



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:

BDO
Appellant

and

THE QUEEN
Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. The respondent certifies that this submission is in a form suitable for publication on the internet.

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

Ground One

2. The jury was properly directed in accordance with the law in Queensland.
3. The law in relation to *doli incapax* in Queensland is expressed in the clear terms of s.29 of the Criminal Code (Qld). Whilst 'capacity to know' and 'knowledge' are closely related in a practical sense, it remains the law in Queensland that it is necessary that the Crown prove that at the relevant time, the appellant had the *capacity to know* that he ought not to have done the acts alleged against him in the charges.
4. The trial judge followed the codified and well-established law of Queensland under s. 29 of the *Criminal Code (Qld)*. The High Court in *RP* did not extend the obligations of the Crown in Queensland beyond the test already articulated in *R v F ex parte A-G*.

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5. In the determination of the present case, the Court of Appeal was not required to import the principles from *RP* into the consideration of the appellant child's capacity under s.29 but instead was required to direct the jury in accordance with s.29 in the context of the relevant evidence in this case.

Evidence of Capacity in the present case

6. Both in terms of the codified law in Queensland and the broader concepts of the common law, there was ample evidence in the present case capable of supporting the conclusion that the appellant had the requisite capacity. This body of circumstantial evidence included evidence of the surrounding circumstances of each of the specific offences which was capable of directly supporting the inference in relating to the specific offences to which it related (which went beyond the mere commission of the offences themselves), together with evidence as to his education and intellectual development provided by his mother and father which broadly supported the conclusion of the relevant capacity. Whether the evidence was capable, in relation to each of the specific offences, of supporting the necessary conclusion as to capacity, was a matter for the jury.
7. Consequently, even having regard to the common law principles articulated in *RP* the evidence in this case nonetheless ably supported the conclusion that the appellant had the capacity to know that his actions were *seriously wrong in the moral sense*.
8. If, contrary to the Respondent's primary submission, further direction was required in relation to the proof of the requisite capacity, the failure to do so cannot reasonably have impacted on *all* of the verdicts of guilty. Despite the conservative drafting of a broad date range, the evidence in this case as to the timing of the particular offences alleged in the counts on the indictment demonstrates that, except in respect of Count 4 and Count 8, the defendant was at least 14 years of age and the requisite capacity was presumed.
9. Consequently, in the circumstances of this case, there was no miscarriage of justice as a result of the failure of the trial judge to direct in terms of the principles in *RP*.

Ground Two

10. The Court of Appeal was correct to conclude that no miscarriage of justice resulted from the misdirection in relation to consent according to the law as it was prior to January 2004, which was shortly after the complainant had turned seven years of age.


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11. Consent was not a live issue in the trial according to the manner in which it was litigated. The trial was not about whether the complainant gave her consent in relation to the charged acts, but in any event the complainant gave evidence that she did not consent to any of the penetrative acts, including from the first occasion which, on the state of the evidence, must have been when she was very young.
12. This is further demonstrated by the discussion between the trial judge and counsel in relation to judicial directions. The appellant's trial counsel specifically disavowed the need for any directions about alternative verdicts. The position taken by defence counsel further demonstrates that not only was mistake of fact not a live issue at the trial, neither was the trial litigated on the issue of consent in relation to the particularised acts.

The Consideration by the Court of Appeal

13. Whilst the wording of paragraph [143] of the Court of Appeal's judgment could be read potentially as a conflation of s 668E(1) and the application of the proviso pursuant to s.668(1A), it is open to conclude from the judgement of Boddice J that he was assessing whether a prejudice to the appellant resulted from the identified misdirection in the application of s.668(1).
14. Recognising the force of the appellant's contention as to the application of the proviso, it is submitted that nonetheless, this was an appropriate case for the Court of Appeal to have applied the proviso. Consequently, no error is disclosed. This is a case in which the Court, in its independent analysis of the whole of the evidence particularly as it relates to the timing of the alleged events, would conclude that despite the misdirection, there was no substantial miscarriage of justice as a result of the misdirection.

Dated: 20 April 2023



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