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 REPLY TO SUPPLEMENTARY SUBMISSIONS

Part I: Certification as to publication

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

Part II: Reply to Supplementary Submissions

Ground 2: the wrong decision in relation to the direction

2. The respondent concedes that a decision on a question of law was made by the judge in deciding to give the propensity direction.[1]

3. The Commonwealth Director similarly accepts that it will be a decision of a question of law where a party requests a direction and, as a result, there is a misdirection.[2] The NSW Director also appears to accept that a direction given at the request of a party (as it was here, at the request of the prosecution), is the product of a decision on a question of law.[3]

4. There is no disagreement, then, that the judge made a "decision on a question of law" when he decided to give the propensity direction. The only issue that remains is whether that direction was wrong. The respondent takes the surprising position that the direction was not wrong because "a warning against propensity reasoning" was required, and that was

[1] Respondent's Supplementary Submissions, 16 August 2024, [24].
[2] Commonwealth Director of Public Prosecutions Supplementary Submissions, 16 August 2024, [33].
[3] NSW Director of Public Prosecutions Supplementary Submissions, 16 August 2024, [25]-[26].

what was given.[4] But the direction given was not a warning against propensity reasoning – it was precisely the opposite. It permitted the jury to engage in propensity reasoning.

Ground 4: the wrong decision in relation to the admission of evidence

5. The respondent contends that the prosecution opened the bottom slapping evidence "as general and innocuous background evidence".[5] The prosecutor at trial did not identify the purpose for leading the evidence;[6] on its face it was evidence which might be said to show propensity.

6. The NSW Director, Commonwealth Director and the respondent contend that in *Johnson v The Queen* (2018) 266 CLR 106, a majority of the High Court held that the wrongful admission of evidence will not be a wrong decision on a question of law if no objection is taken to the evidence at trial.[7] *Johnson* is, like *Soma* and *Hofer*,[8] a different case to the present. The "bath incident" in *Johnson* was led by the prosecution to rebut the presumption of doli incapax in relation to a count on the indictment and for contextual purposes including showing the relationship was one that involved violence, fear and a lack of being brought to account, and that might have given the appellant confidence to offend.[9] The High Court held that the evidence was inadmissible because it was not probative of the appellant's capacity to bear criminal responsibility.[10] However, it was circumstantial evidence which is prima facie admissible if relevant. It is in a different category to propensity evidence, which is prima facie inadmissible unless the prosecution establishes that the evidence meets the *Pfennig* test.

7. The Commonwealth Director contends that "decision" in the second limb of the common form appeal provisions should be taken to mean "an accounted or published ruling or adjudication".[11] In aid of that interpretation, she refers to the adversarial nature of the criminal trial,[12] and the scope of the third limb, which she says will be undermined if the

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[4] Respondent's Supplementary Submissions, 16 August 2024, [24].
[5] Respondent's Supplementary Submissions, 16 August 2024, [7].
[6] Respondent's Book of Further Materials, p169.4-6.
[7] NSW Director of Public Prosecutions Supplementary Submissions, 16 August 2024, [16]; Commonwealth Director of Public Prosecutions Supplementary Submissions, 16 August 2024, [8], [16], [19]; Respondent's Supplementary Submissions, 16 August 2024, [26].
[8] Appellant's Supplementary Submissions, 19 July 2024, [22]-[23].
[9] *Johnson v The Queen* (2018) 266 CLR 106, [44]-[45] (Kiefel CJ, Bell, Gageler, Nettle and Gordon JJ).
[10] *Johnson v The Queen* (2018) 266 CLR 106, [50] (Kiefel CJ, Bell, Gageler, Nettle and Gordon JJ).
[11] Commonwealth Director of Public Prosecutions Supplementary Submissions, 16 August 2024, [11].
[12] Commonwealth Director of Public Prosecutions Supplementary Submissions, 16 August 2024, [17]-[18].

second limb is "read too expansively".[13] On that basis, she contends there must be a ruling on an objection to evidence before there can be a decision.[14]

8. The appellant submits that a "decision" need not be initiated or driven by the parties to criminal litigation in order to meet that description. For example, if a judge of her or his own motion admitted evidence that was inadmissible to the detriment of the accused, there would plainly be a wrong decision of a question of law. The appellant submits the court would not confine the word decision to rulings made after a contest.

9. The respondent contends that the appellant's argument ignores the tactical forensic decisions made by advocates, including sound decisions not to object to evidence.[15] Similarly, the Cth Director submits that because forensic choices of counsel are taken into account under the third limb, the second limb should be interpreted to exclude the admission of evidence where there was no objection.[16] The Cth Director submits that the result of the appellant's argument is that the admission of any evidence at trial could be the subject of an appeal under the second limb.[17] To the contrary, the appellant's argument is narrowly framed in relation to evidence (such as propensity evidence) that is prima facie inadmissible. Because such evidence is highly prejudicial, and only admissible if it meets the *Pfennig* test, it is in a different category to other types of evidence that might be wrongly admitted, such as that in *Soma*, *Johnson* and *Hofer*. The admission of such evidence even without objection represents a positive decision having been made by a trial judge.

The consequences of a finding that there was a wrong decision on a question of law

10. The NSW Director contends that even if an appellant establishes that there was a wrong decision on a question of law, the appeal may not succeed unless the appellant establishes that the error was productive of a miscarriage of justice.[18] By contrast, the Commonwealth Director proceeds on the basis that there is no materiality threshold in relation to the second limb, although noting that the matter is not conclusively settled.[19]

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[13] Commonwealth Director of Public Prosecutions Supplementary Submissions, 16 August 2024, [22].
[14] Commonwealth Director of Public Prosecutions Supplementary Submissions, 16 August 2024, [5.2], [25]-[27].
[15] Respondent's Supplementary Submissions, 16 August 2024, [26].
[16] Commonwealth Director of Public Prosecutions Supplementary Submissions, 16 August 2024, [30], [39].
[17] Commonwealth Director of Public Prosecutions Supplementary Submissions, 16 August 2024, [22].
[18] NSW Director of Public Prosecutions Supplementary Submissions, 16 August 2024, [28].
[19] Commonwealth Director of Public Prosecutions Supplementary Submissions, 16 August 2024, [20]-[23], fn19.

11. The appellant submits the court would find that there is no need to prove a miscarriage of justice under the second limb.

12. First, the NSW Director's argument is inconsistent with the words of section 668E *Criminal Code 1899* (Qld) that provides for three separate bases on which a conviction may be appealed. The submission proposes a gloss on the second limb which is not in the provision. If it is necessary to prove a miscarriage of justice, the second limb has no independent work to do.

13. Second, the appellant submits that *Filippou v The Queen* (2015) 256 CLR 47 does not stand for the proposition put by the NSW Director. The NSW Director relied on [4] and [13], but at [9] by reference to *Fleming v The Queen*, the majority said "*For the purposes of the second limb, the question is whether the judge has erred in law in the sense of a departure from trial according to law*" with no suggested requirement to show a miscarriage of justice. The statement in [13] must simply use the phrase "miscarriage of justice" in a sense of the justice system miscarrying by the wrong legal decision, as opposed to its meaning in the third limb of the common form appeal provision.[20] Paragraph [13] cites *Weiss* at [17]-[18], which relates to the third limb and the proviso and not the second limb. There is no reference to Justice Gageler's judgment in *Baini v The Queen* (2012) 246 CLR 469 at [49], which held by reference to *Mraz v The Queen* (1955) 93 CLR 493 at 514 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*".

14. Third, the NSW Director contends that its interpretation of *Filippou* has been "understood to be the proper approach to establish "second limb" error".[21] That is far from settled. A number of intermediate courts of appeal have applied Justice Gageler's judgment in *Baini*. For example see *R v HMA* [2024] QCA 156, [24] (the Court); *R v Tahiata* [2024] QCA 59, [35], [64]; *McIlwraith v The Queen* [2020] NSWCCA 274, [19].

15. The appellant submits there is no requirement that a miscarriage of justice (in the sense of the third limb) be shown to establish the second limb of the common form appeal provision.

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[20] See for example such a general use of "miscarriage of justice" in *Mraz v The Queen* (1955) 93 CLR 493 at 514 where Fullagar J said "It ought to be read, and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law."

[21] NSW Director of Public Prosecutions Supplementary Submissions, 16 August 2024, [33].

The work to be done ameliorating the strict effect of the second limb is to be done by applying the proviso.

Application of the proviso

16. The Respondent now relies upon the proviso, contending that the appeal to the Court of Appeal should have been dismissed because the Court should be satisfied that "*no substantial miscarriage of justice actually occurred*".[22]

17. For the proviso to apply, the appellate court must be persuaded that the evidence properly admitted at trial establishes guilt beyond reasonable doubt.[23] The court must consider the nature and effect of the error. Some errors will prevent an appellate court from determining whether guilt was proved to the criminal standard.[24] As Kiefel CJ, Bell, Keane and Gordon JJ said in *Kalbasi v Western Australia* (2018) 264 CLR 62, "*These may include, but are not limited to, cases which turn on issues of contested credibility, cases in which there has been a failure to leave a defence or partial defence for the jury's consideration and cases in which there has been a wrong direction on an element of liability in issue or on a defence or partial defence.*"[25] (footnotes removed)

18. As the majority of Gordon, Steward and Gleeson JJ said in *Orreal v The Queen* (2021) 274 CLR 630:

> *[41] … In cases which turn on contested credibility, the nature and effect of the error may render an appellate court unable to assess whether guilt was proved beyond reasonable doubt due to the "'natural limitations' that exist in the case of any appellate court proceeding wholly or substantially on the record". Further, as explained in Pell v The Queen:*
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> > *"[T]he assessment of the credibility of a witness by the jury on the basis of what it has seen and heard of a witness in the context of the trial is within the province of the jury as representative of the community. Just as the performance by a court of criminal appeal of*

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[22] Respondent's Supplementary Submissions, 16 August 2024, [28]-[29].
[23] *Orreal v The Queen* (2021) 274 CLR 630, [20] (Kiefel CJ and Keane J), [41] (Gordon, Steward and Gleeson JJ); *Weiss v The Queen* (2005) 224 CLR 300, 317 [44]-[45]; *Kalbasi v Western Australia* (2018) 264 CLR 62, 69-70 [12]-[13].
[24] *Kalbasi v Western Australia* (2018) 264 CLR 62, 70 [15]; *Orreal v The Queen* (2021) 274 CLR 630, [20] (Kiefel CJ and Keane J), [41] (Gordon, Steward and Gleeson JJ).
[25] *Kalbasi v Western Australia* (2018) 264 CLR 62, 70 [15].

> *its functions does not involve the substitution of trial by an appeal court for trial by a jury, so, generally speaking, the appeal court should not seek to duplicate the function of the jury in its assessment of the credibility of the witnesses where that assessment is dependent upon the evaluation of the witnesses in the witness-box. The jury performs its function on the basis that its decisions are made unanimously, and after the benefit of sharing the jurors' subjective assessments of the witnesses. Judges of courts of criminal appeal do not perform the same function in the same way as the jury, or with the same advantages that the jury brings to the discharge of its function.*
>
> *... The assessment of the weight to be accorded to a witness' evidence by reference to the manner in which it was given by the witness has always been, and remains, the province of the jury." (footnote omitted)*
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> *[42] Where proof of guilt is wholly dependent on acceptance of the complainant's evidence, and a misdirection may have affected that acceptance, the appellate court cannot accord the weight to the verdict of guilty which it otherwise might. The majority of the Court of Appeal erred in placing weight on the verdicts because, as McMurdo JA observed, those verdicts might have been affected by the misuse of the impugned evidence in the absence of a direction to disregard that evidence.*

19. This is a classic case of contested credibility. The complainant gave evidence of the counts on the indictment; the defendant gave evidence that those things did not happen. There was no evidence that would independently prove any of the charges, other than the generalised admission that had been made during the argument with the complainant's mother which could not be sufficient evidence of any individual charge.

20. The respondent contends that the prosecution case was otherwise compelling.[26] No particular features of the complainant's evidence are referred to in support of that submission. The transcript of her evidence is similar to that of many complainants.

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[26] Respondent's Supplementary Submissions, 16 August 2024, [29.1].

21. The respondent contends that the bottom slapping evidence could have had no influence on the jury's consideration of the evidence or verdict.[27] Such a submission made by the Queensland Director was rejected by the Court in *Orreal v The Queen* (2021) 274 CLR 630, a case where inadmissible evidence that a complainant and defendant both had the HSV-1 (herpes) virus was led, and no direction was given that the jury should ignore the evidence. Kiefel CJ and Keane J said:

> *[23] The respondent submits that the impugned evidence was neutral and logically incapable of assisting the jury in support of their ultimate determination as to the guilt or otherwise of the appellant. This submission mirrors what was said by the majority in the Court of Appeal. It may be accepted that, logically, the evidence could not assist the jury, but often the nature of prejudicial evidence means that it may not be rationally applied. Uninstructed by the trial judge, the jury may well have reasoned that the test results were no coincidence and pointed to the complainant having contracted the virus from the appellant. Had the jury been directed to disregard the evidence, such prejudice would almost certainly have been overcome, but that did not occur. (footnotes removed, emphasis added)*

22. Gordon, Steward and Gleeson JJ said:

> *[43] The majority of the Court of Appeal's assessment that the impugned evidence did not impact upon the credibility or reliability of the complainant's evidence ignored the significantly prejudicial nature and effect of that evidence, as do the respondent's submissions that the evidence was "neutral" and "incapable" of affecting the jury's assessment. It could only have been the potentially prejudicial effect of the impugned evidence that made it a miscarriage of justice for the trial judge to have failed to direct the jury to ignore that evidence. (footnotes removed)*

23. This is a case where the inadmissible bottom slapping evidence from a source other than the complainant may have affected the jury's consideration of the complainant's evidence, and may have been used by the jury to reason to guilt. The jury may have considered it "independent" supporting evidence as contended by the prosecutor at trial. Indeed, it is

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[27] Respondent's Supplementary Submissions, 16 August 2024, [29.2], [29.4]-[29.6], [30].

incongruous that the Crown having sought to persuade the jury to reason in a certain way at trial now says that the jury would not have done so.

24. The case was wholly about the credibility of the complainant and the defendant. In those circumstances, the appellant submits this is a case where the court cannot be satisfied that guilt has been proved to the requisite standard. The proviso cannot act to save the convictions.

Conclusion

25. This appeal provides the opportunity for the court to clarify the scope of the second and third limbs of the common appeal provision. The appellant submits the court would conclude:

(a) The trial judge's choice to give the erroneous direction permitting the use of propensity reasoning in relation to the bottom slapping evidence was a wrong decision of a question of law;

(b) The trial judge's choice to allow the admission of evidence which may engender propensity reasoning without first establishing whether the evidence meets the test in *Pfennig v The Queen* was a wrong decision of a question of law;

(c) The wrongful admission of the bottom slapping evidence and the wrong propensity direction given in the present case, each or in combination resulted in a miscarriage of justice; and

(d) The court cannot be satisfied that the evidence proves guilt to the requisite standard within the meaning of the proviso because the case is one of contested credibility and it is not possible to know how the inadmissible evidence was used by the jury.

Dated: 13 September 2024

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Name: Saul Holt KC
Telephone: 07 3369 5907
Email: sholt@8pt.com.au

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Name: Ruth O'Gorman KC
Telephone: 07 3221 2182
Email: rogorman@qldbar.asn.au

.....

Name: Susan Hedge
Telephone: 07 3012 8222
Email: susan.hedge@qldbar.asn.au

IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY

BETWEEN: MDP

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Respondent

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

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