



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: A20/2024
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Filing party: Appellant
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Important Information

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**IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY**

BETWEEN:

MATHEW CUCU BRAWN
Appellant

and

10

THE KING
Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I:

1. The appellant certifies that this outline of oral submissions is in a form suitable for publication on the internet.

Part II: Outline of propositions to be advanced

2. Issues raised by the grounds of appeal (**AS [2] – [5]; Notice of appeal: CAB56**)

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Ground 1

2.1. Whether a materiality threshold exists for an error or irregularity to amount to a miscarriage of justice for the purpose of the common form appeal provision.

2.2. If so, what the materiality threshold is.

2.3. Did the Court of Appeal err in finding that no miscarriage of justice had occurred at the appellant's trial?

Ground 2

2.4. The Court of Appeal acted on a concession that the appellant did not make.

2.5. This error contributed to the Court of Appeal's erroneous finding that no miscarriage of justice had occurred.

3. It is unlikely that the Court will need to consider the respondent's Notice of Contention (at **CAB58**).
4. Factual background to this appeal (**AS [8] – [22]**).

Ground 1 – Miscarriage of justice

5. The starting point is the statutory language – ss 158(1) and 158(2) of the *Criminal Procedure Act 1921* (SA). (**AS [38]**)
6. Interpretation of the third limb must have regard to the existence of the proviso. (**AS [40]**)
- 10 7. The formulation of the third limb of the common form appeal provision in *Weiss* and the cases which approved it, without a materiality threshold.
8. The formulations of a materiality threshold for a miscarriage of justice: *Edwards, Hofer* and *HCF*. (**AS [45] – [66]**)
9. The preferred formulation for a materiality threshold for a miscarriage of justice. (**AS [67] – [74]**)
10. The errors in the Court of Appeal's reasoning. (**AS [29] – [35]**)
11. The non-disclosure resulted in a miscarriage of justice at the appellant's trial. (**AS [75] – [77], [81] – [84], [94]**)

20 **Ground 2 – A concession not made**

12. The Court of Appeal held at **Reasons [83]** that: "*The appellant has conceded that, notwithstanding non-disclosure, he has not been denied the opportunity to adduce admissible evidence that the appellant's father engaged in the offending with which he was charged*". (**CAB 49**)
13. This supposed concession led directly to the Court of Appeal's dispositive conclusions at **Reasons [83], [84]** that the appellant had failed to demonstrate that his defence **would** have been conducted differently and that there was no miscarriage of justice. (**CAB 49**)
14. The supposed concession was not made by the appellant.

15. The exchange at **ABFM 36-37** amounted to an articulation of how **knowledge of** the allegations against the appellant's father might have assisted or affected the presentation of the defence case at trial, **other than** by adducing hearsay evidence of the allegations. (AS [89] – [90])

10 16. The exchange at **ABFM 44** amounted to an acceptance that **the fact** of the charges was not admissible evidence, but not a concession that evidence of their truth could not be led, nor that knowledge of the fact of the allegations could not have prompted the adducing of further admissible evidence, or the making of different closing submissions, placing much greater focus on the appellant's father as the possible true assailant. (AS [91] – [92])

17. Given the importance of the supposed concession to the Court of Appeal's conclusion of no miscarriage of justice, the conclusion is tainted and cannot stand unless this Court takes the same view, without reference to the alleged concession, which it should not.

Dated: 4 December 2024



Scott Henchcliffe KC



Andrew Culshaw