HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: MDP
Appellant

and

THE KING
Respondent

APPELLANT'S SUPPLEMENTARY 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 judge giving a direction to the jury permitting propensity reasoning:

   (a) was a wrong decision of a question of law; and/or

   (b) resulted in a miscarriage of justice.

3. Whether the prosecution leading inadmissible evidence of uncharged sexual conduct at the trial:

   (a) Was the result of a wrong decision of a question of law by the judge to allow that course; and/or

   (b) resulted in a miscarriage of justice.

Part III: Compliance with s78B of the *Judiciary Act 1903* (Cth)

4. No notice is required in accordance with section 78B of the *Judiciary Act 1903* (Cth).

Part IV: Authorised report citation

5. The decision of the Queensland Court of Appeal is not reported. The internet citation is [2023] QCA 134.

Part V: Relevant facts found or admitted in the court below

6. The appellant relies on the recitation of the facts in paragraph [6] to [19] of the appellant's outline filed on 30 January 2024.

Part VI: Argument

Special leave to appeal

7. For the reasons that follow, the appellant submits that it should be granted special leave to appeal on its proposed grounds two to four because each ground:

   (a) raises questions of law of general and public importance, namely the circumstances in which the limbs of the common form appeal provisions will be engaged;

   (b) provides an opportunity for the court to clarify the law where there are inconsistent statements from judges of this Court and intermediate courts of appeal; and

   (c) allows this Court to consider the interplay between the "miscarriage of justice" limb and the "wrong decision on a question of law" limb.

A wrong decision on a question of law

8. One basis on which the Court of Appeal may allow an appeal against conviction under s668E(1) of the *Criminal Code 1899* (Qld) is if "*the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law…*"

9. The appellant submits the trial judge made two wrong decisions of a question of law in the trial. First, on the first day of the trial, he permitted the prosecution to lead evidence of uncharged sexual conduct which did not meet the test in *Pfennig v The Queen* (1995) 182 CLR 461. The Crown prosecutor had opened the evidence, so the judge was aware there was evidence of sexual conduct unrelated to any charge to be led and nonetheless permitted it to be led without further enquiry or ruling. Second, at

the end of trial, he decided to give the propensity direction sought by the prosecution, in relation to evidence which was not admissible as propensity evidence.

10. It is convenient to deal with the second wrong decision first.

Ground 2: The wrong decision to give the propensity direction

11. In *Simic v The Queen* (1980) 144 CLR 319, the Court (Gibbs, Stephen, Mason, Murphy and Wilson JJ) held that cases where there had been a wrong decision on a question of law "*would include those in which there has been a misdirection as to the law or in which evidence has been improperly admitted or rejected*."[1]

12. However, in *Papakosmas v The Queen* (1999) 196 CLR 297 and then *Dhanhoa v The Queen* (2003) 217 CLR 1, McHugh J and then McHugh and Gummow JJ stated the principle differently. In *Papakosmas*, McHugh J said at 319 [72] that there is no wrong decision on a question of law if the appellant has failed to object to evidence or ask for a redirection. No majority of the Court endorsed that statement. Gaudron and Kirby JJ in a joint judgment disagreed with McHugh J.[2]

13. In *Dhanhoa*, defence counsel had not applied for a direction. McHugh and Gummow JJ said that where the trial judge was not asked for a direction or re-direction, there could be no wrong decision on a question of law,[3] and the only ground available was of miscarriage of justice. Again, no majority of the Court endorsed that statement of principle. Gleeson CJ and Hayne J in a joint judgment held that the directions sought by the appellant on appeal were not required, and so did not determine what would constitute a wrong decision of a question of law.[4] Callinan J, in dissent, held that one of the directions was required and would have allowed the appeal on that ground.[5]

14. In *Gassy v The Queen* (2008) 236 CLR 293 at [55]-[56] Kirby J said:

> *[55] One difficulty involves the requirement in the preconditions to the operation of the section of a "wrong decision on any question of law". The issue is whether this necessitates a "decision" in the sense of a specific ruling that the trial judge*

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[1] *Simic v The Queen* (1980) 144 CLR 319, 328.
[2] *Papakosmas v The Queen* (1999) 196 CLR 297, 311 [44].
[3] *Dhanhoa v The Queen* (2003) 217 CLR 1, 12 [37], 13 [38], 15 [49].
[4] *Dhanhoa v The Queen* (2003) 217 CLR 1, 9-10 [22]-[24], 12 [34].
[5] *Dhanhoa v The Queen* (2003) 217 CLR 1, 27-29 [95]-[101].

has been asked to make on an issue that is contested, enlivening a "decision" of such a kind. Opinions to support that interpretation exist, mainly involving rulings on the admissibility of evidence[6]*. In this Court, opinions to this effect have been expressed*[7]*. However, the issue has not been conclusively resolved.*

[56] The meaning of "decision" has attracted differing views, and the present case is an illustration of the need to avoid an unduly narrow meaning. The applicant did not himself object to the balance of the trial judge's supplementary direction to the jury and so could not request a ruling on an objection. He is not legally trained and was representing himself. The prosecutor suggested a need for only a limited redirection. In most important directions to a jury, a judge is bound to conform to many legal requirements. Normally, the judge will have planned at least the outline of the directions to be given. Thus it seems highly artificial to classify providing directions as not involving a "decision" by the judge. In my view, the supplementary direction given to the jury was a judicial "decision" on a "question of law" for the purposes of the statute. However, this point does not need to be decided in this case given the alternative provision of the statute postulating a "miscarriage of justice". (footnotes in original, underlining added)

15. In *Huxley v The Queen* [2023] HCA 40 at [42], Edelman, Steward and Gordon JJ said that a wrong decision on a question of law includes misdirections on matters of substantive law as well as on matters of adjectival law. It was said that "*a misdirection on a matter of law may amount to a "wrong decision of any question of law", at least where, as in this case, the direction was made following a request to the trial judge for a direction so that it may be understood as the product of a "wrong decision".*

16. The appellant submits, consistently with the statements of this Court in *Simic*, Kirby J in *Gassy*, and of Edelman, Steward and Gordon JJ in *Huxley*, a trial judge must have decided to give each direction that is given to the jury, in the way and in the terms that they have chosen. To proceed on the basis that a direction given by a judge in a

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[6] See eg *Gardiner v The Queen* (2006) 162 A Crim R 233 at 260 [127]; *R v Tofilau (No 2)* (2006) 13 VR 28 at 35-36 [15]; *R v Huynh* (2006) 165 A Crim R 586 at 588 [4]-[5].

[7] *Papakosmas v The Queen* (1999) 196 CLR 297 at 319 [72] per McHugh J; [1999] HCA 37; *Dhanhoa v The Queen* (2003) 217 CLR 1 at 12-13 [37]-[38], 15 [49] per McHugh and Gummow JJ; [2003] HCA 40.

criminal trial was not the product of his or her conscious decision would seem to be untenable.

17. It is not necessary in this case to decide what the position would be where no submission was made about a direction or re-direction by either party. This is not a "missed direction" case. The prosecution here sought the propensity direction and the judge decided to give it, despite the judge's misgivings. After hearing from both counsel the judge said "*Yes, well, it was a matter raised with the other child as an unusual feature of their dynamic. At this stage I'm inclined to permit it because the direction to the jury includes that they have to consider whether or not it reaches the bar."*[8] That statement is clear evidence that the judge decided to give the direction. The appellant submits, as the evidence was not admissible as propensity evidence the judge made a wrong decision on a question of law. No question of miscarriage would then arise.

18. The same conclusion has been reached in at least two decisions of intermediate courts of appeal. In *OKS v Western Australia* (2018) 52 WAR 483, Beech JA considered the authorities at 530 – 532 [244] - [255], and relying in *Simic*, held that a misdirection on a matter of law is a wrong decision on a question of law regardless of whether counsel objected to the direction. Buss P[9] and Pritchard J[10] agreed. Beech JA held that the judgment of McHugh and Gummow JJ in *Dhanhoa* should not be taken as extending to a positive misdirection of law.[11] An appeal to the High Court was allowed in relation to the application of the proviso: (2019) 265 CLR 268.

19. In *Doyle v R; R v Doyle* [2014] NSWCCA 4, in the context of r 4 of the Criminal Appeal Rules (NSW) and without expressing a final view, Bathurst CJ, with whom Price and Campbell JJ agreed, said:

> *[428] … As McHugh J pointed out in Papakosmas supra at* [72]*, a trial judge does not make an error of law where an appellant has failed to object to evidence or failed to ask for a direction. With the greatest respect to his Honour, that may state the position a little too widely. For example, a direction that was incorrect*

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[8] Appellant's Book of Further Materials, 78.17-19.
[9] *OKS v Western Australia* (2018) 52 WAR 483; [2018] WASCA 48, 497 [76].
[10] *OKS v Western Australia* (2018) 52 WAR 483; [2018] WASCA 48, 532-533 [259]-[263].
[11] *OKS v Western Australia* (2018) 52 WAR 483; [2018] WASCA 48, 530 [244], 531 [250].

> *as to the burden of proof or in some other fundamental respect would, in my opinion, constitute an error of law irrespective of whether it was asked that it be corrected. In the present case a misdirection as to the use that could be made of tendency evidence would fall into such a category. (underlining added)*

20. There are other decisions of intermediate courts of appeal that, consistently with the grounds advanced in those cases, held a misdirection on a matter of law may only result in an appeal being allowed if a miscarriage of justice is shown, relying on McHugh and Gummow JJ in *Dhanhoa* or McHugh J in *Papakosmas*.[12] The appellant submits that, following *Simic*, those decisions are incorrect, and a misdirection on a matter of law constitutes a wrong decision on a question of law.

21. It is uncontroversial that "*if there is a wrong decision of any question of law the appellant has the right to have his appeal allowed, unless the case can be brought within the proviso*".[13].

Ground 4: The wrong decision to permit the prosecution to lead evidence of uncharged sexual conduct

22. In *R v Soma* (2003) 212 CLR 299, Gleeson CJ, Gummow, Kirby and Hayne JJ held that there was no wrong decision of a question of law when there was no objection at trial to the evidence given about the respondent's police interview: at 304 [11]. That statement was relied on by Gageler CJ in *Hofer v The Queen* in relation to the absence of objection to inadmissible evidence.[14]

23. Both *Soma* and *Hofer* related to inadmissible material elicited in cross-examination of the defendant by a prosecutor. As a result, the trial judge could not have predicted what evidence was to be given.

24. The present case is different. First, the prosecutor opened the evidence. He said "*…you're going to hear [the complainant's sister] talk about having witnessed the defendant smack [the complainant] on the bottom, and she'll describe that that*

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[12] See for example *Foster v The King* [2023] NTCCA 5, [54] (The Court); *Gahani v The Queen* [2022] NTCCA 13, [78] (The Court); *R v KBC* [2023] QCA 60, [113]-[119] (McMurdo JA) [123] (Bond JA); *R v WBS* [2022] QCA 180, [114] (Davis J, with whom Kelly J agreed).
[13] *Mraz v The Queen* (1955) 93 CLR 493, 514; *Baini v The Queen* (2012) 246 CLR 469, 487 [49] (Gageler J).
[14] *Hofer v The Queen* (2021) 274 CLR 351, 390 [119].

occurred when they weren't doing anything wrong; so a non-disciplinary way"[15] The judge thus knew that the evidence was evidence of uncharged sexual conduct because none of the charged offences were particularised as including a slap on the bottom.

25. Second, the evidence was of a type – evidence which shows a propensity by uncharged acts – which is prima facie inadmissible, unless it can be shown to meet the *Pfennig* test. The rule about uncharged acts which may show propensity is an exclusionary rule of evidence, and the admissibility of the evidence because it meets the test in *Pfennig* or for relationship evidence are exceptions to that rule.[16] The evidence is not admissible until it is shown to meet an exception. This Court held in *Pfennig* that the question of admissibility is a question of law, not an exercise of discretion.[17]

26. Third, propensity evidence is well known to be prejudicial if not used appropriately. Callinan J said in *Tully v The Queen* (2006) 230 CLR 234 at 278 [146] that it was important that *"both parties and trial judges pay close attention to any attempt to tender evidence of uncharged acts*" given the potential for prejudice.

27. Similarly, Hayne J said in *HML v The Queen* (2008) 235 CLR 334 at 387 [123] that in most cases it will *"be desirable, before evidence is led, to ask the prosecutor to identify (a) what evidence will be adduced which may demonstrate sexual conduct towards the complainant, other than the conduct founding the charges being tried, and (b) how it is alleged the evidence is relevant. It will usually be necessary, and helpful, to have the prosecutor describe each step along the path (or paths) of reasoning from the intended proof of other sexual conduct which it is expected that the prosecutor will submit that the jury may follow."* None of that was done in this case.

28. In that context, the trial judge, having heard the opening and knowing that uncharged acts were to be led, should be taken to have decided that the evidence could be led. As the evidence was inadmissible, either as propensity evidence or relationship evidence at common law,[18] that decision was a wrong decision on a question of law.

29. Gleeson CJ and Hayne J said in *Dhanhoa* (in relation to the *Evidence Act 1995* (NSW) provisions about identification evidence) that the legislation applies in an adversarial

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[15] Respondent's Book of Further Materials, 169.4-6.
[16] Cross on Evidence (July 2023), [21001].
[17] *Pfennig v The Queen* (1995) 182 CLR 461, 483-484.
[18] See paragraph [20]-[26] of Appellant's Submissions, filed 30 January 2024.

context, so that it is the parties who define the issues at trial, and choose evidence they will lead and to which they will take objection.[19] However, a judge may be required to act on his or her own motion to exclude inadmissible evidence if that is necessary as part of the overriding obligation to ensure a fair trial according to law.[20]

30. The appellant does not contend that there will be a wrong decision of a question of law on every occasion that a trial judge permits the prosecution to lead inadmissible evidence described in the opening. But in the particular case of uncharged acts, because the evidence is prima facie inadmissible as a matter of law, and because of the special prejudice, that conclusion will be likely. In this case, the judge chose not to have the prosecutor establish the admissibility of the evidence, but for it to be led without further enquiry. The appellant submits that constitutes a wrong decision on a question of law. If so, no question of miscarriage arises.

Ground 3: The wrongly admitted evidence of uncharged sexual conduct resulted in a miscarriage of justice

31. The appellant relies on paragraphs [28]-[64] of his outline filed on 30 January 2024 in relation to what is required to constitute a miscarriage of justice, and on paragraphs [20]-[26] as to the inadmissibility of the bottom slapping evidence on any basis.

32. The appellant submits for those reasons there was departure from the requirements of a trial according to law because inadmissible evidence was admitted into evidence. If there is no materiality threshold, then that is sufficient for a finding there was a miscarriage of justice.

33. If there is a materiality threshold built in to the concept of miscarriage of justice, the appellant submits the admission of that inadmissible evidence caused a miscarriage of justice because:

    (a) First, it resulted in the jury having before it evidence from a witness other than the complainant of sexual conduct by the appellant against the complainant. That evidence is commonly understood to be prejudicial to juries.

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[19] *Dhanhoa v The Queen* (2003) 217 CLR 1, 9 [20].
[20] *Pemble v The Queen* [1971] HCA 20; 124 CLR 107, [18]-[20]; *James v The Queen* [2014] HCA 6; 253 CLR 475, [24]; *Perish v R* [2016] NSWCCA 89; (2016) 92 NSWLR 161, [271]-[272] (Bathurst CJ, Hoeben CJ at CL and Bellew J).

(b) Second, the appellant, having elected to give evidence, was required to give evidence about the bottom slapping topic. In the present case, that meant he had to give evidence-in-chief and be cross-examined on his account of any slapping of the complainant's bottom. This provided another opportunity for the prosecutor to attack his credit in cross-examination and could well have affected the jury's consideration of his credit.

(c) Third, the appellant would have been "darkened" by the evidence when he gave his evidence to the jury. As Callinan J said in *Tully v The Queen* (2006) 230 CLR 234 at [147] *"the prosecution evidence of uncharged acts will have already further darkened the character of the accused, over and above the impact of the nature of the acts charged. He will in all likelihood then enter the witness box as a person of bad character, without necessarily having sought to show his own good character, or to impute bad character to a witness for the prosecution. .... Timely objection to the reception of possibly inadmissible "relationship evidence" will ensure that its actual character is identified, and whether it is truly admissible relationship evidence as such".*

34. The admission of the inadmissible evidence had the "*capacity for practical injustice*".[21] If necessary, the only rational conclusion is that its admission could well have had, and was at least capable of having, an effect upon the verdict.

35. If the wrongly admitted evidence did not, by itself, cause a miscarriage of justice, the appellant submits that it, in combination with the erroneous direction about it, resulted in a miscarriage of justice in this case.

Conclusion

36. The appellant submits that the decisions to allow uncharged acts evidence to be led, and to give the propensity direction, were wrong decisions of questions of law. Further, the admission of the evidence and the direction resulted in a miscarriage of justice.

Part VII: Orders sought by the appellant

37. The appellant seeks the following orders:

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[21] *Edwards v The Queen* (2021) 273 CLR 585, 609 [74] (Edelman and Steward JJ).

(a) Appeal allowed.

(b) Order of the Court of Appeal dismissing the appeal against conviction is set aside.

(c) In lieu, an order that the appeal to the Court of Appeal is allowed, the applicant's convictions are set aside and a new trial ordered.

Part VIII: Estimate of oral argument

38. The appellant estimates the presentation of its oral argument will take three hours.

Dated: 19 July 2024

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ANNEXURE – LIST OF CONSTITUTIONAL AND LEGISLATIVE PROVISIONS REFERRED TO IN APPELLANT'S SUPPLEMENTARY SUBMISSIONS

1. *Criminal Code 1899* (Qld), s668E (Reprint current from 22 March 2023)