HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: MDP
Appellant

and

THE KING
Respondent

INTERVENER'S SUPPLEMENTARY SUBMISSIONS
(DIRECTOR OF PUBLIC PROSECUTIONS NSW)

Part I: Certification as to publication

1. These submissions are in a form suitable for publication on the internet.

Part II: Statement of the asserted basis of intervention

Part III: Statement as to why leave to intervene should be granted

2. Pursuant to the orders of the Chief Justice on 4 June 2024, leave has been granted to the Director of Public Prosecutions (NSW) to intervene and to make written submissions, including these supplementary written submissions, and supplement those written submissions by oral submissions.

Part IV:

3. The appellant's supplementary submissions raise three contentions that should not be accepted by this Court.

4. ***First,*** that "a wrong decision on a question of law" may include the admission of evidence in respect of which there was no objection taken in the trial: see Appellant's Supplementary Written Submissions (**"ASWS**") [9], [28], [30] and [36].

5. ***Second,*** that a misdirection to a jury, which was not given at the request of (or despite the request of) a party and did not otherwise involve any ruling or decision by a trial judge, is "a wrong decision on a question of law": see **ASWS [16] and [20].**

6. ***Third,*** that if an appellant establishes "a wrong decision on a question of law", then the appeal is automatically allowed (subject to the application of the proviso) without any need to demonstrate materiality or that the legal error caused a miscarriage of justice: see **ASWS [21]**.

Whether the admission of evidence not objected to can constitute "a wrong decision on a question of law"

7. This Court should not accept the appellant's contention that it will amount to "a wrong decision on a question of law" for a trial judge to allow the prosecution to lead evidence which may be inadmissible "without further enquiry or ruling": **ASWS [9].**

8. To the contrary, it is clear from the authorities of this Court that a "wrong decision on a question of law" requires a decision or a ruling be made by a trial judge. Even where it is later concluded that such evidence should not have been admitted, in the absence of any decision or ruling by a trial judge in relation to that evidence, it could not be said that a "wrong decision on a question of law" has occurred.[1]

9. The appellant's argument relies on *Simic v The Queen* [1980] HCA 25; 144 CLR 319 ("***Simic***"), in particular at 328 [11].[2] However, there, the Court was comparing the test for when a misstatement as to the effect of evidence would invalidate a conviction (that is, if an appellate court is satisfied *"that it is probable that but for the misstatement the jury would not have returned the verdict it did")* with the stricter test *"…which is applied in cases where there has been a wrong decision of a question of law - cases that would include those in which there has been a misdirection as to the law or in which evidence has been improperly admitted or rejected*."[3]

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[1] See *R v Soma* [2003] HCA 13; 212 CLR 299 at [11], [42], [79]; *Hofer v The Queen* [2021] HCA 36; 274 CLR 351 at [119]; *Dhanhoa v The Queen* [2003] HCA 40; 217 CLR 1 at [20], [49]; *Johnson v The Queen* [2018] HCA 48; 266 CLR 106 at [52].

[2] See ASWS [11].

[3] *Simic* at 327 as cited at ASWS [11].

10. The Court was not purporting to define what amounted to "a wrong decision on a question of law", rather to illustrate the types of errors which would fall into that category (as distinct from a misstatement of fact).

11. As conceded by the appellant, there have been further statements by this Court subsequent to *Simic* regarding what constitutes "a wrong decision on a question of law", and what does not: **ASWS [12] – [15].**

12. In *R v Soma* [2003] HCA 13; 212 CLR 299 (*"**Soma**"*), Gleeson CJ, Gummow, Kirby and Hayne JJ stated at [11] that:

> There having been no objection at trial to the evidence that was given and received about the respondent's police interview, it cannot be said that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law.

13. Writing separately, McHugh J also stated (at [42] and [79]) that there cannot be a "wrong decision on a question of law" where there has not been any objection to evidence (or in respect of a direction, any request for redirection). As McHugh J explained at [42], in those circumstances a trial judge has not been asked to rule on the course taken and thus it cannot be said that there is a 'wrong decision'.

14. In *Dhanhoa v The Queen* [2003] HCA 40; 217 CLR 1 (*"**Dhanhoa**"*), McHugh and Gummow J confirmed at [49]:

> Because the trial judge was not asked to direct the jury, he did not make a "wrong *decision* of any question of law" (emphasis in original)

15. The appellant argues that no majority of the Court endorsed that statement of McHugh and Gummow JJ in *Dhanhoa*: **ASWS [13]**. However, the statement of McHugh and Gummow JJ at [49] is aligned with the remarks of Gleeson CJ and Hayne J at [20] of *Dhanhoa* regarding the adversarial context of a criminal trial, and particularly that "[i]t is the parties, and their counsel, who define the issues at trial, select the witnesses, and choose the evidence that they will lead, and to which they will take objection." Further, paragraph [49] of *Dhanhoa* was cited with approval by Gordon, Steward and Gleeson JJ in *Huxley v The Queen* [2023] HCA 40 ("***Huxley***") at [42].[4]

16. In *Johnson v The Queen* [2018] HCA 48; 266 CLR 106 ("***Johnson***"), Kiefel CJ, Bell, Gageler, Nettle and Gordon JJ considered that the wrongful admission of evidence

[4] See below at [25] of these submissions where the relevant paragraph of *Huxley* is extracted.

(referred to as the bath incident) was not a wrong decision on a question of law, as objection had not been taken to that evidence at trial.[5]

17. In *Hofer v The Queen* [2021] HCA 36; 274 CLR 351 (*"**Hofer***"), Gageler J (as his Honour then was) considered that the absence of objection to the (asserted) inadmissible evidence in that case meant that "most of the inadmissible evidence could not be said to have been admitted as a result of a wrong decision of any question of law".[6] In support of that statement, his Honour cited both *Soma* and *Johnson*.

18. The appellant seeks to distinguish his case on the basis that in *Soma* and *Hofer*, the inadmissible material was elicited in cross-examination: **ASWS [23]**. However, there is nothing in the statements of principle in each of the authorities that would suggest it was the absence of notice to the trial judge that impacted whether the matter fell within the category of a wrong decision on a question of law.

19. Further, this argument overlooks that in *Johnson* the evidence that was held to be wrongly admitted was evidence of an incident that was adduced and relied upon by the prosecution as evidence to rebut the presumption of doli incapax.

20. The matters raised by the appellant at **ASWS [25] – [27]** may be arguments to be considered in respect of the assertion that a miscarriage of justice occurred by reason of the admission of the evidence, but those matters do not support the contention that the trial judge ruled on or decided any question of law: cf **ASWS [28]**.

21. As conceded at **ASWS [29],** it was observed by Gleeson CJ and Hayne J in *Dhanhoa* that the *Evidence Act* applies in an adversarial context and counsel for an accused may have any one of a number of reasons for not objecting to particular evidence and "[a] trial judge ordinarily will not know why no objection is taken, and may have no right to enquire" (at [20]).

22. Notwithstanding the acknowledgment of that principle, and despite the disavowal contained at **ASWS [30]**, the result of the applicant's contention in Ground 4 is that the admission of <u>any</u> evidence in a trial (even if led without objection) could be the subject of an appeal against a wrong decision on a question of law because a judge is

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[5] *Johnson* at [52].

[6] *Hofer* at [119].

taken to have decided to permit the evidence simply by a party adducing it in the trial judge's presence. The proposition contended for at **ASWS [28]** and **[30]** is that when a trial judge has heard the opening address and then evidence referred to in that address is led in the trial, that trial judge "is taken to have decided that the evidence could be led" for the purpose of an appeal against any "wrong decision on a question of law" about such evidence.

23. As a matter of logic and practicality, a trial judge does not – merely by listening to an opening address by either prosecution or defence counsel – assume the burden of determining the admissibility of all evidence referred to in the addresses. Such a contention is directly at odds with what was said in *Dhanhoa*.

24. The appellant does not make his argument regarding this aspect of the supplementary submissions by reference to any authority to support his contention that, where evidence is opened on by the prosecution and then adduced in the trial without objection, that the trial judge ought to be "taken to have decided that the evidence could be led": **ASWS [28].** The authorities that the appellant relies upon as supporting a wider interpretation of that phrase do so only as regards directions given by a trial judge to a jury.

Whether a misdirection to a jury, which does not involve any request by a party or ruling by a trial judge is "a wrong decision on a question of law"

25. As the appellant observes at **ASWS [15]**, in *Huxley* at [42], Edelman, Steward and Gordon JJ stated 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". A wrong decision of a question of law may also be made when a trial judge declines to give a redirection at the conclusion of a summing-up. (emphasis added, citations removed)

26. As is clear from the extract above, the remarks in *Huxley* confined the statement of principle to circumstances where the direction was made in response to a request to a trial judge to give the direction, or where a trial judge refuses a redirection, or where

the direction can otherwise "*be understood as the product of a wrong decision*" (as explained by their Honours at [42]).[7]

27. None of the authorities relied upon by the appellant contain a statement of principle to the effect that any direction, irrespective of whether it could be considered the "product of a wrong decision" by the trial judge, could constitute second limb error (as opposed to third limb error). However, as observed at **ASWS [17]**, it may not be necessary to determine that specific question in the circumstances of this matter.

The appellant's argument that "a wrong decision on a question of law" does not require any degree of materiality or demonstration of a resulting miscarriage of justice

28. Contrary to the assertion of the appellant at **ASWS [21]**, even if the appellant establishes that the trial judge made a wrong decision on a question of law, he must still establish that such error was productive of a miscarriage of justice in the trial.

29. In *Filippou v The Queen* [2015] HCA 29; 256 CLR 47 ("***Filippou***"), the plurality (French CJ, Bell, Keane and Nettle JJ) made clear the proper approach to the determination of an appeal (at [4]):

> As will appear, the Court of Criminal Appeal is required to deal with an appeal from judge alone in three stages. The first is to determine whether the judge has erred in fact or law. If there is such an error, the second stage is to decide whether the error, either alone or in conjunction with any other error or circumstance, is productive of a miscarriage of justice. If so, the third stage is to ascertain whether, notwithstanding that the error is productive of a miscarriage of justice, the Crown has established that the error was not productive of a substantial miscarriage of justice. (emphasis added)

30. The plurality at [13] confirmed that *"*..as with the first limb the question under the second limb will be whether the error constitutes a miscarriage of justice in the sense of a departure from trial according to law." (emphasis added).

31. Thus, even where the error is a wrong decision on a question of law, the appellate court considers what was described as 'the second stage' in *Filippou* of deciding whether the error (i.e. the wrong decision on a question of law) is productive of a miscarriage of justice.

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[7] It is to be observed that in *Huxley* the questions of whether the asserted error was material, as well as whether it could fall within either second or third limb error, were not matters in contest between the parties.

32. While *Filippou* concerned an appeal from a trial by a judge sitting alone, there is no difference in an appeal from the verdict of a jury as compared with an appeal from the verdict of a judge sitting alone: see *Dansie v The Queen* [2022] HCA 25; 274 CLR 651 at [15].

33. As outlined in the **(NSW) Intervenor Submissions**[8] (at **[31] – [32]**), the approach in *Filippou* has also been understood to be the proper approach to establish "second limb" error in the common form appeal provision: see *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17; 273 CLR 506 at [161]-[162] per Edelman J; and *Pandamooz v R* [2023] NSWCCA 221 at [60]-[65]); *R v Harris* [2021] QCA 96 at [34]; *Kroni v R* [2021] SASCFC 15; 138 SASR 37 at [60] – [62].

34. The practical impact of the contention advanced by the appellant at **ASWS [21]** (and see Intervenor (Cth) at **Supp Cth [20]-[23]**) is that any 'wrong decision on a question of law'– irrespective of the importance of the issue in the context of the trial – would result in the onus shifting to the respondent to satisfy the appellate court that the proviso should be applied. That is, in each case, the appellate court must make its own independent assessment of the whole of the record of the trial (including considering the nature and effect of the error in the particular case)[9] and determine whether it is satisfied of the "*necessary (albeit not necessarily sufficient)"*[10] threshold for the application of the proviso – that is, that the evidence properly admitted at trial established guilt to the requisite standard.[11]

35. This would amount to a significant change in the practical application of the section.

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[8] Filed on 28 March 2024.

[9] *Orreal v The Queen* [2021] HCA 44 at [20]; *Weiss v The Queen* [2005] HCA 81; 224 CLR 300 at 317 [44]; *AK v Western Australia* [2008] HCA 8; 232 CLR 438 at [53] – [55].

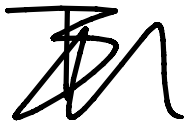
[10] *Hofer* per Kiefel CJ, Keane and Gleeson JJ at [54]; see also *Weiss v The Queen* [2005] HCA 81; 224 CLR 300 at 317 [44]; *Baini v The Queen* [2012] HCA 59; 246 CLR 469 at 480 [28] – [30]; *Lane v The Queen* [2018] HCA 28; 265 CLR 196 at 206 – 207 [38].

[11] *Weiss v The Queen* [2005] HCA 81; 224 CLR 300 at 317 [44]; *Baiada Poultry Pty Limited v The Queen* [2012] HCA 14; 246 CLR 92 at [29]; *Lane v The Queen* [2018] HCA 28; 265 CLR 196 at 206 – 207 [38].

Part V:

36. In accordance with the orders made by the Chief Justice on 4 June 2024, the estimate of oral submissions is half an hour.

Dated 16 August 2024



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