



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: A20/2024
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Important Information

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Form 27F – Outline of oral submissions

Note: see rule 44.08.2.

A20/2024

IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

BETWEEN:

BRAWN
Appellant

and

THE KING
Respondent

**INTERVENER’S OUTLINE OF ORAL SUBMISSIONS
(DIRECTOR OF PUBLIC PROSECUTIONS (NSW))**

Part I: Certification as to publication

1. This oral outline is suitable for publication on the internet.

Part II: Outline of propositions

2. In order to establish a miscarriage of justice within the meaning of the common form appeal provision, it is necessary for an appellant to show that the asserted error or irregularity had a “real chance” or “meaningful potential” to impact a verdict, or operated “to the prejudice of the accused”: *Hofer v The Queen* (2021) 274 CLR 351; *Edwards v The Queen* (2021) 273 CLR 585. That is, there must be a potential connection between the error or irregularity and the outcome of the trial that was had.
3. Regardless of the formulation used, however, the bodies of developed jurisprudence for identifiable categories of errors or irregularities remain relevant to the determination of whether an appellant has demonstrated that a miscarriage of justice occurred in the trial and the factors relevant to that inquiry in particular categories of

cases: Intervener’s Submissions for the Director of Public Prosecutions (NSW) (“IS NSWODPP”) [14]-[18]; [28].

4. In the case of an asserted miscarriage of justice involving the non-disclosure of evidence, the assessment of whether the irregularity rises to the level or threshold of a miscarriage of justice requires the demonstration of some forensic disadvantage or prejudice to the appellant in the trial that was had (not whether the non-disclosed evidence may have capacity to affect the verdict in a hypothetical trial): *Edwards v The Queen* (2021) 273 CLR 585 at [35]; *Grey v The Queen* (2001) 75 ALJR 1708; 184 ALR 593 at [18]; IS NSWODPP [30]-[32].
5. A single universal verbal formulation which relies only on the concept of capacity, divorced from established jurisprudence about how that is to be assessed, overlooks the importance of that jurisprudence in guiding the assessment of whether there was a ‘real chance’ that an irregularity affected the outcome of the trial. So much is highlighted by the fact that the absence of any requirement to show that the fairness of the trial was prejudiced by the non-disclosure may produce a different result in cases such as the present and *Edwards*: IS NSWODPP [33].

Dated: 4 December 2024



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