



HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 11 Nov 2021 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number: B25/2021
File Title: Orreal v. The Queen
Registry: Brisbane
Document filed: Form 27F - Outline of oral argument
Filing party: Respondent
Date filed: 11 Nov 2021

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

BETWEEN:

MALCOLM LAURENCE ORREAL

Appellant

and

THE QUEEN

Respondent

10

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

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

Part II: Outline of propositions to be advanced in oral argument

20

2.1 A miscarriage of justice within the third limb of the common form appeal provision (s.668E(1) of the *Criminal Code (Qld)*) was established by the admission, and subsequent lack of appropriate jury direction, as to the evidence relating to the *Herpes Simplex Virus (HSV-1)*.¹

2.2 Upon establishing a miscarriage of justice an appellate court is required to consider the whole of the record of the trial and the nature and effect of the error in its consideration of the application of the proviso (s.668E(1A)). In applying the proviso, the task is to decide whether a *substantial miscarriage of justice has actually occurred*. That assessment is particular to each individual case.²

30

2.3 This was a case that rested on the evidence of the complainant. In light of the Appellant's denial of any wrongdoing, the complainant's reliability and credibility were central issues in the trial. The assessment of her reliability and credibility was to be conducted in the context of the whole of the evidence and particularly having

¹ Respondent's submissions at [5.2].

² Respondent's submissions at [5.4].

regard to the supporting evidence of the evidence of opportunity to offend as alleged, the observations of the younger sister of the complainant's distressed condition, the complaint made by the complainant to her mother soon after the alleged offending, and particularly the evidence of the physical injuries to the complainant.³

2.4 In that context, the impugned evidence can be seen to be, at best neutral, and logically incapable of assisting the jury in their assessment of the complainant's credibility and reliability.⁴

10 2.5 The task was properly approached by the majority in Court of Appeal. They accepted that the complainant was found by the jury to be credible and reliable before then considering whether the impugned evidence had the capacity to affect that acceptance.⁵ Where the evidence was incapable of affecting the jury's assessment in so far as their assessment of the complainant's credibility and reliability, its admission could not then have impacted their ultimate conclusion as to guilt. The divergent conclusions of the Court are simply the result of separate assessments of the effect of the impugned evidence on the credibility and reliability of the complainant by the members of the Court.⁶

20 2.6 If the majority of the Court was incorrect in their finding, the application of the proviso nevertheless required an assessment of the whole of the record, giving due allowance for the guilty verdict. The weight to be attached to a guilty verdict in a given case will depend on the nature of the error and its potential impact on the verdict itself.⁷

2.7 An assessment of the whole of the record required recognition 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. As such, the evidence was sufficient to permit the majority to be "*persuaded that the*

³ Respondent's submissions at [5.5].

⁴ Respondent's submissions at [5.7], [7.10].

⁵ *Pell v The Queen* (2020) 268 CLR 123 at [39].

⁶ Respondent's submissions [5.6], [5.11], [5.14].

⁷ *Collins v The Queen* (2018) 192 CLR 178 at [36]; Respondent's submissions [5.14] - [5.16].

evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict".⁸

Dated: 10 November 2021



Carl Wayne Heaton QC

Senior legal practitioner presenting the case in Court for the respondent

10



Clayton William Wallis

Junior counsel for the respondent

⁸ *Lane v The Queen* (2018) 265 CLR 196 at [38]; Respondent's submissions [5.17].