HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	B25/2021
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Important Information

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: MALCOLM LAURENCE ORREAL
Appellant

and

THE QUEEN
Respondent

RESPONDENT'S SUBMISSIONS

Part I:

1.1 The Respondent certifies that these submissions are in a form suitable for publication on the internet.

Part II: The issues the Respondent contends the appeal presents

2.1 The appeal gives rise to a question of an individual miscarriage of justice. The Court of Appeal determined, correctly, that the impugned evidence was not admissible and thus an individual miscarriage of justice had occurred.

2.2 The majority of the Court of Appeal correctly determined that the impugned evidence, in light of the directions from the trial Judge, was neutral and thus could not have been used by the jury in their assessment of the complainant's credibility and reliability.

2.3 An assessment of the whole of the record, and giving due allowance for the guilty verdict, the majority of the Court of Appeal were able to be "*persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict*".[1]

2.4 Alternatively, where the impugned evidence had the capacity to affect the verdict and consequentially where the Court was incapable of affording significant weight to the verdict the evidence was nonetheless sufficient to enable the Court to be persuaded of the guilt of the Appellant.

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[1] *Lane v The Queen* (2018) 265 CLR 196; (2018) 92 ALJR 689, 695 [38].

Part III:

3.1 The Respondent does not consider any notice pursuant to s78B of the *Judiciary Act* 1903 (Cth) is necessary.

Part IV:

4.1 The Respondent does not contest any material facts within the Appellant's narrative of facts or chronology.

Part V: The Response

5.2 Evidence was placed before the jury that both the appellant and the complainant had tested positive for the *Herpes Simplex virus (HSV-1)*. That evidence was not "probative of any relevant fact" (CAB79 at [7], 80 at [19], 82 at [27] and 98 at [94]) and thus not admissible. Despite this the evidence was left to the jury without any direction to disregard it, nor how it may be used, if at all. A miscarriage of justice within the third limb of the common form appeal provision (s.668E(1) of the *Criminal Code (Qld))* was thereby established.[2]

5.3 Applying the well-established principles in relation to the application of the proviso, the majority of the Court of Appeal (Mullins JA and Bond J) concluded that, in the circumstances of this case, no substantial miscarriage of justice actually occurred. McMurdo JA on the other hand concluded that in the particular circumstances of this case, he was unable to conclude that no substantial miscarriage of justice actually occurred.

5.4 An appellate court is required to consider the whole of the record of the trial and the nature and effect of the error in the context of the evidence and the issues properly raised in the trial in every case in which the proviso is considered.[3]

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[2] *Mraz v The Queen* (1955) 93 CLR 493 at 514 per Fullagher J; *Kalbasi v Western Australia* (2018) 264 CLR 62 at [12].
[3] *Weiss v The Queen* (2005) 224 CLR 300 at [40]; *Kalbasi v Western Australia* (above) at [15].

5.5 This was a case that rested on the evidence of the complainant. Her evidence though found support in the observations of her younger sister[4] and the evidence of the physical injuries to the complainant. These provided compelling and important support for her reliability and credibility.

5.6 In their separate reasons, each member of the Court recognised the need to consider whether the impugned evidence could or might have had an impact upon the jury's assessment of the reliability and credibility of the complainant.[5] The divergent conclusions are simply the result of separate assessments of the effect of the impugned evidence on the credibility and reliability of the complainant. It was open to the majority to conclude that the impugned evidence would have no impact on the jury's assessment of the credibility and reliability of the complainant.

5.7 Mullins JA concluded that the impugned evidence "*was not evidence that could have had any bearing on the jury's assessment of the reliability and credibility of the complainant's evidence.*"[6] Similarly, Bond J concluded:

> *"To my mind, the jury, acting rationally and following the directions given to them, could not have had their view of the reliability or credibility of the complainant's evidence affected by the HSV-1 evidence".*[7]

5.8 The impugned evidence was simply, at best, and as the jury were directed, neutral and logically incapable of assisting the jury in support of the ultimate determination and subsequent conclusion of guilt.

5.9 The well-founded reasoning of the majority on this point was articulated by Mullins JA at [27]:

> *"For the very reason the HSV-1 evidence should not have been admitted, as it was not probative of any fact in issue in the trial, it was patent from the content of the evidence itself, that it could not assist the prosecution in discharging the onus of proving the appellant committed each of the offences, when almost 80 per cent of the male population would test positive to HSV-1 and it was not known whether the 15 year old boy with whom the complainant had a sexual encounter had or has HSV-1. As Bond J*

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[4] CAB 81 at [21] to 87 at [54]
[5] CAB 79 at [12]; 100 at [100].
[6] CAB82 at [27].
[7] CAB101 at [102].

explained at [102], in the circumstances of the conduct of this trial, it was not evidence that could have had any bearing on the jury's assessment of the reliability and credibility of the complainant's evidence."

5.10 That the evidence did not support the Crown's case was made clear by each of the Crown prosecutor and the appellant's counsel in their addresses to the jury, and by the trial judge in summing up. While the directions could have gone further, they were not such to leave open a reasonable possibility that the jury could use the impugned evidence to reason towards a finding of guilt. Thus, even where the jury were left without further assistance on the use to be made of the evidence they simply could not rationally have been assisted by the HSV-1 evidence in their determination as to whether the complainant child was credible and reliable.

5.11 Where the evidence was incapable of rationally affecting the jury's assessment of the true triable issue, its admission could not then have impacted their ultimate conclusion as to guilt. Thus, having regard to the nature of the error, in the context of the whole of the evidence in the case the application of the proviso was unexceptional.

5.12 This Court in *Pell v The Queen* (2020) 268 CLR 123 at [39] observed that:

"The function of the court of criminal appeal in determining a ground that contends that the verdict of the jury is unreasonable or cannot be supported having regard to the evidence, in a case such as the present, proceeds upon the assumption that the evidence of the complainant was assessed by the jury to be credible and reliable." (citations omitted)

5.13 It was said by this court in *Baiada v The Queen* (2012) 264 CLR 92 at [27] that:

"...An appellate court must undertake the task of determining whether no substantial miscarriage of justice has actually occurred in the same way as it would decide whether the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence although, of course, the inquiries are distinct. That task must be undertaken on the whole of the record of the trial including the fact that the jury returned a guilty verdict." (citations omitted)

5.14 The task was properly approached by the majority of the Court accepting that the complainant was found to be credible and reliable and considering whether the impugned evidence had the capacity to affect that acceptance.[8] The majority concluded that the impugned evidence could not rationally have impacted upon the jury's assessment of the credibility and reliability of the complainant. If the majority was incorrect in this conclusion, that is not the end of the matter.

5.15 This Court in *Weiss* and *Baiada* noted the function of an appellate Court is on the whole of the record, including the guilty verdict. As was said in *Collins v The Queen* (2018) 192 CLR 178 at [36]:

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> *"...where proof of guilt is wholly dependent on acceptance of the complainant and the misdirection may have affected that acceptance, the appellate court cannot accord the weight to the verdict of guilty which it otherwise might."*

5.16 The authorities make clear that the nature of the error is a relevant consideration as to the degree to which the verdict is affected.[9] As such, it follows that where the verdict, or more precisely the assessment of the complainant child's credibility and reliability, may have been affected by the impugned evidence, the verdict cannot be afforded the same *weight* as it might otherwise be given. That is not to say that the verdict is denied any weight in such a case.

20 5.17 It remains a matter for the assessment by the Court of the whole of the record, including the fact that the complainant's evidence on critical matters was supported by other evidence, and that the nature of the impugned evidence was such that any capacity for it to have impacted upon the jury's assessment of the complainant was negligible, at best. In the present case, having regard to the nature and effect of the error and the whole of the evidence in the case, this was a case in which the evidence was sufficient to permit the majority to be "*persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict*".[10]

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[8] CAB100 (*R v Orreal* (above) at [99])
[9] *Collins v The Queen* (2018)192 CLR 178 at 192 [36]; *Weiss v The Queen* (2005)224 CLR 300 at 314 [36], 317-318 [43]-[47]; *Kalbasi v Western Australia* (2018)264 CLR 62 at 83 [57] per Kiefel CJ, Bell, Keane and Gordon JJ , 87-88 [70]-[71] per Gagler J, 106 [127] per Nettle J; *Castle v The Queen* (2016) 259 CLR 449 at 471 [64].
[10] *Lane v The Queen* (2018) 265 CLR 196; (2018) 92 ALJR 689, 695 [38].

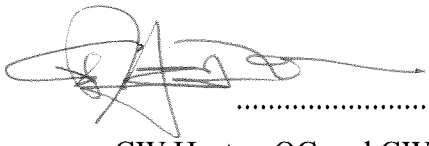
Part VI:

6.1 Not applicable.

Part VII:

7.1 The Respondent estimates a total of one hour to present oral argument.

Dated 02 July, 2021



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