Keeping up Appearances: Apprehended Bias in *Antoun v The Queen*

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Abstract

In *Antoun v The Queen;* the High Court considered the 'ill-defined line' between permissible and impermissible judicial comment. Overturning the unanimous decision of the Court of Criminal Appeal of New South Wales, the High Court found that the conduct of Christie DCJ may have led a fair-minded lay person to apprehend that his Honour might have been biased. In this article, I suggest that the different approaches of the NSW Court of Criminal Appeal and the High Court to this issue highlight a tension between competing concerns of due process and efficiency in the administration of justice. In taking a strict approach to the bias rule, the High Court affirmed the importance of due process and the appearance of justice.

1. Introduction

In *Antoun v The Queen; Antoun v The Queen* (2006) 224 ALR 51[1] ('*Antoun*') the High Court overturned a unanimous finding of the Court of Criminal Appeal of New South Wales[2] that Christie DCJ had not engaged in conduct that might have reasonably given rise to an apprehension of bias. In this essay, I will look in detail at the High Court's decision in *Antoun*, paying particular attention to the ways in which it differs from the decision of the Court of Criminal Appeal. In this first section, I will outline the background to the proceedings, including the conduct that gave rise to the claim of apprehended bias. In Section Two, I look at how *Antoun* fits into the existing law on bias by prejudgment, and in Section Three, I will consider possible reasons why the Court of Criminal Appeal and the High Court came to different conclusions on the question of apprehended bias. I argue that the High Court took a more stringent approach to the issue of apprehended bias than did the Court of Criminal Appeal, which was willing to grant the trial judge greater leeway in his words and conduct. I will also canvass the idea that each court's approach to the issues suggests a different emphasis on the importance of competing concerns of efficiency and due process.

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1 *Antoun v The Queen; Antoun v The Queen* (2006) 224 ALR 51.

2 *R v Joseph Antoun; R v Antoine Antoun* [2004] NSWCCA 268 ('*Antoun CCA*').

A. History of the Proceedings

Brothers Joseph and Antoine Antoun were jointly charged with demanding money with menaces with intent to steal[3] from Michael Savvas, then proprietor of the Daintree Café in the Darling Harbour precinct.[4] Their defence was that they had an honest claim of right over the money, which was owed to them for security services that they had provided for the nightclub.[5] The trial was conducted by judge alone, with Christie DCJ presiding.

During the course of the trial, the trial judge made several comments that gave rise to a complaint of apprehended bias. Early in the hearing, counsel for Joseph Antoun and counsel for Antoine Antoun foreshadowed that they planned to put forward an application for a directed verdict of acquittal, on the ground that there was no case to answer.[6] Upon hearing this, the trial judge replied, 'I see, well that application will be refused. So how long then will the defence case take?'.[7] Following debate with defence counsel, his Honour agreed to hear the no case to answer submissions. However, after defence counsel asked whether his Honour had considered the argument without hearing submissions, his Honour replied, 'I'll consider any submission you put. I'm obliged to consider any position you put'.[8] Defence counsel requested that the trial judge disqualify himself based upon this exchange. However, his Honour demurred, explaining that he had a very firm view that, as a matter of law in the case at hand an application of no case to answer was doomed to failure.[9] Counsel for Joseph Antoun then made another application to disqualify based upon what his Honour had just said. This application, too, was rejected.[10]

A third application to disqualify was made before the conclusion of the defence case, after his Honour had decided to revoke bail of his own motion. When questioned by defence counsel, his Honour indicated that his two principal concerns were with the strength of the Crown case and the demeanor of Joseph Antoun in the witness box. The Crown made no submissions on bail. This third application to disqualify was also rejected.

The test for apprehended bias is whether, in all the circumstances, a fair-minded observer might entertain a reasonable apprehension that the trial judge might not bring an unprejudiced mind to the resolution of the matter.[11] The Court of Criminal Appeal unanimously found that the trial judge had not behaved in a manner giving rise to a reasonable apprehension of bias. The High Court unanimously reversed this decision, finding that the trial judge's words may have caused an observer to conclude that the trial judge might have prejudged the no case submission.

3 Contrary to the *Crimes Act* 1900 (NSW) s 99.
4 *Antoun* (2006) 224 ALR 51 at 52 (Gleeson CJ).
5 Ibid.
6 Id at 69 (Callinan J).
7 Id at 69 (Callinan J).
8 Id at 70 (Callinan J).
9 Ibid.
10 Id at 71 (Callinan J).
11 *Webb v The Queen* (1994) 181 CLR 41 at 67 (Deane J).

B. Proceedings in the NSW Court of Criminal Appeal

There were four grounds of appeal in the Court of Criminal Appeal,[12] and only the first was raised in the High Court. The first ground of appeal was that the trial judge had erred in refusing defence counsel's application that the trial judge disqualify himself by reason of apprehended bias.[13] The appellants claimed that an apprehension of bias had been demonstrated on three occasions: when the defence had foreshadowed that they would make an application that there was no case to answer, during the no case submission, and during the revocation of bail for both defendants.[14] The further grounds of appeal were that there was no case to answer and a verdict of acquittal should have been entered,[15] that Christie DCJ had misapplied the rule in *Browne v Dunn*,[16] and that the verdict of guilty was unreasonable.[17] The Court of Criminal Appeal rejected all four grounds of appeal.

Regarding the bias submission, Smart AJ (with whom Hislop J agreed) found that the trial judge's conduct had not given rise to a reasonable apprehension of bias. His Honour found that, although it would have been 'discouraging' for senior counsel to be told that his application could not succeed, the trial judge had attended to his submissions, alleviating the impression created by his Honour's earlier statements.[18] Smart AJ characterised the trial judge's statements as 'emphatic', but stated that '[l]ack of delicacy in expression and expressing views forcefully are not sufficient to amount to an apprehension of bias if attention is paid to the submission that there was no case to answer'.[19] In discussing the revocation of bail, Smart AJ noted that a reading of the evidence of Joseph Antoun revealed a witness who was 'out of control, very tense and strong minded',[20] and pointed out that the trial judge had heard full submissions from the appellants. His Honour stated that '[g]iven the evidence and the mode of trial selected by the appellants… I am not persuaded that there was a reasonable apprehension of bias on the part of the trial judge'.[21]

Dowd J also decided that the conduct of Christie DCJ had not given rise to a reasonable apprehension of bias. He characterised the trial as one in which there had been 'energetic exchanges' between defence counsel and the trial judge, but found that nothing in those exchanges was reflective of bias.[22] His Honour cited *Vakauta v Kelly*[23] and *Johnson v Johnson*[24] as authorities for the proposition that 'a judge, sitting as judge and jury, is obliged to be frank and open in his or her

12 *Antoun CCA* [2004] NSWCCA 268.
13 Id at [279] (Smart AJ).
14 Id at [280] (Smart AJ).
15 Id at [232] (Smart AJ).
16 Id at [248] (Smart AJ).
17 Id at [257] (Smart AJ).
18 Id at [291] (Smart AJ).
19 Id at [291]–[292] (Smart AJ).
20 Id at [303] (Smart AJ).
21 Id at [307] (Smart AJ).
22 Id at [67] (Dowd J).
23 *Vakauta v Kelly* (1989) 167 CLR 568 ('*Vakauta*').
24 *Johnson v Johnson* (2000) 201 CLR 488 '*Johnson*').

assessment of the evidence'.[25] His Honour also emphasised the context in which the exchange had taken place (during discussion about the length of the trial) and the possibility that the trial judge, hearing the matter as both judge and jury, may have taken a more critical view of the evidence.[26] His Honour pointed out that the trial judge had heard the Crown's evidence and that the view he had formed at that stage was not unreasonable.[27] Regarding the bail application, Dowd J conceded that the trial judge's approach was uncommon, but found no apprehended bias.[28]

C. Proceedings in the High Court of Australia

Joseph and Antoine Antoun appealed to the High Court of Australia on the sole ground that the trial judge had conducted himself in a way that might have given rise to an apprehension of bias. The High Court unanimously reversed the decision of the Court of Criminal Appeal and remitted the matter to the District Court of New South Wales for retrial.

Gleeson CJ's judgment focused on the trial judge's literal expressions of prejudgment. His Honour argued that it would have been acceptable for the trial judge to suggest that a no case submission would be hard to sustain, but his peremptory announcement that he would dismiss the application had departed from 'the standards of fairness and detachment required of a trial judge'.[29] While his Honour did point out that a judge is not required to devote unlimited time to hearing unmeritorious arguments, he nevertheless concluded that the trial judge's decision to reject the argument without first hearing it gave rise to an appearance of prejudgment.[30] Although agreeing that the no case submission was without merit, Gleeson CJ argued that that did not alter the consequences that flowed from the manner in which the trial judge had dealt with it.[31]

Kirby J came to a similar conclusion, holding that the trial judge's expression had 'crossed the line' between 'forthright and robust indications of a trial judge's tentative views and an impermissible indication of prejudgment'.[32] Kirby J found that the most powerful evidence of this was that the trial judge had expressed his conclusion as to the outcome of a submission before hearing any argument.[33] Like Gleeson CJ, Kirby J also found that the trial judge had 'seemingly [acted] under sufferance because he was obliged to' and that his subsequent hearing of the no case submission was not enough to erase the effect of his earlier comments.[34] Kirby J also examined the principle that a judge should not too readily accept recusal simply because it is demanded by a party, but stated that this principle does not operate to 'smother' the effect of disqualification where it has already arisen.[35]

25 *Antoun CCA* [2004] NSWCCA 268 at [67] (Dowd J).
26 Id at [70] (Dowd J).
27 Id at [69]–[70] (Dowd J).
28 Id at [73] (Dowd J).
29 *Antoun,* (2006) 224 ALR 51 at 57 (Gleeson CJ).
30 Id at 57 (Gleeson CJ).
31 Id at 57.
32 Id at 59 (Kirby J).
33 Id at 59.
34 Id at 60 (Kirby J).

His Honour also looked at the fundamental right to an impartial tribunal, which he characterised as a basic human right, not simply a rule of judicial practice.[36]

Callinan J acknowledged that a trial judge may be less formal in a trial by judge alone than in one in which there is a jury.[37] However, his Honour was of the view that this informality needed to be in keeping with the rule against prejudgment and the principle that justice must not only be done, but must also be seen to be done.[38] Like Gleeson CJ and Kirby J, Callinan J stressed that the strength of the Crown's case could not be used as justification for the trial judge's expression of a determination to reject the appellants' submissions.[39] The trial judge was obliged to follow proper process and had not done so, despite the fact that he had ultimately heard the submissions.[40] The apprehension of bias that had already arisen had been reinforced by his Honour's revocation of bail.[41]

Hayne and Heydon JJ agreed with the reasons of Callinan J, but Hayne J made some additional remarks with which Heydon J agreed. Hayne J, like Kirby J, felt there was a line to be drawn between judicial efficiency and prejudgment, and that the trial judge had crossed it.[42] Like Gleeson CJ, Kirby and Callinan JJ, his Honour felt that what was 'determinatively significant' was the trial judge's assertion that he would reject the no case submission before he had heard it.[43] Given that the trial judge had not known the contents of the submission, it was 'inevitable' that the fair-minded observer might apprehend that the trial judge might not have brought an impartial mind to the resolution of the issues in the trial.[44] The revocation of bail had served to reinforce this initial apprehension.[45]

2. Antoun and the Law on Bias and Prejudgment

The basic test for disqualification on the ground of apprehended bias was confirmed by the High Court in *Webb v The Queen* as:

> Whether, in all the circumstances, a fair-minded lay observer with knowledge of the material objective facts "might entertain a reasonable apprehension that [the judge] might not bring an impartial and unprejudiced mind to the resolution of the question".[46]

35 Ibid.
36 Ibid.
37 Id at 76 (Callinan J).
38 Id at 76 (Callinan J)
39 Id at 77 (Callinan J).
40 Id at 77 (Callinan J).
41 Id at 78 (Callinan J).
42 Id at 64 (Hayne J).
43 Id at 65 (Hayne J).
44 Ibid.
45 Hayne J also queried the viability of presenting a no case to answer submission in a trial by judge alone but declined to make a determination upon this issue. See *Antoun* id at 64.
46 *Webb v The Queen* (1994) 181 CLR 41 at 67 (Deane J), quoting from *Livesey v The NSW Bar Association* (1983) 151 CLR 288 at 293–4 (Mason, Murphy, Brennan, Deane & Dawson JJ).

The test has been called a 'double might test' as it refers to a possibility, not a probability, of bias. However, the apprehension of bias still needs to be soundly or reasonably based.[47]

There are generally considered to be two rationales for the bias rule. The first, that no person shall be a judge in his or her own cause, is often used to explain the 'pecuniary interest' test for bias, as a judge with an interest in the proceedings would be passing judgment upon his or her own cause.[48] The second rationale, generally cited for the apprehended bias rule, is that it is important to maintain public confidence in the fairness and impartiality of the judicial system.[49] Justice must not only be done but must also be seen to be done. Thus, there does not need to be any actual bias on the part of the adjudicator for apprehended bias to be found – it is enough that the adjudicator might not appear to be impartial.[50]

A number of considerations have formed the basis of attempts to argue apprehended bias, such as an adjudicator's background or professed opinions, extra-judicial statements, or association with interested parties. The claim of apprehended bias put forward in *Antoun* was that the trial judge, in statements made during the course of proceedings, had indicated that he had prejudged the issue at hand. The key question to be answered in a case such as this is whether or not the trial judge's mind had been 'so foreclosed as to preclude genuine consideration' of the issue.[51]

In *Vakauta v Kelly,* Brennan, Deane and Gaudron JJ described the boundary between permissible and impermissible comment as 'an ill-defined line'.[52] The question of what judicial comment will cross that line, and what will not, remains uncertain. In *Vakauta v Kelly*, the majority rejected the principle in *R v Watson; Ex parte Armstrong*[53] that judicial silence is a 'counsel of perfection.' Instead, the majority stated that, in a trial without a jury, a judge who leaves unknown his or her views on the problems, issues and technical difficulties of a case is not 'a model to be emulated'.[54] This principle was upheld in *Johnson v Johnson*[55] and was referred to with approval in *Antoun*.[56]

Although judges should be encouraged to provide tentative views during the proceedings, these views must not suggest that they have prejudged the matter. In *Vakauta v Kelly*, the majority found that the judge had crossed the 'ill-defined line' when he cast aspersions upon one of GIO's expert witnesses in his judgment, and

47 *Gas & Fuel Corporation Superannuation Fund v Saunders* (1994) 52 FCR 48 at 64, cited in Mark Aronson, Bruce Dyer & Matthew Groves, *Judicial Review of Administrative Action* (3rd ed, 2004) at 606.

48 Margaret Allars, 'Citizenship Theory and the Public Confidence Rationale for the Bias Rule' (2001) 18 *Law in Context* 12.

49 Ibid.

50 Aronson, Dyer & Groves, above n47 at 606.

51 Roger Douglas, *Administrative Law* (2nd ed, 2004) at 211.

52 *Vakauta* (1989) 167 CLR 568 at 571.

53 *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 294 (Barwick CJ, Gibbs, Stephen & Mason JJ), cited in *Vakauta* (1989) 167 CLR 568 at 571.

54 *Vakauta* (1989) 167 CLR 568 at 571.

55 *Johnson* (2000) 201 CLR 488.

56 *Antoun* (2006) 224 ALR 51 at 59–60 (Kirby J).

those comments were considered in light of earlier derogatory references to the insurer's three medical experts.[57] This issue was also considered in *Johnson v Johnson*, in which a Family Court judge had expressed a preference for independent evidence to determine which of the parties owned a particular asset.[58] In that case, the majority found that the trial judge's statements could be distinguished from the categorical statements of the trial judge in *R v Watson; Ex parte Armstrong*, who had told the parties that his opinion of them was such that credit was a 'non-issue'.[59] Here, the trial judge had not expressed a concluded view on the credibility of either party, and his views were 'understandable'.[60]

Although the High Court in *Antoun* made no change to the basic test and enquiry for bias by prejudgment, the decision adds further definition to the 'ill-defined line' between permissible expression of judicial views and impermissible indications of prejudgment. Although similar in style to the comments of the trial judges in *Vakauta v Kelly* and *R v Watson; Ex parte Armstrong*, Christie DCJ's statements provide a further illustration of language that will give rise to an apprehension of bias. In particular, the notion in *Antoun*, that the trial judge had spoken out of turn despite making what the High Court seemed to view as a correct and understandable decision, illustrates the importance of expressing tentative views tentatively.

Moreover, *Antoun* indicates that a reluctant hearing of the issues will not suffice to overcome a strong impression of apprehended bias. The majority in *Johnson v Johnson* suggested that:

> No doubt some statements, or some behaviour, may produce an ineradicable apprehension of prejudgment. On other occasions, however, a preliminary impression created by what is said or done may be altered by a later statement.[61]

In that case, the court concluded that Anderson J's subsequent explanation of his statements would have reinforced the view of the fair-minded observer that there was no apprehension of bias.[62] *Antoun* provides an example of a case in which a judge's attempt at ameliorating conduct, here the reluctant hearing of the no case submission, was held not to alter the impression created by his initial indications of prejudgment.

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57 *Vakauta* (1989) 167 CLR 568 at 573 (Brennan, Deane & Gaudron JJ). In this case the trial judge had referred to the experts as the 'unholy trinity' and referred to them as the 'usual panel of doctors who think [they] can do a full week's work without any arms or legs'. However, the party alleging bias had waived its right to object by failing to raise apprehended bias at the time these statements were made. The majority found, however, that the trial judge's reassertion of his comments in the judgment 'revived' his earlier statements and allowed the claim of apprehended bias to succeed.

58 *Johnson* (2000) 201 CLR 488.

59 Id at 494–5 (Gleeson CJ, Gaudron, McHugh, Gummow & Hayne JJ).

60 Id at 495 (Gleeson CJ, Gaudron, McHugh, Gummow & Hayne JJ). See also Amanda Bradford, 'Casenote: *Johnson v Johnson*' (2000) 10 (2) *Journal of Judicial Administration* 73 at 75.

61 *Johnson* (2000) 201 CLR 488 at 494 (Gleeson CJ, Gaudron, McHugh, Gummow & Hayne JJ).

62 Id at 494 (Gleeson CJ, Gaudron, McHugh, Gummow & Hayne JJ).

3. Broader Implications of the High Court's Decision

Apart from the further definition that *Antoun* adds to the law of bias by prejudgment, the case also raises several policy issues regarding the rationale for the bias rule and the tension between due process and efficiency in the administration of justice. An application of the apprehended bias rule in an appeal involves asking whether or not to overturn a trial on the basis of a procedural error, rather than any necessary miscarriage of justice in the trial's result. The different approaches taken by the Court of Criminal Appeal and the High Court to the question of whether or not apprehended bias was made out demonstrate a tension between two approaches to apprehended bias. The first is a cautious approach that gives judges the benefit of the doubt, and the second is a stricter, more vigilant approach. This tension can be linked to a more general tension between emphasising due process (here by applying strictly a rule of procedural fairness to overturn a guilty verdict), and striving for efficiency in the courts (here by allowing the trial judge greater leniency if there has been no error in the ultimate decision of law). This tension between due process and efficiency was played out in the differing approaches of the Court of Criminal Appeal and the High Court to the bias rule, and in their differing opinions on the importance of the ultimate outcome of the trial.

In his judgment, Kirby J set out what he saw to be the considerations underlying the Court of Criminal Appeal's decision:

1. That the trial judge's expression had been 'forthright' but not excessive enough to warrant disqualification;
2. That it is preferable for a judge to express tentative reactions to submissions rather than to remain silent;
3. That judges should not submit too readily to demands for disqualification; and
4. That the trial had not been ultimately unfair, given the mode of trial selected and the weight of the Crown case.[63]

Broadly speaking, the first three considerations relate to the amount of leniency to allow the trial judge in his or her words and conduct. The fourth consideration relates to the proviso to criminal appeals and questions about the emphasis to be placed on due process and a fair trial.

A. How Much Leeway Should a Judge Be Given?

One of the central differences between the approaches of the Court of Criminal Appeal and the High Court to apprehended bias was the amount of leeway each court allowed the trial judge. This was considered in *Antoun* through two related questions: whether the trial judge's words and conduct had 'crossed the line' into impermissible indications of bias, and how much emphasis should have been placed on the context of the proceedings and the trial judge's attempts at ameliorating conduct.

63 *Antoun* (2006) 224 ALR 51 (Kirby J).

That the Court of Criminal Appeal took a more cautious approach to apprehended bias in *Antoun* than did the High Court can be seen in the approach that each court took to assessing the words and conduct of Christie DCJ. Although agreeing on what had been said, and on the applicable principles of law, the two courts disagreed on the correct interpretation to place on the trial judge's statements. For example, Dowd J, in the Court of Criminal Appeal, acknowledged that the trial judge had not chosen 'the most felicitous way of expressing his view', but did not feel that this infelicity amounted to apprehended bias.[64] Smart AJ, too, characterised the trial judge's conduct as '[l]ack of delicacy in expression and expressing views forcefully', but did not feel that it indicated a closed mind.[65] The High Court, in contrast, found that the trial judge's expressions clearly indicated that he had formed a view on the no case submissions before hearing them.

Moreover, in the Court of Criminal Appeal, both Dowd J and Smart AJ focused to a much greater extent than did the High Court on all the exonerating circumstances of the case: the strength of the prosecution case, the demeanour of the accused, and the fact that the trial judge had ultimately heard submissions. None of the judges in the High Court, on the other hand, placed much weight on the trial judge's assurance that he would consider any submission put, a statement which Callinan J characterised as 'more of a protestation, than an assurance of impartiality'.[66] Indeed, in general, the High Court emphasised the trial judge's initial announcement that he would dismiss the appeal over his Honour's ensuing conduct, which was generally held to reinforce the impression already created.[67]

That the Court of Criminal Appeal took a cautious approach to apprehended bias is also supported by Kirby J's argument that they were influenced by Mason J's caution in *Re JRL; Ex parte CJL*[68] against judges accepting disqualification too readily.[69] In that case, Mason J cautioned that, although the appearance of justice is important, it is also important that judges discharge their duty to sit and do not allow the parties to choose their preferred adjudicator.[70] This principle appears to go hand in hand with that cited by Wilson J in *Re JRL* that, as a general rule, anything that a judge says during the course of argument will be considered tentative and exploratory, not indicative of a closed mind.[71] This principle exposes another tension in the application of the bias rule – between assuming that judges are generally neutral and thus being cautious when applying the bias rule, and being vigilant in upholding the appearance of justice by taking a strict approach to apprehended bias. Consistently with its approach to the trial judge's statements, the High Court took a strict approach to apprehended bias, considering that this principle was not sufficient to override the impression already created by the trial judge's words and conduct.[72]

64 *Antoun CCA* [2004] NSWCCA 268 at [71] (Dowd J).
65 Id at [292] (Smart AJ).
66 *Antoun* (2006) 224 ALR 51 at 78 (Callinan J).
67 Id at 60 (Kirby J), 65 (Hayne J), and 78 (Callinan J).
68 *Re JRL; Ex parte CJL* (1986) 161 CLR 342.
69 Id at 352 (Mason J).
70 Ibid.
71 Id at 360 (Wilson J), citing *R v Lusink; Ex parte Shaw* (1980) 32 ALR 47 at 50–1 (Gibbs ACJ).

The different levels of leniency that each court afforded the trial judge have implications not only for their approaches to upholding the appearance of justice, but also for each court's commitment to due process. The High Court's disinclination to overlook the trial judge's remarks signals a stringent approach to procedural fairness. This approach can be contrasted with that of the Court of Criminal Appeal, which, in downplaying the importance of the trial judge's controversial statements, may privilege concerns of efficiency over a strict adherence to due process.

B. How Relevant Is the Ultimate Fairness of a Trial?

As Kirby J pointed out, the Court of Criminal Appeal took account of the weight of evidence against the accused and likelihood of the appeal changing the ultimate outcome of the trial.[73] Kirby J also suggested that at least a majority of the Court of Criminal Appeal appeared to have referred to considerations mentioned in the proviso governing criminal appeals.[74] Although the proviso was not directly raised as an issue for decision in the appeal, questions about the relevance of the strength of the Crown case to an appeal are strongly tied up with questions about the applicability of the proviso.

(i) The Proviso to Criminal Appeals

The proviso to criminal appeals forms part of s 6(1) of the *Criminal Appeal Act* 1912 (NSW). Section 6(1) provides that 'the court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred'. As Catherine Penhallurick argues, '[t]his "proviso" reflects the need to balance an accused person's right to a fair trial, conducted according to law, with the desire to avoid overturning a conviction on the basis of an inconsequential error at the trial'.[75] Therefore, determining the application of the proviso involves weighing up the competing concerns of efficiency and due process.

Decisions on the application of the proviso are a natural site for debate in the courts about these competing concerns. In *Wilde v The Queen*,[76] the High Court laid down a two-step test to determine when the proviso should be applied. The first step is to ask whether 'an irregularity has occurred which is such a departure from the essential requirements of the law that it goes to the root of the proceedings' (the 'fundamental error test').[77] If this is the case, then it is irrelevant whether this irregularity might have affected the jury's verdict. However, if the irregularity is not 'fundamental', then the court asks whether the accused lost a

72 See *Antoun* (2006) 224 ALR 51 at 60 (Kirby J).

73 Id at 62 (Kirby J).

74 Id at 62.

75 Catherine Penhallurick, 'The Proviso in Criminal Appeals' (2003) 27 *Melbourne University Law Review* 800 at 801.

76 *Wilde v The Queen* (1988) 164 CLR 365.

77 Id at 373 (Brennan, Dawson & Toohey JJ).

chance of acquittal.[78] Penhallurick looks at the rationale behind the fundamental error test, arguing that this test is an affirmation of the paramount importance of due process, as it implies that a substantial miscarriage of justice can occur even if a person who is in fact guilty is convicted.[79] This concept underpins the High Court's decision in *Antoun*.

The application of the proviso was not directly raised as an issue for decision by any of the parties in *Antoun*.[80] However, Kirby J suggested that the Court of Criminal Appeal had disposed of the appeal by reference to considerations mentioned in the proviso.[81] Kirby J also argued that the Crown placed strong emphasis on the strength of the prosecution case in its arguments before the High Court, a matter that would chiefly have been relevant to the application of the proviso.[82] Without deciding whether the proviso would have applied in *Antoun*, his Honour suggested preliminarily that the trial judge's conduct may have resulted in 'a sufficient miscarriage of justice' to preclude the operation of the proviso.[83] Moreover, without explicitly mentioning the proviso, all members of the court engaged in the balancing exercise it demands to varying degrees. Furthermore, the fact that the High Court paid little attention to the strength of the Crown case in overturning the Court of Criminal Appeal's finding strongly suggests that an error such as apprehended bias is of such a fundamental nature that it irreparably impairs the trial, despite the justice or otherwise of the outcome.

(ii) The Importance of Due Process

The implications of the High Court's disregard for the strength of the Crown case emphasise the importance of due process over considerations of efficiency in the administration of justice. The High Court has considered due process fundamental to an individual's right to a fair trial on several notable occasions. In *Dietrich v The Queen*,[84] the court affirmed the principle that an accused's right to a fair trial (or rather the right not to be tried unfairly) is one of the fundamental elements of our criminal justice system.[85] Again, in *Kable v DPP (NSW)*,[86] the court upheld the importance of due process of law in overturning a state law allowing preventative detention without trial.[87] In both of these cases an individual's right to a trial, conducted according to law, was held to be fundamental, despite the cost, efficiency and crime control considerations present in each case.

78 Id at 371. See Penhallurick, above n75 at 807.

79 Penhallurick, above n75 at 808. Penhallurick goes on to argue that the majority's application of the fundamental error test in *Wilde* conflated it with the 'lost chance of acquittal' test and thus weakened its emphasis on due process.

80 See *Antoun* (2006) 224 ALR 51 at 65 (Hayne J).

81 Id at 62 (Kirby J).

82 Id at 62–3 (Kirby J).

83 Id at 63 (Kirby J).

84 *Dietrich v The Queen* (1992) 177 CLR 292.

85 Id at 295–6 (Mason CJ & McHugh J), affirming the principle from *Jago v District Court (NSW)* (1989) 168 CLR 23.

86 *Kable v DPP (NSW)* (1996) 189 CLR 51.

87 Ibid..

Similar considerations underpinned the High Court's strict application of the apprehended bias rule in *Antoun.* Again, Kirby J paid the most explicit attention to the implications of apprehended bias for the accused's right to a fair trial. In deciding to remit the matter for retrial, Kirby J cited the increasing recognition of 'the fact that the entitlement to an impartial tribunal is one of the most important human rights and fundamental freedoms recognized by international law'.[88] His Honour argued that Australia's ratification of the *International Covenant on Civil and Political Rights*[89] and the *First Optional Protocol* thereto[90] has reinforced the existing common law principle that each individual has a fundamental right to an impartial tribunal, stating that '[i]t is not simply an aspiration or guideline of good judicial practice. It is a basic *right* which the appellants in this case have asserted'.[91] Although the other judges of the High Court did not outline their adherence to this principle so explicitly, they each rejected the argument that the strength of the Crown case should mitigate the effect of apprehended bias. Therefore, in ordering a retrial despite the costliness and the small chance of a different result, the High Court emphasised the importance of an individual's right to due process.

4. Conclusion

In deciding whether or not to overturn a criminal verdict on appeal because of apprehended bias, the court must implicitly consider whether a rule of due process such as this necessitates the overturning of a verdict that may still be factually sound. There is thus an inherent tension in the application of this rule between competing concerns of due process and efficiency. This tension was played out in *Antoun* in the differences between the High Court's approach and that of the Court of Criminal Appeal. In weighing up the importance of the trial judge's words and conduct, the High Court took a stricter approach to the bias rule than did the Court of Criminal Appeal. The High Court's stringent approach, combined with its willingness to order a retrial despite the strength of the Crown case, affirmed the importance of due process, the appearance of justice, and an individual's right to a fair trial.

88 *Antoun* (2006) 224 ALR 51 at 60 (Kirby J).

89 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

90 *Optional Protocol to the International Covenant on Civil and Politicial Rights*, opened for signature 16 December 1966, 999 UNTS 302 (entered into force 23 March 1976).

91 *Antoun* (2006) 224 ALR 51 at 61 (Kirby J) (emphasis in original).