HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 17 Oct 2024 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	A20/2024
File Title:	Brawn v. The King
Registry:	Adelaide
Document filed:	Form 27A - Appellant's submissions
Filing party:	Appellant
Date filed:	17 Oct 2024

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

BETWEEN: **MATHEW CUCU BRAWN**
Appellant

and

THE KING
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification as to publication

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

Part II: Concise statement of the issues presented by the appeal

2. Whether the failure of the prosecution to disclose that the appellant's father was accused and charged with committing sexual offences against a child occasioned a miscarriage of justice in the appellant's trial for alleged sexual offending against another child.
3. Whether there is a threshold of materiality for an error or irregularity to be a miscarriage of justice for the purposes of the *Criminal Procedure Act 1921* (SA) (**CPA**), and if so, what the threshold is, and whether it was satisfied in this case.
4. If no threshold of materiality exists for an error or irregularity to be a miscarriage of justice, whether no substantial miscarriage of justice actually occurred in this case.[1]
5. Whether the appellant conceded to the Court of Appeal that the prosecution's breach of its duty of disclosure did not deprive him of any opportunity to adduce admissible evidence at his trial that his father had committed sexual acts with a child.

[1] This issue is raised by the respondent's Notice of Contention: **CAB 59**.

Part III: Section 78B notice

6. The appellant has considered whether any notice is required in accordance with s 78B of the *Judiciary Act 1903* (Cth). No notice is required.

Part IV: Authorised report citation

7. The authorised report of the reasons of the Court of Appeal is *Brawn v The King* (2022) 141 SASR 465 (**Reasons**).

Part V: Facts found or admitted below

The trial

8. The appellant was charged with the offence of maintaining an unlawful sexual relationship with a child, contrary to s 50(1) of the *Criminal Law Consolidation Act 1935* (SA).[2] The Information alleged the offence was committed by the appellant engaging in two or more sexual acts with the complainant between 1 April 2016 and 1 January 2019.[3]
9. The appellant was born on 1 April 1998. The complainant was born on 30 June 2010. The charged period commenced on the appellant's 18th birthday. It was the prosecution case that the appellant had also engaged in four uncharged sexual acts with the complainant when he was 17 years of age.[4]
10. The appellant and the complainant were cousins and members of the Sudanese community living in Adelaide. The appellant and his family, including his father, had a close relationship with the complainant and her family, and the respective families regularly spent time in each other's company.
11. The prosecution case was that the appellant engaged in sexual acts with the complainant when she was five to eight years old. The complainant was 10 years old when she gave evidence at the trial.
12. After the prosecution opening, the appellant's counsel outlined the issues in dispute.[5] Counsel said that the appellant's plea of not guilty did not put in issue whether the complainant was sexually abused by some male person or not, however, he did not have

---

[2] Information: **CAB 5-6**.
[3] The prosecution case was that the appellant engaged in eight separate unlawful sexual acts with the complainant, during four incidents, within the period of two years and nine months: Summing up at **CAB 10-12**; **Reasons [8], [9]; CAB 35**.
[4] Summing up at **CAB 12-13**. These acts were uncharged because only an adult can commit the offence charged.
[5] As permitted by s 136 of the CPA.

a sexual relationship with her. Counsel said that the issue at trial was whether the appellant was the perpetrator of sexual abuse against the complainant.[6] In the summing up, the trial Judge told the jury that the defence case was that the complainant had been sexually abused by someone, but the appellant was not the abuser.[7]

13. The appellant gave evidence at the trial. He denied engaging in any sexual acts with the complainant.[8] The appellant called witnesses who contradicted aspects of the evidence given by the complainant and other prosecution witnesses.[9] The appellant called evidence of his own good character.[10] The appellant's defence relied upon inconsistencies in the evidence of the complainant and other prosecution witnesses, which undermined their credibility and reliability, and the inherent implausibility of parts of the complainant's evidence.

14. The more significant factual issues at the trial affecting the complainant's credibility and reliability included:

    14.1 The first initial complaint witness gave evidence the complainant told her, "*I feel sad when I remember things that my uncle does to me*."[11] Within the Sudanese community, the appellant was considered a "cousin" of the complainant, not an "uncle". The term "uncle" was used to refer to more senior men and was an appropriate term to describe someone like the appellant's father.

    14.2 The complainant's evidence about the timing of the alleged sexual acts by the appellant contained both internal and external inconsistencies.[12]

    14.3 The complainant gave evidence that a sexual act occurred at a birthday party at a public park. Prosecution witnesses gave evidence the appellant was present throughout the party. However, documentary and oral evidence proved the appellant worked that afternoon and was only present briefly at the end of the party.[13]

    14.4 The complainant gave evidence that the appellant engaged in sexual acts with her in his bedroom with the door locked and that his bedroom contained a mirror.

---

[6] **Reasons [13]**; **CAB 35**. In the summing up the trial Judge also referred to counsel's similar closing submissions: **CAB 11**.
[7] Summing up: **CAB 19**.
[8] Summing up: **CAB 19**.
[9] Summing up: **CAB 19-20.**
[10] Summing up: **CAB 20**.
[11] Summing up: **CAB 17**.
[12] Summing up: **CAB 15-16**.
[13] Summing up: **CAB 19**; **Reasons [16]; CAB 36**.

There was photographic and oral evidence that the appellant's bedroom door was incapable of being locked and did not contain a mirror.[14]

15. The trial Judge directed the jury that the prosecution case turned upon the complainant's evidence and it could not convict the appellant unless it was satisfied beyond reasonable doubt that the complainant's evidence was the truth.[15]
16. On 1 July 2021, the jury found the appellant guilty.[16]

Prosecution non-disclosure

17. In August 2021, it came to the attention of defence counsel for the first time that the appellant's father had previously been charged with sexual offences against a child.[17]
18. On 30 August 2021, the appellant's solicitor contacted the Office of the Director of Public Prosecutions (**DPP**) and requested that he was provided with any further information the DPP had in relation to the issue.[18] Further email correspondence between the appellant's solicitor and the DPP followed, until on 1 November 2021, the DPP provided a copy of the SA Police Facts of Charge relevant to the allegations against the appellant's father.[19]
19. After this information first came to light, the appellant's solicitor spoke with the appellant in custody. The appellant confirmed he was aware that charges had been laid against his father but said he did not understand the relevance or significance of that information as it related to his charges, trial and instructions.[20]

An appeal is commenced

20. On 16 November 2021, the appellant appealed against his conviction on the ground that the failure to disclose the existence and details of the charges laid against his father had resulted in a miscarriage of justice for the purposes of s 158(1)(c) of the CPA.[21]

---

[14] Summing up: **CAB 19-20**; **Reasons [15]-[16] CAB 36**.
[15] Summing up: **CAB 8**.
[16] **CAB 21-22**.
[17] **Reasons [18]** at **CAB 36**; Affidavit of Aaron Almeida, 27/1/22 at [2]-[4] Appellant's Book of Further Material (**ABFM**) **5**; Affidavit of Aaron Almeida, 19/8/22 at [3]-[6] **ABFM 27.**
[18] Affidavit of Aaron Almeida, 27/1/22 at [4]-[6] and Annexure AA1 **ABFM 5, 8-14**.
[19] Affidavit of Aaron Almeida, 27/1/22 at [7]-[20] and Annexures AA1, AA2 and AA3 **ABFM 5-25**. The SA Police Facts of Charge document is at **ABFM 19-25**.
[20] Affidavit of Aaron Almeida, 19/8/22 at [7]-[10] **ABFM 27-28**.
[21] Notice of Appeal: **CAB 26**.

21. During the course of the appeal, the Court of Appeal received two affidavits provided by the appellant's solicitor.[22] The content of the affidavit evidence was not challenged by the respondent.

22. The SA Police Facts of Charge recorded that the appellant's father had been charged with committing seven sexual offences against a female child who was also part of the Sudanese community in Adelaide.[23] The sexual offences were alleged to have been committed between November 2018 and May 2019, whilst the appellant's father was living in the same house as the child. The child first reported her allegations in June 2019. Details about the allegations were first obtained by police on 2 July 2019 and on 5 July 2019 the child signed a typed statement of her allegations.[24] The appellant's father was arrested and charged on 5 July 2019 and was committed for trial in July 2020. His charges were discontinued prior to his arraignment in a superior court.[25]

Part VI: Argument

The Court of Appeal

23. The Court of Appeal only ever considered whether the prosecution's failure to comply with its duty of disclosure had occasioned a miscarriage of justice. The Court of Appeal never considered the proviso.

24. It was common ground that the prosecution had not disclosed the fact, and the details, of the charges laid against the appellant's father, before the appellant's trial occurred.

25. The DPP further conceded that, at least by the time that defence counsel outlined the issues in dispute after the prosecution opening, that omission constituted a failure by the prosecution to comply with its duty to make disclosure of all relevant material.[26]

26. Accordingly, the Court of Appeal proceeded on the basis that, *"the prosecution failed to disclose material that might, as a reasonable possibility, have materially assisted the defence case"*: **Reasons [58]; CAB 44**.

---

[22] **Reasons [17]; CAB 36**; Affidavit of Aaron Almeida, 27/1/22 **ABFM 4**; Affidavit of Aaron Almeida, 19/8/22 **ABFM 26**. The affidavits were not formally marked as exhibits by the Court of Appeal, but they were accepted into evidence before it.
[23] **ABFM 19-25**.
[24] Affidavit of Aaron Almeida, 27/1/22, Annexure AA3 **ABFM 22**.
[25] Affidavit of Aaron Almeida, 27/1/22, Annexure AA2 in **ABFM 16**; **Reasons [23]** at **CAB 37**.
[26] **Reasons [51]-[53], [56]; CAB 42-44.**

27. The Court of Appeal held to the effect that evidence that the appellant's father had sexually abused another child would have been relevant and therefore able to be called at the appellant's trial, if it was in an admissible form: **Reasons [39]-[49]; CAB 40-42**.

28. The Court of Appeal concluded at **Reasons [49]; CAB 42** that, "*if the appellant had demonstrated to this Court that, but for the non-disclosure, relevant evidence could have been called, it may have been difficult to refute the proposition that he had been denied "a real chance of acquittal".*" The quoted test was formerly used to decide whether an appeal could be dismissed using the proviso.[27] It was not a relevant test for the antecedent question of whether there had been a miscarriage of justice. The Court of Appeal plainly had in mind the wrong test for a miscarriage of justice.

29. The Court of Appeal proceeded on the basis of a supposed concession, said to have been made by the appellant at the hearing of the appeal, that the failure to make disclosure, *"had not deprived him of any opportunity to adduce admissible evidence that his father had engaged in unlawful sexual intercourse with another child"* **Reasons [50]; CAB 42**. This concession was not in fact made and is the subject of the second appeal ground.[28]

30. The dispositive conclusion of the Court of Appeal was that there was no miscarriage of justice. The central plank of the reasoning by which the Court of Appeal reached that conclusion was a finding that the *"undisclosed material, if disclosed, could not have altered the forensic contest which was marked out by the cases for the prosecution and the defence at the trial"*: **Reasons [73]; CAB 47**.

31. The two ultimate and conclusory paragraphs of the Reasons are worth extracting in full. They rely on the disputed concession of the appellant and contradict one another as to whether it was necessary, to establish a miscarriage of justice, that the appellant **would**, or **might**, have conducted his trial differently, had full disclosure been made:[29]

> "83. 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. Having regard to the way in which the forensic contest was framed at trial, it must be concluded that the appellant has failed to demonstrate that his defence **would** have been conducted differently and, on that account, been denied a fair trial.

---

[27] *Mraz v The Queen* (1955) 93 CLR 493 at 514; *Wilde v The Queen* (1988) 164 CLR 365 at 371-372; *GBF v The Queen* (2020) 271 CLR 537 at [24].
[28] Notice of Appeal: **CAB 56**.
[29] **Reasons [83]-[84]; CAB 49**.

Conclusion

84. In circumstances where the appellant cannot demonstrate that his trial **might** have been conducted differently had the charges against his father been disclosed by the prosecution, he has not been denied a fair trial and there has been no miscarriage of justice." (emphasis added)

32. Requiring the appellant to demonstrate that his defence **would** have been conducted differently if full disclosure was made was a higher test than demonstrating that his defence **might** have been conducted differently. Other than at **Reasons [84]; CAB 49**, the Court of Appeal used a test of **would**, not **might**: see **Reasons [5]; CAB 34**. The appellant submits that was not the correct level of certainty required to establish that a miscarriage of justice had occurred.

33. The intermediate findings of the Court of Appeal which gave rise to its ultimate conclusion can be summarised as:

    33.1. It was always open to the appellant to point to his father as an alleged offender in light of his position as one of a number of men in the Sudanese community, but he did not do so: **Reasons [74]-[76]; CAB 47**;

    33.2. The complainant's account was specific to the appellant and the places he had been seen to attend, so it would not have been credible to substitute another male as the offender: **Reasons [78]-[79]; CAB 48**; and

    33.3. Even if it had been put that the appellant's father was responsible for the abuse, and assuming the complainant denied the suggestion, there was no admissible evidence available to the defence to undermine that denial: **Reasons [80]; CAB 49**.

34. Each of these processes of reasoning was underpinned by the same error of logic. They presumed that the preparation for, and forensic decisions taken at, the trial by the appellant and his legal representatives were not affected by the failure of disclosure. The fact that certain forensic approaches were **open** at the trial did not mean the failure of disclosure did not affect the approach the appellant's counsel actually took.

35. It was true that trial counsel **could** have pointed to the appellant's father as the true offender, but absent the undisclosed material, she had no basis to do so. It was true that the complainant's account was specific to the appellant and the places he had attended, but the father's whereabouts were not explored because absent the undisclosed material, there was no basis to point to him (or single him out) as the offender. It was true that the defence did not have access at the trial to admissible evidence to support a suggestion

that the appellant's father was the true offender, but no enquiries had been made to try to obtain that evidence before the trial, because absent the undisclosed material, there was no reason to do so.

First ground of appeal - miscarriage of justice

36. It is against that factual background that the first ground of appeal falls to be considered. The appellant submits that the Court of Appeal erred in finding that the failure in prosecution disclosure did not occasion a miscarriage of justice. The appellant further submits that the Court of Appeal was wrong to set the threshold for a miscarriage of justice as requiring that the appellant demonstrate that his trial **would** have been conducted differently if the undisclosed material had been disclosed.
37. The appellant submits that the question the Court of Appeal should have asked is whether the failure of the prosecution to provide disclosure before his trial was an irregularity which had the capacity to affect the outcome of the trial.

Miscarriage of justice: what is it?

38. The starting point is the legislation. Subsections 158(1) and (2) of the CPA follow the common form appeal provision, but have separated the three grounds of appeal into sus-paragraphs:

> (1) The Court of Appeal, on any such appeal against conviction, 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 cannot be supported having regard to the evidence; or
>
> (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; or
>
> (c) on any ground there was a miscarriage of justice.
>
> (2) The Court of Appeal may, notwithstanding that it is of the opinion that the point raised in an appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

39. As was demonstrated by Edelman and Steward JJ in *HCF v The Queen* (2023) 97 ALJR 978 at [75]-[79], in recent years various "verbal formulations" have been expressed to describe what amounts to a miscarriage of justice. Those will be returned to momentarily.
40. What is clear as a matter of statutory construction, is that whatever meaning is to be ascribed to the phrase "miscarriage of justice", it must leave room for the existence of a

miscarriage of justice that is not a "substantial" miscarriage of justice. For it to be otherwise would collapse the test for the operation of the proviso into the test for a miscarriage of justice. In addition to being radical and ahistorical (*HCF* at [80]), such a formulation would leave s 158(2) of the CPA (and its equivalents) with no work to do in respect of the ground of appeal provided for in s 158(1)(c) of the CPA.

41. The various formulations of "miscarriage of justice" have their roots in the judgment of six members of the Court in *Weiss v The Queen* (2005) 224 CLR 300 at [18], where Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ observed that a miscarriage of justice was "*any* departure from trial according to law, regardless of the nature or importance of that departure. A trial according to law required regularity of both the procedure and substance of the trial" (emphasis in original). That formulation was confirmed in later decisions of this Court.

42. In *Kalbasi v Western Australia* (2018) 264 CLR 62 at [12], Kiefel CJ, Bell, Keane and Gordon JJ observed:

> "Consistently with the long tradition of the criminal law, any irregularity or failure to strictly comply with the rules of procedure and evidence is a miscarriage of justice within the third limb of the common form provision."

43. In *GBF v The Queen* (2020) 271 CLR 537, a unanimous judgment (Kiefel CJ, Bell, Keane, Gordon and Edelman JJ) stated at [24]:

> "The distinction between a miscarriage of justice within the third limb of the common form appeal provision, proof of which lies upon the appellant, and the dismissal of an appeal under the proviso, proof of which lies on the prosecution, is as explained in *Weiss v The Queen*. Any irregularity or failure to strictly comply with the rules of procedure and evidence is a miscarriage of justice within the third limb of the provision." (footnotes omitted)

44. The suggestion that a materiality threshold (of varying strength) attaches to the concept of a miscarriage of justice, for the purposes of the third limb of the common form appeal provision, has gained support in several judgments of this Court since *GBF*, which appear to qualify the literal formulation in *Weiss*.

Edwards

45. *Edwards v The Queen* (2021) 273 CLR 585 was a case in which a prosecution failure to make disclosure was held not to amount to a miscarriage of justice. For that reason, *Edwards* will be returned to later, to distinguish its facts.

46. Kiefel CJ, Keane and Gleeson JJ delivered a joint judgment dismissing the appeal. They held that the non-disclosed material was not relevant to the prosecution or defence cases,

or to the reliability of the complainant. The non-disclosure did not prejudice the fairness of the appellant's trial and did not give rise to a miscarriage of justice.[30]

47. Edelman and Steward JJ delivered a joint judgment, also dismissing the appeal. They considered the miscarriage of justice limb of the common form appeal provision at [74]-[75]. They said, without purporting to overrule *Weiss*, that a departure from a trial according to law requires an erroneous occurrence with "the capacity for practical injustice" or which is "*capable* of affecting the result of the trial." The effect of this was to acknowledge that a materiality threshold existed for a miscarriage of justice, albeit a low one. Their Honours dismissed the appeal because the appellant had not established that any of the information that was not disclosed was *capable* of providing the defence with any advantage at the trial.[31]

Hofer

48. In *Hofer v The Queen* (2021) 274 CLR 351, a majority of this Court (Kiefel CJ, Keane and Gleeson JJ delivering a joint judgment, Gageler J delivering separate concurring reasons, Gordon J dissenting) held that a miscarriage of justice was occasioned by improper cross-examination by a prosecutor but the proviso applied because there had been no substantial miscarriage of justice.

49. The plurality added a postscript (in bold below) to the words used in *Weiss*:[32]

> "A miscarriage of justice to which s 6(1) of the *Criminal Appeal Act* refers includes any departure from a trial according to law **to the prejudice of the accused**. This accords with the long tradition of criminal law that a person is entitled to a trial where rules of procedure and evidence are strictly followed. The larger and different question raised by the proviso, which is reserved to an appellate court, of whether there has notwithstanding that departure been no substantial miscarriage of justice, focuses upon whether the nature and effect of the error which has occurred prevents the appellate court from undertaking its assessment as to whether guilt has been proved to the requisite standard." (emphasis added)

50. The emphasised words "to the prejudice of the accused" apply a modest materiality threshold, or limitation. The appellant suggests this formulation is practically, although not word for word, consistent with the formulation in *Weiss*. It would be surprising if the plurality in *Weiss* intended the effect of their formulation of miscarriage of justice to encompass errors of procedure and evidence that were to an accused's advantage. An

---

[30] (2021) 273 CLR 585 at [25], [30].
[31] Ibid at [35].
[32] (2021) 274 CLR 351 at [41].

available reading is that the plurality in *Hofer* intended to do no more than restate the existing law as they understood it.

51. Gageler J (as his Honour then was) delivered separate reasons which concurred in the result. His reasons addressed the content of, and relationship between, the miscarriage of justice ground and the proviso (at [81]). His Honour examined the relationship between the Exchequer Rule, its different understandings at the time of the statutory formulation of the common form appeal provision, and the provision itself, before concluding that a materiality threshold inhered within the miscarriage of justice ground of appeal.

52. A number of different expressions of a materiality threshold for a miscarriage of justice were then referred to, or made, in His Honour's reasons. They included:

    52.1. A significant possibility that the acts or omissions of which complaint is made affected the outcome of the trial: at [115];

    52.2. That the irregularity had the meaningful potential or tendency to have affected the result of the trial: at [118];

    52.3. A realistic possibility of a causal connection between one of more identified legal errors or procedural irregularities and the verdict returned by the jury: at [120];

    52.4. The tendency or propensity of an error or irregularity to have affected the basis on which the jury actually reached its verdict in the totality of events that occurred in the trial: at [121].

53. Ultimately, Gageler J reached the following conclusion at [123]:

> "Except in the case of an error or irregularity so profound as to be characterised as a "failure to observe the requirements of the criminal process in a fundamental respect", an error or irregularity will rise to the level of a miscarriage of justice only if found by an appellate court to be **of a nature and degree that could realistically have affected the verdict of guilt that was in fact returned by the jury in the trial that was had**. Only if that threshold is met is a miscarriage of justice established." (emphasis added)

54. The appellant submits that these words impose a higher materiality threshold than that which is expressed in the plurality judgment in *Hofer* and in the judgment of Edelman and Steward JJ in *Edwards*.

55. The appellant submits that fixing a materiality threshold in the way proposed by Gageler J risks, at least in a practical sense, requiring an appellant to establish there was a

substantial miscarriage of justice in order to meet the third limb of the common form appeal provision, thereby:

55.1. effectively reversing the onus of proof on the proviso; and

55.2. leaving the proviso with little, if any, room to operate.

56. Gordon J dissented in the result. On the issue of a materiality threshold to establish a miscarriage of justice, her Honour observed that under the common form appeal provision, any of the three grounds of appeal, including that of miscarriage of justice:[33]

> "… would not be established if the mistake made at trial was one which could have had no effect on the outcome of the trial. That is, when considering whether a ground of appeal is established it is necessary and sufficient for the appellate court to conclude that the error **might** have made a difference." (emphasis added)

HCF

57. In *HCF v The Queen* (2023) 97 ALJR 978, the issue was whether the alleged misconduct of a juror (and the balance of the jury in failing to report it) amounted to a miscarriage of justice. By majority (Edelman and Steward JJ in dissent) the appeal was dismissed.

58. The majority (Gageler CJ, Gleeson and Jagot JJ) impliedly approved the summary of when errors and irregularities in the criminal process will amount to a miscarriage of justice that was given by Beech-Jones CJ at CL (as his Honour then was) in *Zhou v The Queen* [2021] NSWCCA 278. Leaving to one side a failure to observe the requirements of the criminal process in a fundamental respect, the summary provided that:[34]

> "… there is no miscarriage unless the error or irregularity is "prejudicial in the sense that there was a 'real chance' that it affected the jury's verdict… or 'realistically [could] have affected the verdict of guilt'… or 'had the capacity for practical injustice' or was 'capable of affecting the result of the trial'".

59. The above summary cited the judgment of the majority and Gageler J in *Hofer* (but not the judgment of Gordon J) and the judgment of Edelman and Steward JJ in *Edwards*. No reference was made to *Weiss*, *Kalbasi* or *GBF*.

60. It will be observed that even within the summary, four different formulations are set out. Respectfully, it is unclear if they were intended to be treated as interchangeable formulations of the same concept, or as disjunctive alternative routes to miscarriages of justice. Regardless, the appellant submits that not all the formulations are equivalent. For

---

[33] Ibid at [130].
[34] (2023) 97 ALJR 978 at [2].

example, establishing there was a 'real chance' that an irregularity affected a verdict is more demanding than establishing it was capable of affecting the verdict.

61. Given the reasoning process of the majority in *HCF*, it was not necessary for it to resolve what amounts to a miscarriage of justice, generally. Rather, the summary was used as a building block towards the ultimate pronouncement (at [13] and [14]) of the test to be applied to the particular type of miscarriage of justice alleged in the case involving juror or jury misconduct.

62. Edelman and Steward JJ again delivered a joint judgment, on this occasion in dissent. They held that the juror misconduct had occasioned a miscarriage of justice, and that consideration of the proviso should be remitted to the Court of Appeal.

63. Edelman and Steward JJ noted the statement in the majority judgment in *Hofer* that a miscarriage of justice includes any departure from a trial according to law **to the prejudice of the accused**. They rhetorically queried the emboldened words. They asked by what test the prejudice of the accused was to be assessed. The appellant agrees this is the most important question, for the reason their Honours gave at [76].

64. Edelman and Steward JJ stated at [78] that of the three judgments in *Hofer*, it was Gordon J's approach that cleaved most closely to the terms of *Weiss*. They said that Gordon J's approach was consistent with their own approach in *Edwards*. They described the materiality threshold in terms of, "*whether the irregularity had a capacity to affect the outcome, rather than whether it might or might not have actually done so*." The appellant supports this expression of the materiality threshold and submits it imposes a lower threshold than the formulation by Gaegler J in *Hofer* (above at [54]).

65. Their Honours noted various "verbal formulations" of the test for a miscarriage of justice and said any attempt to reconcile them would await another case. They then made four observations (at [79]-[83]). The first three are relevant:

    65.1. Any materiality threshold for establishing a miscarriage of justice cannot have the effect of collapsing the test for the proviso into the test for a miscarriage of justice;

    65.2. It follows that any such threshold cannot be one that requires an appellant to establish that the result of the trial might have been different but for the irregularity; and

    65.3. The approach taken by their Honours in *Edwards*, and which Gordon J took in *Hofer*, would avoid the perception (and, the appellant adds, the reality) that the

test for the proviso has been collapsed into the test for a miscarriage of justice. This means, "Any irregularity that, in and of itself, has the capacity to prejudice the jury's consideration of the defendant's case will be a miscarriage of justice irrespective of whether the result might, or might not, have been different."[35]

66. Respectfully, their Honour's analysis is persuasive and the appellant embraces it.

The appellant's submission as to the correct approach

67. This case provides the means for this Court to authoritatively state the extent to which (if any) the *Weiss* formulation of what is a miscarriage of justice under the common form appeal provision is qualified by a threshold of materiality.

68. It is theoretically open to advance a submission that, consistent with a literal reading of *Weiss*, there is no materiality threshold at all.

69. Notwithstanding that, from *Edwards* onwards, the analysis of the formulation in *Weiss* by members of this Court has tended towards a position that, properly understood, a miscarriage of justice has an implied threshold of materiality (whatever that threshold might be). It can be accepted that a number of factors favour that position, including:

    69.1. The detailed analysis of the Exchequer Rule by Gaegler J in *Hofer*;

    69.2. That the *Weiss* formulation was drawn from the Exchequer Rule, from which the statutory common form appeal provisions were intended to depart;

    69.3. That "miscarriage of justice", in its ordinary meaning, would tend to suggest an evaluative judgment, rather than the application of a rigid rule; and

    69.4. Despite the apparent rigidity of the *Weiss* formulation, a materiality threshold has often been incorporated into miscarriage of justice cases that post-date *Weiss*, as explained by Gageler J in *Hofer* at [115] and [120].

70. If there is a materiality threshold that inheres in the test for a miscarriage of justice, the appellant submits that the approach adopted by Edelman and Steward JJ in *Edwards* and *HCF* is preferable and correct.

71. To set a materiality threshold in the test for a miscarriage of justice that requires an appellant to establish that the error or irregularity might actually have affected the result of the trial risks collapsing the test for the proviso into the test for a miscarriage of justice.

---

[35] Ibid at [82].

To the extent this occurs, the burden of proof for the proviso is reversed and the area of operation for s 158(2) of the CPA is diminished.

72. The appellant submits that the preferable materiality test is that any error or irregularity that has the capacity to affect the outcome of a trial is a miscarriage of justice, irrespective of whether the outcome might, or might not, have actually been different.

73. To set the materiality threshold at that standard is to simultaneously acknowledge:

    73.1. The long tradition of the criminal law that a person is entitled to a trial where rules of procedure and evidence are strictly followed;

    73.2. That there can be irregularities that occur in trials that are innocuous, benign or advantageous to an accused person, and that those irregularities do not in any real sense cause justice to miscarry; and

    73.3. That a distinction must be drawn between a miscarriage of justice and the application of the proviso.

74. In other words, errors in the trial process are to be strictly regulated, without wantonly allowing appeals on the basis of spurious errors or irregularities that are incapable of causing justice to miscarry in any meaningful way.

Application to the facts of this case and the Court of Appeal's reasons

75. Two central findings made by the Court of Appeal required the conclusion there was a miscarriage of justice in the appellant's case:

    75.1. First, the Court of Appeal held that the appeal was to be decided on the basis that the prosecution failed to disclose material which might as a reasonable possibility have materially assisted the conduct of the defence case, was relevant to the defence case that the appellant was not the offender, and which may have assisted the appellant's cross-examination of various witnesses at trial on the topic of the identity of the offender: **Reasons [56]; CAB 44**; and

    75.2. Second, and related, the Court of Appeal held that it could not be said in all the circumstances of the case, that the material the prosecution had failed to disclose was trivial or insignificant **Reasons [69]; CAB 46**.

76. On those findings, the appellant submits the Court of Appeal was bound to find that the prosecution's failure to disclose was an irregularity that had the capacity of affecting the outcome of the trial, regardless of how likely it was to do so. The Court of Appeal was therefore bound to find there had been a miscarriage of justice.

77. However, that was not the test the Court of Appeal applied. Instead, the Court of Appeal overstated what was necessary to establish a miscarriage of justice. There are two clear examples:

77.1. At **Reasons [46] CAB 42**, the Court of Appeal held that the appellant had not demonstrated he was in a position to call admissible evidence to prove the allegations against his father. After analysing the counter-factual situation where such evidence was called (**Reasons [47]-[48]**), the Court of Appeal concluded that in that counter-factual, *it may have been difficult to refute the proposition that he had been denied "a real chance of an acquittal"* **Reasons [49] CAB 42**. In this analysis, the Court of Appeal erred twice. First, by placing an onus on the appellant to prove what evidence **would have** been called had proper disclosure been made. Second, by requiring the appellant to demonstrate he had been denied "a real chance of an acquittal" to establish there was a miscarriage of justice.

77.2. At **Reasons [83] CAB 49**, the Court of Appeal (relying in any event on the disputed concession) determined that it must be concluded that the appellant had failed to demonstrate that his defence **would have** been conducted differently and, on that account, been denied a fair trial. While the question of whether the appellant had positively demonstrated that his defence would have been conducted differently might be relevant when considering the proviso, it was not determinative of whether there had been a miscarriage of justice.

<u>*Edwards* is distinguishable on its facts</u>

78. The argument above is sufficient to allow the appeal. However, given that this Court unanimously found in *Edwards* that prosecution non-disclosure did not result in a miscarriage of justice, the appellant will identify the factual distinctions which compel a different conclusion in this case.

79. In *Edwards*, the non-disclosed material was a Cellebrite download from a mobile phone, which although voluminous, was able to be exhaustively searched in order to determine whether it contained evidence that might have assisted the defence. The reasons of Kiefel CJ, Keane and Gleeson JJ on the one hand, and Edelman and Steward JJ on the other, both concluded that the appellant was unable to identify any evidence in the download

that could have assisted the defence case. Hence its absence at the trial could not have prejudiced that appellant's case.

80. The circumstances of this case are different. The Court of Appeal accepted that the material which was not disclosed might have materially assisted the conduct of the defence case and may have assisted the appellant's cross-examination of various witnesses at trial on the topic of the identity of the offender.

81. Additionally, the nature of the defence case advanced was capable of forensic shifts in emphasis. For example, one available forensic approach was to simply deny the offending without nominating who was the true offender. That was the approach in fact taken at trial. At the other extreme was to nominate and accuse a specific alternative person as being the true offender. Between the two extremes, there were other forensic options as to the emphasis counsel might place on who might have been the true offender, both in cross-examination and closing address. The subtlety involved in crafting (at least) cross-examination and a closing address to present the defence case in the circumstances of this case makes it impossible to approach it in the same way as *Edwards*, where a finite pool of evidence either had the capacity to assist or not assist the defence case.

82. Furthermore, defence counsel could not, consistently with professional rules, suggest to the complainant, or to the jury, that the appellant's father was or may have been the true offender unless she was satisfied that it was reasonably justified by the material then available to her.[36] Defence counsel had no basis to be so satisfied in the absence of the material that was not disclosed. Its non-disclosure restricted counsel's forensic options. Counsel's forensic choices were capable of affecting the outcome of the trial.

83. Another distinction is that in *Edwards*, both judgments (at [28] and [82] respectively) placed weight on the fact that it was not put to the complainant that an important text message was not sent. That was significant because the appellant's sending of a text message was a matter within his own knowledge. It was a matter for instructions.

84. On the other hand, in this case, the appellant's representatives at trial had no knowledge of the undisclosed material. No significance can be attached to them not conducting a detailed exploration of the possibility that the appellant's father was the true offender. The appellant's counsel was in no position to know that he was any more likely to be the true offender than any other man in the Sudanese community in Adelaide.

---

[36] SABA Barristers Rules, r 3 and South Australian Legal Practitioner Conduct Rules, rr 57(a) and 61(d).

85. Accordingly, the result in *Edwards* is in no way determinative of the result in this case.

The second ground of appeal – was a concession made and if so, what was conceded?

86. As has already been made plain, the appellant did not have to demonstrate he would (or could) have called admissible evidence to prove his father committed sexual acts against another female child in the Sudanese community in Adelaide, in order to establish there was a miscarriage of justice, and the Court of Appeal erred by proceeding on that footing at **Reasons [46], [49], [83]; CAB 42**. The affidavit evidence established that such evidence existed and might have been available to be called at the trial if disclosure had been made before the trial.[37] This provides another reason, additional to those already discussed, why the non-disclosure was capable of affecting the verdict.

87. However, even proceeding on the basis the Court of Appeal did, it erred in determining the appeal partly on the basis that the appellant's counsel conceded at the hearing that the appellant could not have called such evidence: see **Reasons [50], [83]; CAB 42, 49**.

88. There were two parts of the hearing at which the question of what use the appellant could have been made of the undisclosed material were raised with the appellant's counsel.[38] Plainly, the appellant's counsel was thinking on her feet as she responded to questions from the bench. The appellant's counsel's primary submission was that the Court of Appeal did not have to make any findings about how the information that was not disclosed would have been deployed at the trial, if it had been disclosed, in order for a miscarriage of justice to be established.[39]

89. The appellant's counsel agreed, in answer to a question from the bench, that the appellant could not have tendered "the charge sheet that's in the appeal book" at the trial. The "charge sheet" was presumably a reference to the list of charges on the first page of the SA Police Facts of Charge document.[40]

90. The appellant's counsel was then asked, "*So is it your argument that you would have used that information without necessarily educing* [sic] *evidence of it*?" and she replied, "*Yes"*. [41] This was not a concession that the appellant would not (or could not) have adduced evidence at the trial of sexual acts by the appellant's father against another

---

[37] **ABFM 4-28**.
[38] **ABFM 36-38, 44**.
[39] **ABFM 36.8, 46.24**.
[40] **ABFM 36.18**. The list of charges in the SA Police Facts of Charge document is at **ABFM 19**.
[41] **ABFM 37.23**.

female child. It was an off the cuff agreement that **part** of the appellant's argument was that the information/material that had now been disclosed could have been used at the trial without it having to be tendered.

91. The appellant's counsel later said she found another question from the bench hard to answer, because the defence did not know (at the trial) about the material that was not disclosed and she did not want to commit to say that the defence could not have deployed it at the trial.[42]

92. The appellant's counsel then said, *"I can't point to a way that the fact of [the appellant's father] being charged was something that would have been introduced in the trial"*.[43] This was correct. The fact that the appellant's father was charged was, in and of itself, irrelevant. It was the evidence and allegations behind the charges that were relevant.

93. There was no concession that, or to the effect that, had the undisclosed material been disclosed to the defence in a timely way before the trial, admissible evidence relating to the allegations against the appellant's father could not, or would not, have been adduced. In order for counsel to have made such a concession, it would at least have been necessary for the appellant's solicitors to have a copy of his father's complainant's statement and interview her, with a view to her giving evidence.[44] There was no evidence before the Court of Appeal of any impediment to the appellant calling his father's complainant to give evidence at trial (either voluntarily or by subpoena).

Conclusion

94. Whilst the appellant has submitted that the materiality thresholds for a miscarriage of justice as expressed by Edelman and Steward JJ and Gordon J are correct as a matter of law, the question of the precise level of the materiality threshold is not determinative of the appeal. The appellant submits that on any of the materiality thresholds described by the justices of this Court from *Edwards* onwards, based on the factual conclusions of the Court of Appeal, there was a miscarriage of justice in his case.

---

[42] **ABFM 44.5**.
[43] **ABFM 44.22**.
[44] Despite the concession that the prosecution breached its duty of disclosure at the trial by not disclosing the material relating to the child sex offence charges laid against the appellant's father, the DPP did not disclose a copy of the statement made by the father's complainant to the appellant prior to the Court of Appeal hearing. The DPP has still not disclosed that statement, or the balance of the police investigation into the appellant's father, to the appellant, notwithstanding its continuing duty of disclosure.

95. The appellant sought orders in his Notice of Appeal that the appeal be allowed and the matter remitted to the Court of Appeal for its further determination. This may have been appropriate if the respondent sought to invoke the proviso in s 158(2) of the CPA.
96. As the appellant understands the respondent's Notice of Contention, the respondent only invites this Court to apply the proviso if it finds there is no threshold of materiality required to establish a miscarriage of justice. In the event the Court does not make that finding, the respondent does not seek to invoke the proviso.
97. In those circumstances, if the appeal is allowed and the conviction quashed, the appropriate order is to remit the matter for retrial.

Part VII: Orders sought

98. The orders sought are:

    98.1. The appeal is allowed;

    98.2. The order of the Court of Appeal dismissing the appeal is set aside;

    98.3. The conviction is quashed;

    98.4. The matter be remitted to the District Court of South Australia for retrial.

Part VIII: Estimate of time

99. The appellant estimates requiring 75 minutes to present his oral argument.

Dated: 17 October 2024

Name: S G Henchliffe KC

Telephone: 08 8231 6400

Email: shenchliffe@ebchambers.com.au

Name: A J Culshaw

Telephone: 08 8210 6400

Email: aculshaw@lenkingchambers.com.au

Annexure – List of constitutional and legislative provisions referred to in the Appellant's submissions

1. *Criminal Procedure Act 1921* (SA), s 158(1)-(2) (reprint current from 22 June 2023)
2. *Criminal Law Consolidation Act 1935* (SA), s 50 (reprint current from 22 June 2023)