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

RESPONDENT'S SUPPLEMENTARY SUBMISSIONS

Part I: Certification.

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

Part II: Issues that the respondent contends the appeal presents.

2. Whether under the common form appeal, in the context of the trial and the issues joined by the parties, a wrong decision on a question of law or any other issue in the trial, must result in a miscarriage of justice.

Part III: Certification regarding s78B of the Judiciary Act 1903 (Cth).

3. No notice is required pursuant to section 78B of the *Judiciary Act 1903* (Cth).

Part IV: Material facts set out in the appellant's narrative of facts and chronology that are contested.

4. The respondent had accepted the narrative statement of relevant facts and chronology provided by the appellant, subject to further observations, in our outline of submissions.[1] This Court directed the respondent to provide appropriate evidentiary references to support its contention that the proviso should apply, and a more fulsome referenced narrative is now provided supporting that contention.

5. The appellant was convicted of fifteen sexual offences committed against his de facto stepdaughter, then aged 7 to 12 years. The prosecution called the complainant, her sister KN

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[5] – [24] of the respondent's outline of submission, 1 March 2024.

and their mother MN. The appellant and MN had been in a continuous and then intermittent relationship, where the complainant and KN lived with their mother but would sometimes stay with the appellant. The appellant's presence in the children's lives corresponded with the state of his relationship with their mother. That relationship ended acrimoniously when the appellant told MN he was pursuing a relationship with another woman. Shortly afterwards the complainant disclosed the offending. The appellant gave but did not call evidence. He denied any wrongdoing, however accepted he slapped the complainant on the backside several times in his role as a parent. He testified that MN reacted angrily to his ending their relationship and made threats of denying future contact with the children.

6. The parties were enjoined in the issue in the trial, the proof that the allegations did occur. At trial, it was suggested the complainant had concocted the allegations at the behest of her mother.

7. The prosecution opened on the "backside slapping" evidence as general and innocuous background evidence. At the close of the defence case, the prosecution then sought to rely on this evidence, as evidence demonstrating sexual interest in the complainant, as observed by her sibling preceding the termination of the appellant's relationship with MN. The defence relied on the same evidence as a source of truth bolstering the appellant's evidence of slapping K's backside innocuously and in contradistinction to the nature and extent of the offending alleged by complainant.

8. **Episode 1. Count 1**,[2] The offence occurred at their home in Earlville, at the time the appellant lived with them. The complainant was 7 or 8 years of age when the appellant "poked" one finger under her pants through a leg opening and into the front part of her "private part". The complainant described it as "a triangle thing with a line. He went through the line, inside of her" for six minutes. This occurred when the pair were in the loungeroom, and the complainant lay across the appellant's lap as he played a video game and she pretended to be asleep. The remainder of the family were upstairs asleep.

9. **Episode 2. Counts 2 and 3.**[3] This occurred at the Earlville house when the complainant was 8 turning 9. The appellant woke her up and told her they should go swimming in the laundry tub. The complainant undressed in the laundry, got into the laundry tub but then said she wanted to get out. The appellant took her out and laid her on the washing machine, where he

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[2] RFM 11.10, 12.2, 31,13.1,39,58,14.2-48, 15.1,15.58-16.48, 17.1-11,17.50,18.7-21, 27.1 - 28.
[3] RFM 11.28 - 36,19.1-20.1,23-39,21.24-51,22.21-31,23.4,17-21,24.56,25.35,26.53, 27.45, 28.56-29.3,21.

"sucked her private part to suck out the worms," moving his tongue around in the line, for five minutes (Count 2). Her head was near the buttons and her legs were up a bit on his shoulders with her bum on the lid. The appellant asked her to suck his penis (Count 3) which she described, like a banana and pointing down, with a small round tip. She said no and he put his penis away. The remainder of her family where asleep upstairs when this occurred.

10. **Episode 3. Count 4**,[4] This offending occurred at a different house after the appellant had moved out. The appellant had come to the house for a sleepover and slept in the same bedroom as the complainant. They were the only persons in the room and the complainant pretended to be asleep. The appellant pulled her tights and underpants down and sucked her private for about five minutes. This time was different to the laundry time, as he did not penetrate her vagina with his tongue. Then he put her tights back up and they went to sleep.

11. **Episode 4. Counts 5 and 6.**[5] The complainant's brother M had been born and they stayed at the appellant's home in Earlville. The complainant had asked to stay there, and was in the appellant's bed upstairs, watching movies on a computer when she woke lying on her back. The appellant removed the complainant's school pants and underpants, sucked her private part without penetration. He unzipped his shorts and used his hand to guide his penis inside her vagina and moved it in and out quickly. The appellant dressed the complainant, then tipped water on her. He told the complainant she had peed herself and to change.

12. **Episode 5. Count 7.**[6] The complainant was living at a home in Amuller Street. The appellant and the complainant were the only people in the house. The complainant fell asleep on the couch and the appellant carried her to her room. The complainant woke up when she felt his finger going up shorts, and into her vagina. He put "it in really hard" and it hurt. He desisted when he laid her onto her bed.

13. **Count 8** alleged the appellant maintained a sexual relationship with the complainant between January to October 2019 when she was 12 years of age. Counts 9 to 16 formed particulars of the maintaining count along with other similar conduct.[7] The complainant described the appellant opportunistically touching her, including hugging her from behind and rubbing her genitals over her clothes with his fingers about twice a week, rubbing her breasts, sucking her bottom lip when kissing her and putting his tongue in her mouth.

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[4] RFM 30.20 -39, 31.1, 31.5 -19,31.26, 31.49-54, 32.3,48, 33.22-37,52, 34.22-26,39, 35.4.
[5] RFM 35.22,36.5, 37,34.5,37.11-22,27-38,39.50,40.11-19,41.3,47,43.38,44.7,45.14, 46.1,46.49.
[6] RFM 74.14-46, 51.75.14-32,41,57,76.15, 76.36-37, 77.5, 78.9.
[7] For example RFM 48-50, 60.1.

14. **Episode 6. Count 9.** [8] The complainant was 12 years of age, and their family was staying at the appellant's home in Paramatta Park at the time as they were homeless. It was a one-bedroom ground floor unit, and the complainant was in bed in his room on her back. The appellant woke the complainant and rubbed her breast.

15. **Episode 8. Counts 10 and 11.**[9] The appellant visited the complainant at Mount Sheridan. She was painting and the appellant carried her to the bathroom and told her to wash her hands. He hugged her from behind and rubbed her vagina with one hand and her breast with another. His hand was big enough to touch both breasts at the same time. She finished washing her hands and removed his arm from her body. Her mother MN was on the couch at the time.

16. **Episode 9. Counts 12 to 16.** The complainant gave evidence that this a few weeks before her interview. This was the final occasion the appellant indecently dealt with her. There was a birthday party and the complainant, with her sister and the two babies were at home. The appellant was baby-sitting. The complainant argued with the appellant and went to her mother's room, slamming the door. The appellant came in and told her he was sorry and asked her to kiss him. When she did, he sucked her lower lip and put his tongue in her mouth (Count 12).[10] He carried the complainant into her own room, put her on the bed, undressed her and started sucking her private part and her breasts. KN and M were awake and home at this time. The complainant's mother called the appellant, and he left the room. (Counts 13 and 14).[11] When he came back in, he closed the door, but did not completely shut it. The complainant pretended to have fallen asleep. The sucked her private while squeezing her breast. When he stopped the appellant dressed the complainant and left (Counts 15 and 16).[12]

17. The first person the complainant disclosed the offending to her sister KN a week or so prior to her interview. The complainant and KN heard the appellant and their mother arguing. During the argument they heard the word rape and the complainant told KN he had done that to her.[13]

Part V: Statement of the respondent's argument

18. A primary contention of the appellant asserts that the proper approach to determination of the

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[8] RFM 56.31- 58, 57.21-56, 58.10- 59.24.
[9] RFM 25.37,52. 60.25-61.30, 52. 53.1 – 55.60.
[10] RFM 61.39-60, 62.30,40-53, 63.1-10,25-44, 65.60, 68.50.
[11] RFM 63.54-65.10, 66.1-20, 41-45, 54-67.40,50,68.9-11,69.12,41-45, 70.1-6, 29,35-40.
[12] RFM 65.9-20,32, 67.40-2, 71.10-60, 72.17-60.
[13] RFM 79.20-30, 79.43-50.

third limb[14] of the common form appeal provision, does not engage any requirement or threshold of "materiality". The common form appeal provision section 668E(1) of the *Criminal Code 1899* (Qld) should be construed as enacted and not as reprinted.[15] *Weiss v The Queen*[16] focused on the wording of an almost identical common form appeal provisions. The consequence was to remove a formulistic approach based on artificial tests such as predicting how an issue may have affected "a" or "this" jury. To adopt that approach invariably led back to the very mischief the common form appeal was intended to remedy, that is setting aside a jury's verdict whenever a trial was imperfect, regardless of the significance of that imperfection.[17] The court in *Weiss* engaged in a contextual construction considering the development of the wording of the common form appeal[18] and considered that it replaced the old procedures in which the Exchequer rule prevailed in the granting of a new trial.[19] Prior to the common form appeal the common law courts had renounced any discretion where evidence was wrongly admitted and where there had been any misdirection which could not be said to be wholly immaterial. The precursor to the common form appeal provided a new trial should not be granted on either basis unless a substantial wrong or miscarriage affecting some part of the matter in contest had occurred.[20]

19. There was no absolute rule a party was entitled to a new trial upon any wrongful admission of evidence which may have affected the verdict as contended by the appellant.[21] A like view was expressed by Gordon, Steward, and Gleeson JJ in *Huxley v The Queen*.[22] This view is supported by *Weiss* where the court rejected the existence of an absolute "right" to a trial in strict compliance with the law, a trial by jury or to a new trial so a jury might reach its verdict without exposure to inadmissible evidence rather than a determination by an appellate court because of the wording of s668E(1).[23]

20. It is the degree of influence in the context of the whole case which determines if there has been injustice and hence a miscarriage of justice:

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[14] s668E(1) of the *Criminal Code (Qld)* "on any ground whatsoever there was a miscarriage of justice".
[15] *R v Pickering* [2016] QCA 124 at [24], *Weiss v The Queen* (2005) 224 CLR 300 at 312 [31].
[16] (2005) 224 CLR 300.
[17] *Weiss* supra at 16 at 314[14] and 308 [18].
[18] *Weiss* supra at 16 at 306 [12].
[19] *Weiss* supra at 16 at 306 [13].
[20] *Weiss* supra at 16 at 307 [14].
[21] The contrary view is a misunderstanding of *R v Gibson* (1887) 18 QBD 537 at 540-541, the correct position was as summarised and discussed in *Weiss* at 308 [17].
[22] (2023) 98 ALJR 62 at 72 [40] to [44] referring to *Hargraves* (2011) 245 CLR 257 at 277 [46].
[23] *Weiss* supra 16 at 311 [26-27] and 312 [28-29].

(i) If the issue raised on appeal (wrong decision of law or for any other reason)[24] is not sufficiently influential or influential at all per *Grills*[25], *Balenzuela*[26], and *Conway*[27] the appeal must be dismissed as there has been no miscarriage of justice.

(ii) If the issue is sufficiently influential the appeal succeeds subject to the proviso.

(iii) Sufficiency of influence is spectral. An issue may be sufficiently influential to amount to a miscarriage of justice but insufficiently influential to support a finding that no substantial miscarriage of justice actually occurred in which case the appeal must be dismissed. [28]

(iv) The issue may be sufficiently but indeterminately influential. The proviso cannot be applied, the appeal succeeds.

(v) The issue is so influential, a substantial miscarriage of justice actually occurred. The appeal succeeds.

It is submitted it follows that fact and degree of influence remains relevant throughout the application of the common form appeal but with a difference in emphasis depending on the issue being considered. Consequently, the passages from *Hofer v The Queen* identified by Edelman and Stewart JJ in *HCF*[29] are applications of *Weiss*, and not additions to it.

21. The appellant's attempt to confine the application of the materiality threshold to the proviso is inconsistent with s668E(1) as construed by *Weiss*. To promote a "materiality threshold" is an attempt to describe the operation of the common form appeal provisions in language other than the words of the provision itself.[30]. No decision of this court has adopted that approach in form or substance. The materiality threshold masks the operation s668E(1). The concept of "threshold" is logically indistinguishable from the conceptualisation of what effect evidence "might" have on the jury. Both concepts invariably come back to inscrutable jury deliberation which taken to their logical conclusion would lead to the readoption of the narrow expression of the Exchequer rule.[31] Further, sufficiency of influence is a dynamic spectral concept linked

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[24] As noted by Gageler J in *Hofer v The Queen* (2021) 274 CLR 351 at 383 [103] *Weiss* should not be taken as drawing a distinction in the miscarriage ground between legal error and irregularity.
[25] *The King v Grills* (1910) 11 CLR 400.
[26] *Balenzuela v De Gail* (1959) 101 CLR 226.
[27] *Conway v The Queen* (2002) 209 CLR 203.
[28] *Baida Poultry Pty Ltd v The Queen* (2012) 246 CLR 92 at 103 [25] French CJ, Gummow, Hayne, and Crennan JJ, followed in *Filippou v The Queen* (2015) 256 CLR 47 per French CJ, Bell, Keane, and Nettle JJ at 55 [15].
[29] (2023) 97 ALJR 978 at 997 [76] – [77].
[30] *Weiss* supra at 16 at 305 [9], 313 [33].
[31] *Weiss* supra at 16 at 315 [38].

to the actual issues litigated and relevant at different levels when considering both a miscarriage of justice and no substantial miscarriage of justice actually occurring. It is not susceptible to collapse as postulated by the appellant.

22. The application of the common form appeal is a matter of impression of influence, similar in many respects to the exercise of the sentencing discretion, in which a range of factors are considered together including the nature of the charges, the area of contest chosen by the parties, the central issues of the trial, the atmosphere of the trial discernible from the record, the public interest for and against conviction and the evolution of issues and focus as the trial progresses and the verdict of the jury to the extent it was unaffected[32] by the issue raised. Viewed through this prism, the application of any materiality threshold in the various cases cited by the appellant, only reflect differences of impression to be expected from the correct application of the common form appeal as pronounced in *Weiss*. As noted by Nettle J in *Kalbasi v The State of Western Australia*[33] the High Court decisions since *Weiss* had affirmed and elucidated the insights of *Weiss* and confirmed and reinforced that there is no single universally applicable description of what constitutes a substantial miscarriage of justice.

23. The long tradition to which the appellant refers, as demonstrated above, has always been influence centric and not in absolute terms. Removing influence from the miscarriage issue invariably leads back to the application of the Exchequer rule.

24. The appellant contends that the admission of inadmissible evidence or misdirection on a matter of law will always constitute a "wrong decision of any question of law"[34], irrespective of the conduct of, or positions adopted by the parties.

25. The respondent contends that on the proper construction of the common law appeal provision, it is not satisfied unless the parties sought the direction or litigated the proper admission of the evidence before the judge. It is noted that the respondent's contention accords with that of the intervenor for the Commonwealth.

26. The proper construction of the provision requires consideration of the text of the provision with regard to its context and purpose.[35] The text invites the ordinary meaning attributed to such a phrase, involving some adjudication of competing positions.[36] Plainly where a party

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[32] *Baida* supra 28 per French CJ, Gummow, Hayne, and Crennan JJ at 104 [28], 106 [34] and Heydon at 114 [67].
[33] (2018) 264 CLR 62 at 101 [114], 104 [122].
[34] The second limb of the common law appeal provision, s.668E(1) of the *Criminal Code (Qld)*.
[35] *ENT19 v Minister for Home Affairs* (2023) 97 ALJR 509 per Gordon, Edelman, Steward and Gleeson JJ at [86].
[36] *Gassy v The Queen* (2008) 236 CLR 293 per Kirby J at [55]; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 per Mason CJ at 335.

invites adjudication, the judge is making a "decision on a question of law".[37] Where, as in this matter, no objection was taken to the admission of evidence (the "backside slapping" incident), the judge was not invited to make any ruling, and so there was no decision made. That proposition is well supported.[38] The construction proposed by the appellant would ignore the tactical forensic decisions made by advocates more familiar with the competitive environment of the trial, and require the Court to intervene even where there may be sound tactical reasons for permitting the admission of the evidence without objection.

27. In this case the "impugned direction" was sought by the prosecutor, and a decision on a question of law was made by the judge. The question remains whether the decision was wrong, that requires an assessment of the context in which the decision was made including the issues at the trial, the evidence, closing addresses by counsel and the whole of the judge's summing up.[39] The admission of the evidence of the "backside slapping" necessarily required a warning against propensity reasoning and the decision to provide that direction was not wrong.

Application of the proviso in this case

28. The appellant relies on the wrongful of admission of the "backside slapping" evidence and giving sexual interest directions as wrongful answers to questions of law or otherwise giving rise to a miscarriage of justice. The respondent submits, without conceding these points, that this court should be satisfied on the whole of the record the appellant is guilty of each charge. The appeal should be dismissed because no substantial miscarriage of justice has occurred.

29. It is submitted, no substantial miscarriage of justice actually occurred in this case because:

29.1. Absent the backside slapping evidence the prosecution case was otherwise compelling.

29.2. The record shows that throughout the trial and until the closing addresses of counsel the "backside slapping" evidence could have had no influence on the impressions of the appellant, complainant, or other witnesses.

29.3. The "backside slapping" evidence bore no resemblance to any of the specific

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[37] *Huxley* supra at 22 per Gordon, Steward and Gleeson JJ) at [44], per Gageler CJ and Jagot JJ at [11]; *HCF* supra at 29 per Gageler CJ, Gleeson and Jagot JJ at [7].
[38] *The Queen v Soma* (2003) 212 CLR 299 per Gleeson CJ, Gummow, Kirby and Hayne JJ at [11], *Johnson v The Queen* (2018) 266 CLR 106 at [52], *HML v The Queen* (2008) 235 CLR 334 per Hayne J at [175], *Hofer v The Queen* (2021) 274 CLR 351 per Gageler J at [119].
[39] *Huxley* supra at 22 per Gordon, Edelman and Steward JJ at [43].

allegations made by complainant and did not form part of her narrative. Any contemplation by the jury of sexual interest in the complainant, until closing addresses would have been dominated by considerations of what aspects of her narrative they should accept.

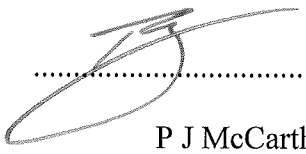
29.4. The impugned directions of the primary judge almost certainly removed the backside slapping evidence from consideration by the jury. Assuming compliance with those directions before the jury could have utilised that evidence, they would have first had to have found beyond reasonable doubt it happened, demonstrated sexual interest and preparedness to act upon it. The appeal is prefaced upon these findings being impossible in which case the impugned evidence could have had no influence. This conclusion is supported by the nature and timing of the jury questions.

29.5. Assuming, contrary to the appellant's submission, the jury were satisfied the "backside slapping" occurred, it showed sexual interest, and that the appellant was prepared to act upon it there was no risk of impermissible propensity reasoning considering the persistent and more serious allegations testified to by the complainant. The "backside slapping" evidence was trifling in comparison and any residual risk of propensity reasoning removed by explicit directions.

29.6. Even if the initial admission of the "backside slapping" evidence was erroneous because as general relationship evidence it was irrelevant, in that guise it could have had no influence as discussed in *Grills*.

30. A review of the record leaves only one impression, the backside evidence had no influence in this trial and consequently no substantial miscarriage of justice actually occurred.

Dated 16 August 2024



P J McCarthy KC

G J Cummings

E L Kelso

Counsel for the Respondent

Telephone: (07) 3738 9770

Email: DPP-HC-Appeals@justice.qld.gov.au

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ANNEXURE TO THE RESPONDENT'S SUPPLEMENTARY SUBMISSIONS

Pursuant to Practice Direction No 1 of 2019, the Respondent sets out below a list of the statutes and provisions referred to in these submissions:

No.	Description	Version	Provision
1	*Criminal Code 1899* (Qld)	Reprint current from 22 March 2023	s668E