that appeal.

Relevant cases and supporting material:

Mallard v The Queen [2005] HCA 68; (2005) 224 CLR 125 particularly the judges of GUMMOW, HAYNE, CALLINAN AND HEYDON JJ para 1-44

The Queen v Stafford [2009] QCA 407 particularly the judgement of Keane JA at para 131 to 152

Article by Stephen Odgers SC entitled "The Criminal Proviso: A Case for Reform". It can be found at:

<http://search.informit.com.au.ezproxy.bond.edu.au/search;action=doSearch>
[h](#)

PROBLEM

COURT OF CRIMINAL APPEAL QUEENSLAND

CITATION: *R v Harris* [2011] QCCA 154

PARTIES **THE QUEEN**

and

JOHN MICHAEL HARRIS

Defendant

REGISTRY: Brisbane

NUMBER: D00368/EH

JUDGE: Rhodes CJ, Ferrier & Townley JA

ORDERS: Appeal Dismissed

Rhodes CJ

Introduction

1. This is a reference from the Attorney General under s672A of the Criminal Code Qld. Mr Harris was convicted of the murder of Belinda Jackson on 3 April 1998. He appealed his conviction to this court but on December 1998 that appeal was dismissed. His subsequent application for special leave to the High Court was refused.
2. In September 2010 Mr Harris submitted a petition for pardon to the Queensland Governor pursuant to s672A and that matter was referred to this court.
3. In this petition for pardon Mr Harris has produced evidence which was not before the jury at his trial. He argues that this evidence demonstrates that the case that was put to the jury was wrong in material respects. He seeks that this court quash his conviction and acquit him. Alternatively he seeks that this court order that he be re-tried.

Summary

4. For the reasons set out below I would dismiss the appeal. Though it is true that the evidence produced on this appeal make it unlikely that the Crown case at trial is correct, the evidence which remains unchallenged is such that no jury reasonably directed would acquit Mr Harris and as such a retrial would be futile.

Background Facts

5. On 15 August 1997 Mr Harris, his girlfriend Linda Jackson, and her sister Belinda Jackson ('the deceased') were all holidaying together at Fraser Island. They had rented a two bedroom unit at the Kingfisher Bay Resort. Linda Jackson and Mr Harris had arranged to take an all day 4WD tour of the island. The tour left at 7:30am. As it transpired Mr Harris did not accompany his girlfriend on that tour. It was said he had a hangover. As such he was left alone in the unit with the deceased.
6. When Linda Jackson returned from the tour at 6pm she found Mr Harris in the unit reading the paper. The deceased was not there. Linda Jackson was told by Mr Harris that the deceased had gone for a bush walk. At 9pm when she still had not returned, Linda Jackson accompanied by Mr Harris alerted the Hotel staff and subsequently the local parks and wildlife officer.
7. Though a significant search was undertaken, no trace of the deceased was found. On 20 August 1997 some bushwalkers at Eli Creek on the other side of the island found the half naked body of the deceased, partially buried at the high tide mark on the beach.
8. It was initially believed that the deceased had drowned while swimming. It was not until an autopsy report of Dr Hatcher that suspicion was raised as to the manner in which the deceased had died. Dr Hatcher found a bruise on the scalp of the deceased and concluded that she had been struck on the head, rendering her unconscious before she entered the water. Mr Harris was arrested and his possessions seized.

Crown case at trial

9. At trial the crown presented the jury with the following theory of how the murder occurred.
10. Mr Harris and the deceased were secretly in a relationship. Mr Harris lied to Linda Jackson about having a hangover on 15 August 1997 so that he and the deceased could spend time together. Mr Harris had decided that the relationship between him and the deceased should end without Linda Jackson finding out. On the afternoon of 15 August 1997 sometime after 2pm the deceased and Mr Harris went for a 4WD drive to Ellie Creek. Either Mr Harris had determined that he was going to kill the deceased or during a heated argument he struck her in a rage. Either way Mr Harris struck the deceased on the back of the head causing her nose to bleed and rendering her unconscious. He had then held her underwater in Eli Creek before allowing her body to be washed out to sea on the tide. Subsequently her body had been washed up on the beach where it was found on 20 August 1997.

Crown Evidence

11. To support this theory of the case the Crown produced evidence from Dr Hatcher that the bruise on the scalp of the deceased was consistent with having been inflicted just prior to death. There was further evidence, that traces of blood in the nostrils of the

deceased were consistent with having a nose bleed after a significant blow to the head.

12. The Crown also produced evidence from Professor Alan Rogerson, a marine biologist, that the stage of decay of the body was consistent with it having been put in sea water on Monday afternoon before sunset.
13. The Crown also produced evidence of a spot of blood consistent with the deceased blood on Mr Harris board shorts and a further spot of blood and smear of blood consistent with the deceased inside his camera bag.
14. The Crown produced evidence that Mr Harris had a sexual relationship with the deceased by tendering love letters she had written him. The letters were undated. Further they produced evidence from hotel staff that the pair had been seen by the hotel pool around 11am, and that Mr Harris had attended at the front desk around 12pm inquiring about 4WD tracks of the island and was seen shortly before 2pm in the car park area near where his vehicle was parked.
15. It was accepted that Mr Harris was in the company of other people from 6pm on 15 August 1997 and could not have committed the murder after that time.

Defence Case

16. Mr Harris denied that he was involved in the murder of the deceased. He says that on 15 August 1997 he was hung-over from dinner the night before where he had drunk a considerable quantity of alcohol. There was some support for this from Linda Jackson. Further he said that he had slept late and got up just before 11am and walked out to get some breakfast. He had seen the deceased by the pool and stopped briefly to chat with her. Afterwards, back in the hotel room the deceased had come in and asked Mr Harris to get a bushwalking map from the front desk while she had a shower, which he did. He said she left the unit saying she was going for a buskwalk. Mr Harris said he used the Hotel gym before grabbing a sandwich from the Hotel Kiosk. He produced a receipt for the sandwich with gave the time of 12:59pm. He then returned to his room to shower. At around 2pm he walked out to look at the hotel grounds but returned to his room and slept for the afternoon. He awoke shortly before Linda Jackson returned and read the paper.
17. He conceded that a year before, in 1996, he and the deceased had had a short sexual relationship but that it had ended and both had moved on. Mr Harris could not explain how a spot of blood of the deceased got on his board shorts or in his camera bag. He pointed to the fact that the deceased had had a bloody nose some weeks before when Mr Harris, Linda Jackson and the deceased were swimming at Surfers Paradise.
18. Mr Harris gave evidence at his trial and all this information was before the jury. As Mr Harris was convicted it can be concluded that they jury did not accept his version of events.
19. There was an appeal to this court in July 1998 on technical grounds relating to the judge's summing up to the jury. It was dismissed and the reasoning does not affect the judgement on this appeal.

20. On 30 October 1998 an application for Special Leave to appeal was rejected.

New Evidence

21. Mr Harris now produces three experts' reports that were not before the jury or this court on the first appeal.
22. The first report is from a Professor Cameron Forrest who holds the Chair of Forensic Medicine at the James Cook University Medical School. Professor Forrest takes issue with several conclusions reached in the original autopsy report of Dr Hatcher. Specifically Professor Forrest says that it is impossible to tell the age of a bruise unless a dissection is taken. As this was not done, Professor Forrest says Dr Hatcher could not say definitively that the bruise on the scalp of the deceased occurred shortly before death.
23. Further Professor Forrest said that it impossible to say definitively whether a bruise on the head would have resulted in a person becoming unconscious. Finally Professor Forrest stated that it was impossible to say definitively whether a blow to the head caused a nose bleed. Professor Forrest's report demonstrates that Dr Hatcher should have been more circumspect in his analysis and evidence at trial. It does not demonstrate that Dr Hatcher was wrong.
24. The second expert report was from Dr Henrich Newlands a forensic pathologist. Dr Henrich had retested Mr Harris's camera bag and concluded that the blood smear found inside the bag could not be grouped and it was wrong to conclude that this was definitively the blood of the deceased. However, Dr Newlands retested the drop of blood in the camera bag and concluded that this was the blood of the deceased. Dr Newlands did not question the results of the blood found on Mr Harris' board shorts.
25. The final expert report produced on this appeal was a further report from Professor Rogerson who gave evidence at trial. Professor Rogerson, having received more information recalculated his estimate as to the time for death of the deceased. The Queensland police had provided Professor Rogerson with water temperatures from the waters to the west of Fraser Island which are on average 2 degrees warmer than the ocean on the eastern side of the island where the deceased washed ashore. The colder water temperature, according to Professor Rogerson, would mean the body would take longer to decompose. Finally Professor Rogerson had been told that Eli Creek was a salt water creek when in fact it is a fresh water creek. Bodies take longer to decompose in fresh water than in salt water he says.
26. All this information now leads Professor Rogerson to estimate that the time of death of the deceased was sometime on the morning of the 16th of August 1997. Though he conceded that it was not an exact science.
27. Mr Harris submits that the new evidence produced on appeal has demonstrated that a central plank of the Crown case is incorrect and he is therefore entitled to a re-trial if not an acquittal. To support this proposition he cites *Mallard v The Queen* [2005] HCA 68; (2005) 224 CLR 125; (2005) 222 ALR 236; (2005) 80 ALJR 160 ('*Mallard*').

28. Mr Harris argues that this entitles him at least to a retrial if not an acquittal.

Legal Considerations

29. There is no doubt that the new material demonstrates that some evidence put to the jury has been determined to have been incorrect. However, the Crown was not bound to provide a particular theory to the jury beyond a reasonable doubt merely that Mr Harris murdered the deceased beyond reasonable doubt (*Peacock v The King* [1911] HCA 66; (1911) 13 CLR 619). The jury were told that that was the question of which they had to be convinced.

30. It seems that even if the new material was accepted, the opportunity Mr Harris had, the fact that he was the last person to have seen the deceased alive, his lies, his motive to kill and the drop of blood of the deceased in his camera bag and on his board shorts which he could not explain, are sufficient to satisfied a jury of his guilty beyond a reasonable doubt.

31. It is true that *Mallard* is authority of the proposition that when a central plank of the Crown case is determined to have been wrong an accused is entitle to a retrial. However, the High Court did not mandate that in all cases an appeal court must make such an order. An appeal court in such a situation must always keep in mind the question of the utility of a retrial. Further, the decision in *Mallard* did not and could not negate the effect of the proviso which is enshrined in the *Criminal Code* (s668E(1A)) and is applicable in this case because a reference under s672A is “to be heard and determined as an appeal”.

Conclusion

32. Though it is a fine balancing act; I conclude that even considering the new evidence now produced that no substantial miscarriage of justice has occurred or, put another way, that a jury reasonably directed would be satisfied that Mr Harris is guilty beyond reasonable doubt. As such I would dismiss the appeal.

Ferrier JA

33. I have read the reasons for the decision given by my brother Rhodes CJ and I agree with the orders he proposes.

Townley JA

34. I have read the reasons for the decision given by my brother Rhodes CJ and I agree with the orders he proposes.

Orders

Rhodes CJ

Therefore the orders of the court are that the appeal be dismissed