HIGH COURT OF AUSTRALIA

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File Number:	A20/2024
File Title:	Brawn v. The King
Registry:	Adelaide
Document filed:	FOR PUBLICATION: Form 27D - Respondent's submissions
Filing party:	Respondent
Date filed:	06 Dec 2024

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IN THE HIGH COURT OF AUSTRALIA

ADELAIDE REGISTRY

BETWEEN: **MATHEW CUCU BRAWN**

Appellant

and

THE KING

Respondent

RESPONDENT'S SUBMISSIONS

PART I: CERTIFICATION

1. This submission is in a form suitable for publication on the internet.

PART II: CONCISE STATEMENT OF THE ISSUES

2. The Court will have to consider whether there was a "miscarriage of justice" in connection with the prosecution's obligation of disclosure occasioned in the appellant's trial for sexual offending against a child. Disposing of the appeal will require the construction of s 158(1) and (2) of the *Criminal Procedure Act 1921* (SA) ("***CPA***").[1] In particular, s 158(1)(c), the "third limb" as to whether "on any ground there was a miscarriage of justice."

3. The following questions arise for determination:

   a. in order to establish a "miscarriage of justice" for the purposes of s 158(1) of the CPA, does an appellant have to establish not only that an error or irregularity exists, but that the error or irregularity is a material one?

   b. is the need to establish material error consistent with *Weiss v The Queen*?[2]

   c. in the event an appellant must establish material error, what is the content of the threshold of materiality in order to make out a "miscarriage of justice"? ("***the materiality threshold***").

   d. if there is a materiality threshold, is there a principled difference in the various ways in which members of this Court have as yet sought to express it?[3]

   e. in circumstances where s 158(1)(c) is a deliberately expansive provision to address errors or irregularities arising in both process and outcome, is it appropriate to fix the threshold's content with respect to the capacity of the error or irregularity, and require an appellant to establish that the error or irregularity "…could realistically have affected the verdict of guilt that was in fact returned?" ("***the formulation***").[4]

   f. if there is no materiality threshold, was there a substantial miscarriage of justice where it is contended the irregularity in this matter did not have the capacity to have impacted the result?

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1 In South Australia, found in ss 158(1) and (2) of the *Criminal Procedure Act 1921* (SA).

2 *Weiss v The Queen* (2005) 224 CLR 300.

3 *Hofer v The Queen* (2021) 274 CLR 351; *Edwards v The Queen* (2021) 273 CLR 585; *HCF v The Queen* (2023) 97 ALJR 978; *Huxley v The Queen* (2023) 98 ALJR 62.

4 The respondent respectfully adopts the formulation that the Commonwealth Director has contended for in the matter of *MDP v The King* (B72/2023) at [36]-[38] of her submissions filed 28 March 2024.

The respondent's contentions in brief

4. The respondent contends[5] that there is a materiality threshold and that the formulation above reflects the statements of principle in the various decisions of this Court. For the reasons that follow, because of the way in which the issue of identity was explored at trial, there has been no miscarriage of justice in this case. The irregularity the appellant relies upon could not realistically have affected the result. Similarly, the approach of the Court of Appeal ("***CoA***"), properly understood, was to find that the irregularity did not have the capacity to impact the result, and on that basis, find there was no miscarriage of justice. The appeal should be dismissed.

PART III: 78B NOTICE

5. No such notice is required.

PART IV: FACTS

The offending

6. The appellant was charged with one count of maintaining an unlawful sexual relationship with a child.[6] On the prosecution case, the appellant regularly abused the complainant, who was a fellow member of the Sudanese community. The complainant consistently identified the appellant as her abuser throughout her evidence, by name and by referring to him as her "cousin."[7]

7. A complaint witness attested to the complainant's identification of her "uncle" as her abuser. The complainant was cross examined about this and accepted she might have used the word "uncle", but denied any suggestion that anyone other than the appellant was her abuser.[8] This was clarified in re-examination, where the complainant said she did not use the word "uncle" when she made her complaint.[9]

8. The complainant was between five and eight years old for the period of the abuse. The charged period spanned 2016 to 2018 and was based on evidence of eight unlawful sexual acts occurring at premises at Blakeview, Clearview and Andrews Farm in suburban

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5 These submissions reflect the position of the respondent and interveners in the matter *MDP v The King* (B72/2023). They are put on the basis that "fundamental" errors are material and preclude the application of the proviso in the sense discussed in *Lane v The Queen* (2018) 265 CLR 196 at [38]; *HCF v The Queen* (2023) 97 ALJR 978 at [7]; *TKWJ v The Queen* (2002) 212 CLR 124 at [73].

6 Contrary to s 50(1) of the *Criminal Law Consolidation Act 1935* (SA); CAB 5-6.

7 See, eg, MFIP2 at [102]-[106], [108], [568]; Respondent's book of further material ("***RBFM***") at 12, 44; MFIP4 at [48]; RBFM at 53.

8 Trial transcript at 82-83; RBFM at 112, 113.

9 Trial transcript at 92; RBFM at 121.

Adelaide. Evidence was also led of uncharged acts which occurred prior to the appellant's 18th birthday on 1 April 2016.

9. The eight unlawful sexual acts were:

   a. two acts of fellatio and an act of anal intercourse in the appellant's bedroom, which led to rectal bleeding ("***acts 1, 2 and 3***");

   b. an act of cunnilingus and an act of fellatio, on a chair in the appellant's bedroom ("***acts 4 and 5***");

   c. an act of causing the complainant to touch the appellant's penis and an act of fellatio in the complainant's bathroom ("***acts 6 and 7***"); and

   d. an act of cunnilingus in a public bathroom at a park during a birthday party ("***act 8***").

10. The uncharged acts were:

   a. vaginal intercourse during the complainant's kindergarten years;

   b. an act of fellatio in the appellant's bedroom during which the complainant began bleeding from her nose;

   c. two acts of fellatio and one act of vaginal intercourse in the appellant's bedroom which led to vaginal bleeding and damage to the complainant's underwear; and

   d. an act of vaginal intercourse in the complainant's bedroom.

The trial

11. The defence did not challenge that the complainant had been sexually abused.[10] Rather, the defence case was that the complainant was lying that it was the appellant who committed the abuse.[11] The defence case had two aspects. First, challenging the complainant's credibility in an effort to erode her identification of the appellant. Here emphasis was placed on the complainant's evidence that the appellant's room had a door lock and a mirror, with evidence called on the defence case to the contrary.[12] Second, by suggesting various alternate male culprits within the Sudanese community, without nominating a single individual.

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10 Trial transcript at 32, 430; RBFM at 79, 393.
11 Trial transcript at 32, 430, 432, 434, 436; RBFM at 79, 393, 395, 397, 399.
12 Trial transcript at 302-5, 315, 323-5, 346, 389; RBFM at 307-10, 318, 326-8, 341, 384.

12. This more diffuse approach[13] was adopted because the availability of a single offender, other than the appellant, for all of the acts of abuse was unavailable on the evidence.

13. Nomination of the appellant's father (X) as the perpetrator was explored to the extent that it was available.[14] This drew upon the reference to the complainant's "uncle" in the complaint evidence, outlined above, as a way to suggest an alternative culprit. Motives to lie were explored, citing the potential for the complainant to have been influenced by family dynamics or fear of a hierarchy within the Sudanese community.

The irregularity in this case: "the material"

14. The prosecution did not disclose to the appellant that, in July 2019, X was charged with six counts of unlawful sexual intercourse and one count of aggravated assault against his biological niece, Y ("***the material***").[15]

15. The offences were alleged to have been committed between 10 November 2018 and 24 May 2019 when Y was 15 and 16 years of age. At the time of the alleged offences X and Y were living together at Davoren Park with Y's brothers.

16. The offences were alleged to have been committed at the Davoren Park address; one occasion was said to have occurred in Y's bedroom and the remainder were said to have occurred in X's bedroom. The allegations included that X had touched Y's breasts and vagina; that X had inserted his fingers inside Y's vagina; that X had inserted his penis into Y's vagina; and that on one occasion X had forcefully grabbed Y by her hair. The offences were alleged to have occurred on six separate occasions – 10 November 2018, 18 November 2018, 1 December 2018, 15 December 2018, 1 March 2019 and 24 May 2019.

17. X was committed for trial on 23 July 2020, but the prosecution filed a certificate declining to prosecute the matter on 13 August 2020 and the charges did not proceed.[16]

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13 Trial transcript at 32, 91, 432; RBFM at 79, 120, 395. On appeal, it was conceded that there was no scope for the complainant to be mistaken as to her abuser. See CoA transcript at 17; Appellant's book of further materials ("***ABFM***") at 45.

14 The complainant was cross examined about the presence of the appellant's father in respect of acts 1, 2 and 3, the uncharged acts causing the blood nose and the act of vaginal intercourse occurring in the complainant's bedroom. See trial transcript at 56, 68, 76; RBFM at 85, 97, 105. The presence of X was established on the evidence for some of the period that the complainant's mother was in Africa, act 8, as was his presence in the complainant's home for a period of three months. See trial transcript at 110, 112, 138, 164-5, 171, 173, 211, 280, 365; RBFM at 137, 139, 163, 189-90, 196, 198, 236, 285, 360.

15 See, eg, ABFM at 18-23.

16 Consistent with *Criminal Procedure Act 1921* (SA), s 122.

The appeal to the CoA

18. In the CoA, it was contended that the failure to disclose the material amounted to a miscarriage of justice as the appellant had been "denied an opportunity to explore":

    a. the opportunity of X to have committed the offending;

    b. the existence of a lock or a mirror in X's bedroom; and

    c. further exploration of the initial complaint.

19. The CoA held there had not been a miscarriage of justice. On its analysis of the forensic contest, the CoA was not convinced the irregularity had the capacity to have impacted the result. The crystallisation of this analysis was at [73] where the CoA held that the material "…could not have altered the forensic contest which was marked out by the cases for the prosecution and the defence at trial".[17]

PART V: RESPONDENT'S ARGUMENT

20. A central question in the appeal is what meaning is to be attributed to the concept "miscarriage of justice" in s 158(1) and (2) of the CPA. That question has to be answered by a consideration of s 158(1) and (2) in the context of s 158 more generally in the CPA, and matters of context and purpose, including the common-form provision's history.[18]

What does history tell us?

21. The history of the recognition and correction of error in criminal proceedings is substantial.[19] The disparate and idiosyncratic ways in which errors could be addressed in criminal proceedings in England led to two significant innovations.

22. The first was the establishment of the Court for Crown Cases Reserved,[20] which had the ability to consider relevant questions of law and had powers including to set aside a conviction. The more significant development, which occurred against the background of an increasingly strict approach to errors in criminal proceedings,[21] was the creation of a

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17 *Brawn v The King* [2022] SASCA 96 at [73]; CAB 47.

18 See, eg, *The Queen v A2* (2019) 269 CLR 507 at [32]-[33]; *Legislation Interpretation Act 2021* (SA), s 14; *Weiss v The Queen* (2005) 224 CLR 300 at [9], [11].

19 See, eg, *Conway v The Queen* (2002) 209 CLR 203 at [7]-[32]; Orfield, "The History of Criminal Appeal in England" [1936] 1 *Missouri Law Review* 326; O'Halloran, "Development of the Right of Appeal in England in Criminal Cases" [1949] 27 *Canadian Bar Review* 153; O'Connor, "Criminal Appeals in Australia Before 1912" (1983) 7 *Criminal Law Journal* 262; Leeming, *Authority to Decide* (Federation Press, 2nd ed., 2020) at 281-284; see also the extra-curial writing of Justice M Downs, "No Substantial Miscarriage of Justice: the History and Development of the Proviso to s 385(1) of the Crimes Act 1961" (PhD Thesis, University of Otago, 2010).

20 11 & 12 Vict c 78, s 2; Stephen, *A History of the Criminal Law of England* (1883), vol 1, at 311-312.

21 See, eg, *R v Gibson* (1887) 18 QBD 537 at 540-541.

Court of Criminal Appeal exercising powers pursuant to the "common form" appeal provision.[22] That provision was enacted across Australia, and in some instances went beyond the initial terms of the provision in conferring a power to grant a new trial.[23]

23. As described in *Weiss*,[24] and by Gageler J (as he then was) in *Hofer*,[25] an understanding developed that the effect of Parke B's judgment in *Crease v Barrett* was that, in civil proceedings[26] and criminal proceedings,[27] if an error occurred, the appellant was entitled to having the appeal upheld. This has been described as "the Exchequer rule" but whether the rule's content reflected that understanding has long been doubted.[28] In *Crease v Barrett* itself the error related to the failure to admit a document that it could not be said "….would have had no effect with the jury", rather than the mere failure to admit it.[29]

24. The development of the Exchequer rule in crime was without legislative basis, and its incremental incorporation at common law was not done in a principled manner.[30] Similarly, early decisions and commentary on the *Criminal Appeal Act* and common-form provision reveal that an analysis of error included considerations of the potential significance, or capacity, of errors or irregularities being taken into account by the jury.[31]

"Justice" in the context of criminal appeals

25. The history traced above reveals a desire to ensure material errors and irregularities are corrected. It is convenient to consider, at a general level, what "justice" represents in that context. Justice guarantees an impartial judge[32] who superintends the common law system

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22 *Criminal Appeal Act 1907* (UK), s 4(1).

23 See *Criminal Appeals Act 1912* (NSW), s 6(1), *Criminal Appeals Act 1924* (SA), s 6(1), *Criminal Code Amendment Act 1913* (Qld), *Criminal Code* (WA) s 689(1), *Criminal Code Act 1924* (Tas), s 402(1) and (2), *Criminal Code Act* (NT), s 411(1) and (2). See also *Weiss v The Queen* (2005) 224 CLR 300 at [20]-[21].

24 *Weiss v The Queen* (2005) 224 CLR 300 at [17].

25 *Hofer v The Queen* (2021) 274 CLR 351 at [106]-[108].

26 Prior to the enactment of the *Supreme Court of Judicature Act 1873* (UK).

27 See *R v Gibson* (1887) 18 QBD 537 at 540-541.

28 See, eg, *R v Grills* (1910) 11 CLR 400 at 409-410; *Balenzuela v De Gail* (1959) 101 CLR 226 at 234-235; *Simic v The Queen* (1980) 144 CLR 319 at 332; *Weiss v The Queen* (2005) 224 CLR 300 at [13]; *Hofer v The Queen* (2021) 274 CLR 351 at [107]-[108].

29 *Crease v Barrett* (1835) 1 C M & R 919 at 933. This is also reflected in the summary of argument in the headnote where it was emphasised that the document was "…an important document" in the context of the trial (at 926).

30 See, eg, *Conway v The Queen* (2002) 209 CLR 203 at [7]-[12]; *Weiss v The Queen* (2005) 224 CLR 300 at [12]-[18]; *Cesan v The Queen* (2008) 236 CLR 358 at [77]ff; *Hofer v The Queen* (2021) 274 CLR 351 at [106]-[108].

31 See, eg, Wrottesley and Jacobs (eds), *The Law and Practice of Criminal Appeals* (Sweet and Maxwell, London, 1910) at 195, 200; *R v Coleman* [1908] 1 Cr App R 50 at 51 ("…a clear misdirection"); *R v Lee* [1908] 1 Cr App R 5 at 6 ("…here, perhaps, the jury had been influenced"); *R v Meyer* [1908] 1 Cr App R 10 at 11-12 ("…omission to direct the jury on a point which was not taken at trial may not matter if no injustice was done"). See also *Dal Singh v King Emperor* [1917] UKPC 21 at 6-7.

32 See, eg, *Charisteas v Charisteas* (2021) 273 CLR 289.

of adversarial trial in accordance with judicial process;[33] such trial being conducted fairly and according to law. A verdict returned after a trial undertaken in accordance with that guarantee, is just. Justice guarantees only one trial so conducted,[34] and binds an accused to the case they run.[35] It guarantees that the judicial power of the State to punish will not be exercised absent a conviction returned in accordance with the guarantee,[36] and that there is an appearance and maintenance of confidence in the system of justice,[37] but recognises that perfect justice is an unattainable end.[38]

The history is consistent with the approach in Weiss

26. The respondent contends that the above reveals that Gageler J's analysis in *Hofer* (that an appellant, even under the Exchequer rule, had to establish material error)[39] should be preferred.[40] As explained in *Conway v The Queen* and the Court itself in *Weiss*, it was by no means clear that "any" error entitled a person to a new trial as of right, despite the rule often being expressed in absolute terms.[41] This is also consistent with the subsequent explanations of *Weiss* as primarily being directed toward the proviso.[42]

Returning to the text: s 158 of the CPA and surrounding provisions

27. The CPA provides that, as of right on a question of law alone and with the permission of the court on any other ground,[43] a person convicted on information may appeal to the Court of Appeal against the conviction. On any appeal against conviction, s 158 of the CPA provides[44] that the Court "…will only allow the appeal if it thinks that":

    a. the verdict of the jury should be set aside on the ground that it is unreasonable or against the weight of the evidence ("***the first limb***");

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33 See, eg, *Cesan v The Queen* (2008) 236 CLR 358.
34 See, eg, *Clone Pty Ltd v Players Pty Ltd (In Liquidation)* (2018) 264 CLR 165.
35 See, eg, *Nudd v The Queen* (2006) 80 ALJR 614; *R v Baden-Clay* (2016) 258 CLR 308.
36 Cf, eg, *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005 at [40].
37 See, eg, *Charisteas v Charisteas* (2021) 273 CLR 289 at [21].
38 *Jago v District Court (NSW)* (1989) 168 CLR 23 at 54.
39 *Hofer v The Queen* (2021) 274 CLR 351 at [106].
40 In this connection the respondent embraces the analysis of the Director from New South Wales in the matter of *MDP v The King* (B72/2023) in her submissions at [15]-[20] filed on 28 March 2024.
41 *Conway v The Queen* (2002) 209 CLR 203 at [26]-[31]; *Weiss v The Queen* (2005) 224 CLR 300 at [16]-[18].
42 See, eg, *Cesan v The Queen* (2008) 236 CLR 358 at [112]-[122]; *Filippou v The Queen* (2015) 256 CLR 47 at [4], [9], [13]; *Hofer v The Queen* (2021) 274 CLR 351 at [41], [130].
43 *Criminal Procedure Act 1921* (SA), s 157(1)(a)(i) and (ii).
44 *Criminal Procedure Act 1921* (SA), s 158(1). While the form of the provision was altered (from being a single unbroken provision into two separate provisions) by the *Summary Procedure (Indictable Offences) Amendment Act 2017* (SA) where the provision was moved from the *Criminal Law Consolidation Act 1935* (SA) to the renamed *Criminal Procedure Act 1921* (SA), its substance remained

b. the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law ("***the second limb***"), or;

c. on any ground there was a miscarriage of justice ("***the third limb***").

28. The provisions are accompanied by the proviso empowering the court to dismiss an appeal if "…no substantial miscarriage of justice has actually occurred",[45] and powers in "special cases" to affirm or substitute the sentence passed, substitute a verdict of guilt for a different offence and pass sentence, or make orders giving effect to a special verdict.[46] Hence, the text itself indicates that there is a difference between a "miscarriage of justice" and a "substantial miscarriage of justice".[47]

29. The powers in "special cases" are a further indicator of the purpose of providing flexible ways to address errors in criminal proceedings[48] – including those errors that may be material to some part or count on an information but not material to the result (allowing a sentence to be affirmed) or are material to the result but not in a manner justifying a conviction being quashed and either an acquittal or re-trial ordered (eg re-sentencing on remaining counts or substituting a conviction with a further offence and re-sentencing).

30. The history of the provision reveals that not all errors or irregularities are a "miscarriage of justice", and that there are some third limb errors ("fundamental" errors) that are necessarily material. As a result, the purpose in enacting the provision was not to enact a species of the Exchequer rule as some understood it – but to enact a rule that requires an error or an irregularity of a particular quality to make out a "miscarriage of justice".

<u>The tasks for the parties on an appeal against conviction</u>

31. As explained by this Court in *Filippou*,[49] a court of criminal appeal applying the common-form provision is required to deal with an appeal in three stages. The first requires identification of error (or errors), the second requires determination of whether there was a miscarriage of justice as a result of the error (or errors) and the third is considering whether,

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the same. That is not in dispute. See also *Criminal Code* (Qld) s 668E, *Supreme Court Act 1933* (ACT), s 37O(2)-(3); *Criminal Appeal Act 1912* (NSW), s 6(1); *Criminal Code* (NT), s 411; *Criminal Code* (Tas), s 402(1)-(2); *Criminal Appeals Act 2003* (WA), s 30(3)-(4). See also *Criminal Procedure Act 2009* (Vic).

45 *Criminal Procedure Act 1921* (SA), s 158(2).

46 *Criminal Procedure Act 1921* (SA), ss 158(3), 160.

47 See in this connection, *Baini v The Queen* (2012) 246 CLR 469 at [55]-[56].

48 See *Ryan v The Queen* (1982) 149 CLR 1; *McL v The Queen* (2000) 203 CLR 452.

49 *Filippou v The Queen* (2015) 256 CLR 47 at [4].

notwithstanding the errors, no substantial miscarriage of justice actually occurred. Each requires attention to the forensic contest, and what occurred or did not occur at the trial.[50]

32. Putting aside "fundamental" errors,[51] the respondent contends that it is also for an appellant to establish at the second stage, on the second and third limbs, that the error or irregularity was material, in the sense that it could realistically have affected the verdict of guilt that was in fact returned in the trial.[52] If the appellant succeeds in the first two stages, then it is open for a respondent to contend that, notwithstanding the establishment of material error, the proviso ought be applied.

33. If there is a "fundamental" error, there will have been a miscarriage of justice that is "inherently substantial" and there is no scope for the proviso to apply. There is no rigid formula to determine what will amount to a fundamental error (it may relate to the form of the trial or the manner in which it was conducted)[53] and it will be for an appellant to establish in any given appeal.[54]

The formulation for the materiality threshold[55]

34. The respondent contends that this Court should hold that an appellant must establish an error that "…could realistically have affected the verdict of guilt that was in fact returned" for there to have been a miscarriage of justice.

35. That formulation reflects the content of the various ways in which members of this Court have expressed the need for an appellant to establish the *capacity*, distinct from the *substance* of an error or irregularity in a particular case to establish a miscarriage of justice.[56] This does not impact the role of the proviso or the analysis in *Weiss*. While the

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50 See, eg, *Nudd v The Queen* (2006) 80 ALJR 614 at [3], [6], [24].

51 Which, by definition, are material errors and have no scope for the proviso to apply. See, eg, *Maher v The Queen* (1987) 163 CLR 221 at 234; *Wilde v The Queen* (1988) 164 CLR 365 at 372-373; *Weiss v The Queen* (2005) 224 CLR 300 at [46]; *Baini v The Queen* (2012) 246 CLR 469 at [26]; *Hofer v The Queen* (2021) 274 CLR 351 at [123]; *HCF v The Queen* (2023) 97 ALJR 978 at [7].

52 The respondent respectfully adopts the formulation that the Commonwealth Director has contended for in the matter of *MDP v The King* (B72/2023) at [36]-[38] of her submissions filed 28 March 2024.

53 *Wilde v The Queen* (1988) 164 CLR 365 at 372-373.

54 The respondent respectfully adopts the analysis of the Commonwealth Director on this topic in *MDP v The King* (B72/2023) in her submissions filed on 28 March 2024 at [21]-[25].

55 While making its own submissions here, the respondent contends they broadly reflect the position of those filed by the respondent and the interveners in their primary and supplementary submissions in the matter of *MDP v The King* (B72/2023).

56 See, eg, *Hofer v The Queen* (2021) 274 CLR 351 at [47], [118], [123], [130]; *Edwards v The Queen* (2021) 273 CLR 585 at [74]; *Awad v The Queen* (2022) 275 CLR 421 at [78], [84]; *HCF v The Queen* (2023) 97 ALJR 978 at [78]; *Huxley v The Queen* (2023) 98 ALJR 62 at [40]-[44].

respondent accepts that this appeal only raises the third limb[57] it makes a number of submissions on s 158(1) and (2) taken together, given that the limbs of s 158(1), and surrounding provisions, must be considered, and construed, as a whole.[58]

The "verbal formulations" do not reveal any difference in principle: "materiality" is directed to the capacity of any error or irregularity

36. Various verbal formulations have been employed by members of this Court in considering the third limb. Each formulation, while differently expressed, requires an assessment of the asserted irregularity and the potential of that irregularity to affect the outcome of the trial. In *Hofer*,[59] Kiefel CJ, Keane and Gleeson JJ asked whether there was a "real chance" that the irregularity affected the jury's consideration of the evidence. Gageler J considered whether the irregularity had the "meaningful potential or tendency" to affect the result of the trial, or, put another way, whether the irregularity was of a nature or degree that could realistically have affected the verdict of guilt that was returned in the trial that was had. Justice Gordon's analysis focused on whether it could be said that the irregularity could have had no effect on the outcome of the trial. In *Edwards*,[60] Edelman and Steward JJ considered that the test required an analysis of whether the irregularity had "the capacity for practical injustice" or was "capable of affecting the result of the trial", and in *HCF* their Honours referred to "the capacity of the irregularity to cause prejudice to the jury's consideration of the defendant's case".[61] The majority in *HCF*[62] asked whether the irregularity could realistically have affected the verdict of guilt, and in *Huxley*,[63] Gordon, Steward and Gleeson JJ asked whether the irregularity in the trial process "deflected" the jury from its task.

37. Each formulation is directed to the capacity of the error or irregularity and does not, contrary to the appellant's contention,[64] reveal a different approach to the underlying principle. That principle is, reflective of the history surveyed above, that a "miscarriage of

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57 In contrast to the amended grounds, and supplementary submissions in the matter of *MDP v The King* (B72/2023).

58 See, eg, *Lordianto v Commissioner of the Australian Federal Police* (2019) 266 CLR 273 at [62]. The respondent embraces the analysis of the respondent and the intervenors on the proper approach to second-limb error in the matter of *MDP v The King* (B72/2023) in their supplementary submissions filed on 16 August 2024.

59 *Hofer v The Queen* (2021) 274 CLR 351 per Kiefel CJ, Keane and Gleeson JJ at [41], Gageler J at [102], [116], Gordon J at [130].

60 *Edwards v The Queen* (2021) 273 CLR 585 per Edelman and Steward JJ at [74].

61 *HCF v The Queen* (2023) 97 ALJR 978 per Edelman and Steward JJ at [78].

62 *HCF v The Queen* (2023) 97 ALJR 978 per Gageler CJ, Gleeson and Jagot JJ at [2].

63 *Huxley v The Queen* (2023) 98 ALJR 62 per Gordon, Steward and Gleeson JJ at [40]-[44].

64 Cf appellant's submissions at [44], [54], [56], [58], [60]-[61].

justice" only occurs where errors or irregularities had the *capacity* to impact the result. The function of the threshold is to require a causal connection between an error or irregularity and the result of the trial.

The framework for analysis on all appeals against conviction: the three limbs of s 158(1)

38. On the ***first limb***; it may be generally accepted that where an appellant establishes the verdict was unreasonable, they will have established material error and it will not be appropriate to apply the proviso.[65]

39. On the ***second limb***; the question can relate to misdirection on substantive law and adjectival law, and will ultimately be "…whether the error constitutes a *miscarriage of justice* in the sense of a departure from trial according to law."[66] The respondent contends there is a degree of contextual support for this in the text of second limb itself, in that the "wrong decision" has to be one such that the court "…thinks that" on account of the wrong decision, "the judgment…should be set aside".

40. There is not a principled basis for differentiating the threshold of materiality required for a second limb or third limb error or irregularity. This is in part informed by the fact that the second limb is a narrower species of error,[67] but one that (as outlined in *Filippou*) still requires the identification of an error that has led to a "miscarriage of justice".[68] This approach allows the concept to be interpreted as having the same content in each instance of its use in the provision – the second and third limbs as to *capacity*, and the proviso as to whether or not, as a matter of *substance*, a substantial miscarriage of justice "has actually occurred". This is consistent with the verbal formulations surveyed above.

41. On the ***third limb***; the concept of "miscarriage of justice" is broad. Its inclusion has been characterised as the "greatest innovation" of the *Criminal Appeal Act*.[69] It has been referred to as the "…dragnet ground"[70] and has been construed and applied by this Court in

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65 See, eg, *Filippou v The Queen* (2015) 256 CLR 47 at [15]; *Haydar v The King* [2023] NSWCCA 213 at [6]; *Matenga v R* [2009] 3 NZLR 145 at [9]. Cf the consideration of the receipt of fresh evidence in connection with the proviso on this limb in the extra-curial writing of Justice M Downs: "No Substantial Miscarriage of Justice: the History and Development of the Proviso to s 385(1) of the Crimes Act 1961" (PhD Thesis, University of Otago, 2010) at 66-67.

66 *Filippou v The Queen* (2015) 256 CLR 47 at [13] (emphasis added).

67 As outlined by the Commonwealth Director in her supplementary submissions in the matter of *MDP v The King* (B72/2023) at [19]-[23].

68 *Filippou v The Queen* (2015) 256 CLR 47 at [13].

69 *Hargan v The King* (1919) 27 CLR 13 at 23.

70 *TKWJ v The Queen* (2002) 212 CLR 124 at [72]; *Cesan v The Queen* (2008) 236 CLR 358 at [79].

scenarios relating to both process and outcome in criminal proceedings.[71] The authorities demonstrate that miscarriages of justice relating to process and outcome can be found in an extraordinarily wide range of circumstances.[72]

42. These include considerations of the capacity of fresh evidence,[73] the sufficiency of a trial judge's directions,[74] the potential impact of inadmissible or prejudicial evidence,[75] and irregular conduct on the part of counsel[76] or a judge.[77] In every case, the evaluation of the error or irregularity is tethered to the circumstances and forensic contest of the trial.

43. The need for an appellant on the third limb to establish not only error, but a sufficiently material error, to make out a "miscarriage of justice" has historical pedigree and does no violence to the operation of the common-form provisions. Further, in line with Gageler J's analysis in *Hofer*, it is consistent with the judgment in *Weiss* in that it reflects the content of the common law rule that the Court in *Weiss* was considering.[78]

44. A requirement for materiality is also consistent with the fact that where an appellant is able to establish an error or irregularity that may have been material, but in effect favourable to the appellant, that has not been found to be a basis to set aside a conviction on the third limb.[79] This reflects the majority's characterisation of the concept in *Hofer*.[80]

45. The determination of whether there has been a "miscarriage of justice" requires not only an isolation or identification of an error or irregularity (or multiple errors or irregularities) but a demonstration it had the capacity to have impacted the proceedings below. The fact the focus is confined to the capacity of the error preserves the role of the proviso.[81]

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71 See, eg, *Nudd v The Queen* (2006) 80 ALJR 614 at [6]-[7] and [24]; *Cesan v The Queen* (2008) 236 CLR 358 at [65]-[69]; *Baini v The Queen* (2012) 246 CLR 469 at [25], [54].

72 See, eg, the overview of 33 recent decisions in intermediate appellate courts in the submissions of the Director of Public Prosecutions for New South Wales in *MDP v The King* (B72/2023) at [41].

73 See, eg, *EC (a pseudonym) v R* [2023] NSWCCA 246 at [62].

74 See, eg, *Bates v The King* [2023] SASCA 65 at [55]-[60]; *Walters v The King* [2023] SASCA 133 at [48].

75 See, eg, *R v Scott* [2014] SASCFC 27; *Tomlinson v R* (2022) 107 NSWLR 239 at [60], [120]-[139].

76 See, eg, *R v Kennedy* [2017] SASCFC 170; *R v Bakhuis* [2012] SASCFC 55 at [40]-[41]; *Day v R (No 2)* [2023] NSWCCA 312 at [75]-[77]; *Dedeoglu v R* [2023] NSWCCA 126 at [242]-[244].

77 See, eg, *R v Clancy* (2022) 11 QR 582 at [48].

78 *Hofer v The Queen* (2021) 274 CLR 351 at [108].

79 See, eg, *JW v The King* (2022) 302 A Crim R 365 at [45], [61] (albeit at [61] being expressed in the terms of the proviso); *R v Andreassen* [2005] QCA 107 at [30].

80 *Hofer v The Queen* (2021) 274 CLR 351 at [41].

81 As evidenced in the consideration of "third limb" error, and separate consideration of the proviso, without any principled difficulty or incoherence, in the decisions of *AW v The King* [2023] NSWCCA 92 and *Ilievski v The King; Nolan v The King (No 2)* (2023) 112 NSWLR 375.

The proviso

46. This Court has repeatedly emphasised that the relevant test for the proviso is the statutory test. As was explained in *Kalbasi v Western Australia*, when considering the potential applicability of the proviso, the question is always in the circumstances of the case whether there has been a "substantial miscarriage of justice".[82]

47. If there is no requirement for an appellant to establish the material irregularity (whether in connection with the second or third limb) then the volume of matters in which the proviso arises is likely to increase.[83] To the extent material error is established and the proviso is engaged, the analysis of the particular error is not bifurcated from the circumstances of the case in which it has occurred. A court must consider the nature and circumstances of the material error in the particular case.[84]

48. Finally on the proviso, the respondent observes that in considering its operation and scope, the "negative proposition" from *Weiss* ought not be seen as a necessary condition of its application.[85] Some material errors may have the capacity to make out a miscarriage of justice, but not, properly considered, have had a substantive impact on the trial when the record is considered in line with *Weiss*. The nature and circumstances of the particular error in the case is what requires attention in discharging the task under the proviso.

Conclusion on construction: a "materiality" threshold focussing on capacity is consistent with this Court's approach and the text, context and purpose of s 158

49. The substance of the construction and the formulation for which the respondent contends gives effect to the history of the provision and to this Court's recent decisions. As outlined above, there is no principled basis for differentiating between the various formulations members of this Court have offered in matters where a materiality threshold has not been the subject of considered submissions or argument.

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82 *Kalbasi v Western Australia* (2018) 264 CLR 62 at [15]-[16].

83 As outlined by the Commonwealth Director in *MDP v The King* (B72/2023) at [32]-[34] of her submissions and [22] of her supplementary submissions.

84 *Weiss v The Queen* (2005) 224 CLR 300 at [43]. See also *Cesan v The Queen* (2008) 236 CLR 358 at [126] and *Filippou v The Queen* (2015) 256 CLR 47 at [15]. This includes whether the trial was by Judge alone and, hence, resulted in a finding of guilt supported by extensive reasons: *Schoffel v The King* [2023] NSWCCA 88 at [89].

85 See, eg, *Kalbasi v Western Australia* (2018) 264 CLR 62 per Gageler J at [68]-[72] and Edelman J at [157]-[160].

50. Section 158(1)(c), properly construed, requires an appellant to establish an error or irregularity that could realistically have affected the verdict of guilt that was in fact returned in the trial to establish a "miscarriage of justice".

Disclosure: the prosecution's obligations

51. The prosecution's common law duty of disclosure is a corollary of an accused person's rights to a fair trial, to procedural fairness, and to open justice.[86] It is a duty owed by the prosecution to the court.[87] In South Australia the common law duty is complemented by statute,[88] the Director's policies and guidelines,[89] and obligations imposed under the South Australian Legal Practitioners Conduct Rules.[90]

52. The duty at common law requires the prosecution to disclose material that, on a sensible appraisal by the prosecution: (a) is relevant or possibly relevant to an issue in the case; (b) raises or possibly raises a new issue, the existence of which is not apparent from the prosecution case; or (c) holds out a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (a) or (b).[91] The reference to "an issue in the case" must be given a broad interpretation.[92] Further, the duty is not limited to material that would be admissible in evidence. Further again, by the operation of s 10A of the *Director of Public Prosecutions Act 1991* (SA) the duty is not limited to material in the actual possession of the prosecutor, and extends to material in the possession of the police officer in charge of the investigation which might reasonably be expected to assist the case for the prosecution or the case for the defence.[93]

53. The duty of disclosure extends to information relevant to the credibility of prosecution witnesses, including information about criminal convictions of prosecution witnesses, if the information is sufficiently cogent to cause the prosecution to think that cross-

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86 *R v Brown (Winston)* [1998] AC 367 at 374-5.

87 *R v Ward* [1993] 1 WLR 619 at 645, applying *R v Hennessey* (1978) 68 Cr App R 419 at 426. See also *Marwan v Director of Public Prosecutions (NSW)* (2019) 278 A Crim R 592 at [29].

88 See, eg, *Director of Public Prosecutions Act 1991* (SA) s 10A; *Criminal Procedure Act 1921* (SA) s 111, s 125.

89 Director of Public Prosecutions South Australia, *Statement of Prosecution Policy & Guidelines* (2014), Guideline 9, 20.

90 South Australian Legal Practitioners Conduct Rules, Rule 29.5.

91 *Edwards v The Queen* (2021) 273 CLR 585 per Edelman and Steward JJ at [48]; *R v Keane* [1994] 1 WLR 746 at 752; *R v Brown (Winston)* [1998] AC 367 at 376-7; *R v Melvin and Dingle* (Central Criminal Court, 20 December 1993, unreported); *R v Spiteri* (2004) 61 NSWLR 369 at [17]; *R v Reardon (No 2)* (2004) 60 NSWLR 454; *R v Andrews* (2010) 107 SASR 471 at [19].

92 *R v Brown (Winston)* [1998] AC 367 at 376-7.

93 *R v Forrest* (2016) 125 SASR 319 at [63]-[65].

examination based upon it might materially affect the credibility of the witness.[94] That aspect of the duty has been held to require the prosecution to make an inquiry into whether prosecution witnesses have relevant prior convictions.[95] The duty does not, however, extend to material that is relevant only to the credibility of defence witnesses.[96]

54. A failure of the prosecution in relation to its obligations may amount to a miscarriage of justice under s 158(1)(c) of the CPA.[97] Establishing such failure does not rely on principles relating to fresh evidence.[98] Whether a miscarriage of justice has occurred in a particular case will depend upon the nature and significance of the material that was not disclosed and whether the failure to disclose deprived the accused of their entitlement to a fair trial.[99]

55. In *Grey v The Queen* the prosecution failed to disclose a letter of comfort relating to a key prosecution witness. The majority considered that this led to a miscarriage of justice[100] because the disclosure and admission into evidence of the letter of comfort "could have put a quite different complexion on the case for the appellant and the way in which it was conducted",[101] and would have altered the trial judge's summing up in relation to the witness (including possibly entitling the appellant to an unreliable evidence direction).[102] The majority declined to apply the proviso.[103]

56. In *Mallard v The Queen* the majority confirmed *Grey* as standing for the proposition that a failure of the prosecution to comply with its duty of disclosure may, in some circumstances, require the quashing of a verdict of guilty[104] and suggested that the "cogency" of the evidence not disclosed was the relevant matter for consideration.[105]

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94 See, e.g., *Grey v The Queen* (2001) 75 ALJR 1708; *R v K* (1991) 161 LSJS 135 at 140-141, cited in *R v Forrest* (2016) 125 SASR 319 and *Eastman v Director of Public Prosecutions (ACT) (No 13)* [2016] ACTCA 65; *R v Brown (Winston)* [1998] AC 367 at 377.

95 *R v Brown (Winston)* [1998] AC 367 at 377; *R v K* (1991) 161 LSJS 135 at 140-141; *R v Garofalo* (1999) 2 VR 625 at [70]; *Eastman v Director of Public Prosecutions (ACT) (No 13)* [2016] ACTCA 65.

96 *R v Brown (Winston)* [1998] AC 367 at 379, cited in *R v Reardon (No 2)* (2004) 60 NSWLR 454 at [49] and *R v Spiteri* (2004) 61 NSWLR 369 at [23].

97 *Mallard v The Queen* (2005) 224 CLR 125 at [17]; *Grey v The Queen* (2001) 75 ALJR 1708 at [15]-[18].

98 *Grey v The Queen* (2001) 75 ALJR 1708. See also *R v Reardon* [2004] NSWCCA 197 (Hodgson JA, in *obiter*); *Wood v the Queen* (2012) 84 NSWLR 581 at [713].

99 *Edwards v The Queen* (2021) 273 CLR 585 at [25].

100 *Grey v The Queen* (2001) 75 ALJR 1708 at [23].

101 *Grey v The Queen* (2001) 75 ALJR 1708 at [18].

102 *Grey v The Queen* (2001) 75 ALJR 1708 at [21]-[22].

103 *Grey v The Queen* (2001) 75 ALJR 1708 at [27].

104 *Mallard v The Queen* (2005) 224 CLR 125 at [17].

105 *Mallard v The Queen* (2005) 224 CLR 125 at [17].

57. In *Edwards*, Edelman and Steward JJ held that the irregularity arising in relation to disclosure had not led to a miscarriage of justice because the appellant had not established that the material "was capable of providing the defence with any advantage at trial".[106] The majority did not squarely consider the content of the duty, but found that the appellant had not demonstrated that his entitlement to a fair trial according to law was adversely affected by the non-disclosure.[107]

This appeal: there was no miscarriage of justice

58. For the reasons developed below, the CoA's approach was correct in holding any irregularity arising from the undisclosed material did not lead to a miscarriage of justice.

Appellant's complaints about the CoA's approach

59. The appellant's assertion that the CoA erred has, broadly, three limbs:

    a. first, that the CoA applied the wrong test in determining that there was no miscarriage of justice;[108]

    b. second, that the CoA acted substantively and erroneously on a concession made by the appellant; and[109]

    c. third, that the findings of the CoA required them to conclude that a miscarriage of justice had occurred such that the appeal should be allowed.[110]

60. Each of the above relies on isolated aspects of the judgment. On a reading of the whole of the judgment, the appellant's complaints are not made out and no error is demonstrated.

61. The appellant's argument in support of the first limb relies upon an acontextual reading of the use of the word "would" within the judgment to demonstrate error. The use of this word must be read alongside the analysis throughout the judgment and in the CoA's framing of the ultimate question: "…whether there was a failure by the prosecution to make disclosure which has resulted in a miscarriage of justice".[111]

62. The appellant's acceptance of a materiality threshold, albeit one he characterises as "moderate",[112] does not sit comfortably with his submissions on the capacity of the irregularity in this case. The appellant's arguments do not grapple with the capacity of the

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106 *Edwards v The Queen* (2021) 273 CLR 585 at [35].
107 *Edwards v The Queen* (2021) 273 CLR 585 at [25].
108 See, eg, appellant's submissions at [28].
109 See, eg, appellant's submissions at [86]-[93].
110 See, eg, appellant's submissions at [75]-[76].
111 *Brawn v The King* [2022] SASCA 96 at [27]; CAB 37. See also [66]; CAB 45.
112 Appellant's submissions at [69].

material to have impacted the trial, or the CoA's analysis of and conclusion in relation to the capacity of the irregularity, given the way in which the issue of identity was explored. Whilst actual prejudice on any formulation of the test need not be shown, mere conjecture will not suffice: the causal connection between the irregularity and the result discussed above must be satisfied.

63. The appellant also refers to the CoA's use of the loss of a "...real chance of an acquittal" in support of his contention that the CoA conflated the test for a miscarriage of justice with the proviso. Use of this analytical device in considering the potential relevance of the material does not demonstrate error. The fact that the CoA have stepped through the, respectfully correct, analysis[113] undermines any assertion that the judgment turned on the application of the incorrect test in determining if there was a miscarriage of justice.

64. As to the second limb, the CoA's use of the term "concession" was as a framing device for the analysis that follows.[114] In substance, it summarised the positions of the parties as to the capacity of the material in the context of the forensic contest. The appellant's contention relies upon an assumption that the CoA have acted on that concession alone, without considering the capacity of the material. A reading of the CoA's judgment demonstrates the opposite. The CoA stated that it was not bound to act on the concession. Moreover, the CoA observed it had to, and did, make its own assessment in any event.[115]

65. The CoA made clear that its determination – what it described as the "primary difficulty" for the appellant – of the appeal was underpinned by the fact that the material "…could not have altered the forensic contest" at trial.[116] That determination is consistent with the analysis of third limb error above: that the material did not have the capacity to have impacted the result of the trial that was actually had.

<u>The insignificance of the material in this case</u>

66. The appellant contends that the defence case was capable of forensic shifts in emphasis.[117] The appellant is limited to expressing an irregularity in these terms given the defence case at trial involved a careful ventilation of the issue of identity, and that at its core the material could only give rise to a possibility that X may have been an alternate offender, but because

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113 See, eg, *Brawn v The King* [2022] SASCA 96 at [57], [66], [72]; CAB 44, 45, 47.
114 See, eg, *Brawn v The King* [2022] SASCA 96 at [50]-[56]; CAB 42-44.
115 *Brawn v The King* [2022] SASCA 96 at [72]; CAB 47.
116 *Brawn v The King* [2022] SASCA 96 at [73]; CAB 47.
117 Appellant's submissions at [81].

the evidence revealed he did not have the opportunity to have committed all of the acts, the use to which it could be put was necessarily more limited.

67. A consideration of the defence case at trial undermines the appellant's arguments. As outlined above, the defence case challenged the complainant's identification of the appellant as her abuser in two ways. First, by seeking to suggest various alternative offenders, forensically avoiding the risks that would have necessarily arisen running a case involving the positive substitution of a single other offender. Second, by attacking the complainant's credit in an effort to support submissions to the jury that they should not rely on her repeated, express, identifications of the appellant.

68. There were forensic reasons why a single alternate offender was not identified by the defence; it was not credibly available on the evidence. Acts one through five occurred during a period where the complainant was staying at the appellant's house as the complainant's mother had travelled to Sudan.[118] The fact of the abuse, and seemingly the location and time in which that abuse took place, was not the subject of challenge. During this period, the sexual abuse was alleged to have occurred daily.[119] For at least some of this time, there was evidence that X was in Melbourne.[120] This necessarily limited the utility of the material as a simple substitution of X was constrained.[121]

69. Further, the undisclosed material does not reveal a way to make more likely the fact that X had committed the alleged acts of abuse against Y. The CoA made this observation.[122] The appellant has not pointed to other ways to use the material that sustainably arise, or any other way the material could have been deployed.[123] The allegations were unproven and, as they were withdrawn, were never tested. This tends to weaken a foundation of the

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118 It was an agreed fact that the complainant's mother travelled to Sudan between 5 September 2016 and 24 September 2016.

119 But for on one occasion when the appellant was working a long shift: Exhibit MFIP2 at 590-594; RBFM at 45-6.

120 Trial transcript at 169, 180, 184, 272; RBFM at 194, 205, 209, 277.

121 The complainant was cross examined about the presence of the appellant's father in respect of acts 1, 2 and 3, the uncharged acts causing the blood nose and the act of vaginal intercourse occurring in the complainant's bedroom: trial transcript at 56, 68 and 76; RBFM at 85, 97, 105. The presence of the appellant's father was established on the evidence for some of the period that the complainant's mother was in Africa, act 8, as well as his presence in the complainant's home for a period of three months: trial transcript at 110, 112, 138, 164-5, 171, 173, 211, 280, 365; RBFM at 137, 139, 163, 189-90, 196, 198, 236, 285, 360.

122 *Brawn v The King* [2022] SASCA 96 at [45]; CAB 41-42.

123 See, for example, *Evidence Act 1929* (SA), ss 34KA, 52-53, noting any application to admit the evidence via a statutory pathway would require a favourable exercise of a discretion.

appellant's argument: that the material was capable of making it more likely that X was the true offender as distinct from any other member of the Sudanese community.

70. The submission the appellant was restrained in being able to nominate a specific offender (whether X or otherwise)[124] must be considered against the fact the complaint witness raised the issue relating to the complainant's "uncle". In circumstances where the appellant was considered a "cousin", and X was her cousin's father, there was a reasonable justification to explore that issue if desired. As identified above, the complainant was cross examined on this topic[125] and the appellant's trial counsel highlighted this issue in her closing address.[126] Hence, the submission now advanced is unsustainable in light of the emphasis already placed on this evidence, and given the challenge to identity was the central plank of the defence case. On the material available, there were at least three other Sudanese males that lived at the address where the majority of the offending occurred.

71. The second aspect of the defence, attacking the complainant's credit, involved:

    a. challenges to the complainant's evidence there was a lock on the doorknob of the appellant's room and a mirror in the room;

    b. emphasising the evidence of one of the initial complaint witnesses that the complainant had identified her abuser as her "uncle"; and

    c. evidence that the appellant was only briefly present at the birthday party in the park in order to constrict his opportunity to have committed act 8.

72. The layout of the appellant's house was explored at trial, with five witnesses called on the defence case to comment on the existence, or otherwise, of a door lock and mirror within the appellant's room and other rooms within the house.[127] As for act 8, the opportunity of other Sudanese males, including X, at the birthday to commit act 8, was already established on the evidence. The material did not bear on either of these, as the CoA identified, given the "…advisedly, more diffuse" approach to the issue of identity at trial.[128] The appellant has not pointed to any other aspect of the material that demonstrates it has the requisite capacity to have impacted the result of the trial.

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124 Appellant's submissions at [82].
125 Trial transcript at 82; RBFM at 111.
126 Trial transcript at 430-432; RBFM at 393-5.
127 Trial transcript at 302-5, 315, 323-5, 346, 389; RBFM at 307-10, 318, 326-8, 341, 384.
128 *Brawn v The King* [2022] SASCA 96 at [81]; CAB 48.

73. The above reveals neither the specific substitution of X or the issue of identity at large were capable of being impacted by the material. The material could not realistically have affected the verdict that was in fact returned.

PART VI: NOTICE OF CONTENTION

74. As set out in the notice of contention,[129] the respondent seeks to rely upon the proviso in s 158(2) of the *Criminal Procedure Act 1921* (SA) for the limited purpose of contending that, if there is no "materiality threshold" in the provision, no substantial miscarriage of justice actually occurred.

75. For the reasons articulated in Part V above, if there is no "materiality threshold", then if there has been a "miscarriage of justice", it was one without the capacity to impact the result of the trial and, on that basis, was not a substantial miscarriage of justice.

PART VII: TIME ESTIMATE

76. The respondent estimates that no more than one and a half hours will be required for the presentation of its oral argument.

Dated 7 November 2024

.....	.....	.....
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[129] CAB 59.

ANNEXURE – LIST OF CONSTITUTIONAL AND LEGISLATIVE PROVISIONS REFERRED TO IN THE RESPONDENT'S SUBMISSIONS

1. *Criminal Procedure Act 1921* (SA), ss 111, 122, 125, 157(1), 158(1), (2) and (3), 160 (as at 22 June 2023)
2. *Criminal Law Consolidation Act 1935* (SA), s 50 (as at 22 June 2023)
3. *Director of Public Prosecutions Act 1992* (SA), s 10A (as currently in force)
4. *Evidence Act 1929* (SA), ss 34KA, 52-53 (as currently in force)
5. *Criminal Code* (Qld) s 668E (as currently in force)
6. *Supreme Court Act 1933* (ACT), s 37O(2)-(3) (as currently in force)
7. *Criminal Appeal Act 1912* (NSW), s 6(1) (as currently in force)
8. *Criminal Code* (NT), s 411 (as currently in force)
9. *Criminal Code* (Tas), s 402(1)-(2) (as currently in force)
10. *Criminal Appeals Act 2003* (WA), s 30(3)-(4) (as currently in force)