HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	B72/2023
File Title:	MDP v. The King
Registry:	Brisbane
Document filed:	Appellant's Outline of Oral Submissions
Filing party:	Appellant
Date filed:	03 Dec 2024

Important Information

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: MDP
Appellant

and

THE KING
Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification as to publication

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

Part II: Oral Submissions

The bottom slapping evidence was not admissible at all

2. The bottom slapping evidence did not – as the Court of Appeal held – meet the test in *Pfennig v The Queen* (1995) 182 CLR 461: [2023] QCA 134, [42].

3. All members of this Court in *BBH v The Queen* (2012) 245 CLR 499 held that evidence of sexual interest is 'propensity' evidence and so must meet the *Pfennig* test.

4. Nor was the evidence admissible as 'relationship' evidence because it answered no question that would reasonably have arisen in the minds of the jury. See *Roach v The Queen* (2011) 242 CLR 610, 624 [42] (French CJ, Hayne, Crennan and Kiefel JJ); *Johnson v The Queen* (2018) 266 CLR 106, 116-117 [19] (Kiefel CJ, Bell, Gageler, Nettle and Gordon JJ).

5. Nor was it admissible under s 132B of the *Evidence Act 1977* (Qld).

The Judge's direction permitting 'sexual interest' reasoning

6. If evidence does not meet the *Pfennig* test, a direction permitting the jury to employ propensity reasoning is an error. *HML*, 498-499 [502]-[503], 502 [512] (Kiefel J), *Roach*, 623-624 [41] (French CJ, Hayne, Crennan and Kiefel JJ).

7. The directions given here explicitly permitted the bottom slapping evidence to be used as "sexual interest". Consistent with *BBH*, the direction permitted propensity reasoning. This dovetailed with Crown submissions inviting such reasoning.

Wrong decision on a question of law – directions to the jury

8. The Respondent properly concedes that the decision to give the direction was a "decision on a question of law". Because the evidence was not admissible in accordance with *Pfennig*, it was a *wrong* decision on a question of law. That being so, the only question properly remaining on this ground is the application of the proviso.

Wrong decision on a question of law – admission of evidence

9. The admission of presumptively inadmissible propensity evidence that had been opened by the Crown is properly characterised as a decision on a question of law. Because the evidence was inadmissible, it was a wrong decision. That being so, the only question properly remaining on this ground is the application of the proviso.

The evidence mattered

10. In a 'word on word' case involving a child, evidence of "sexual interest" from an 'independent' source (here the complainant's sister) is likely to be devastating for a defence case if accepted by a jury.

11. Given that the Crown asked the jury to accept the "sexual interest" evidence, and the Trial Judge permitted it to do so, it cannot be said that a jury would not do so.

Miscarriage of justice

12. Properly construed, a third limb "miscarriage of justice" is "any departure from trial according to law; regardless of the nature or importance of that departure".

13. Materiality, innocuousness, lost chance of acquittal and fundamental error can all be dealt with in the proviso: *Kalbasi v Western Australia* (2018) 264 CLR 62, 87-88 [70]-[72] (Gageler J); 118-121 [152]-[160] (Edelman J).

14. If there is a materiality criterion within 'miscarriage of justice' then it ought be set at a modest level to avoid collapsing the proviso into the third limb.

15. Howsoever considered, the admission of the evidence and the use the jury was permitted to make of it amounted to a miscarriage, notwithstanding defence counsel's concession.

The proviso (Respondent's Notice of Contention)

16. In a case where the verdict rested on credit and the error had the capacity to affect the assessment of the complainant's credibility, the limitations of review on the record mean that the "negative proposition" cannot be satisfied.

17. In any event, the error did have a material impact on the trial in that it permitted a potentially decisive but erroneous line of reasoning to be deployed by the Crown.

Dated: 2 December 2024

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Name: Saul Holt KC

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Name: Susan Hedge