IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY No. B68 of 2017

BETWEEN: **JOHN COLLINS**
Appellant

and

THE QUEEN
Respondent

APPELLANT'S OUTLINE OF ORAL ARGUMENT

Part I:

1. We certify that this submission is in a form suitable for publication on the internet.

Part II:

A breach of procedural fairness

2. The essence of the appellant's argument is contained in paragraphs 19, 20 and 25 of the appellant's annotated submissions (**outline**).

3. The approach adopted by the Court of Appeal involved an elementary breach of procedural fairness.

The arguments that might have been made:

(a) in response to the Court's reasons for applying the proviso

4. This breach of procedural fairness had functional significance. Had the appellant been on notice that the proviso might be applied for the reasons proposed by the Court of Appeal ([72], AB 290 line 1), then submissions could have been made in response (appellant's outline, [31]).

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5. Under this heading, the appellant has addressed submissions referable to the "other matter" identified by the Court of Appeal ([73], AB 290 line 19, appellant's outline [40]-[46]).

6. On reflection, this may not have been something upon which the Court was purporting to rely in applying the proviso. But if it was, it had no relevance to the function then being performed by the Court (appellant's outline, [41], [46]).

7. Clearly though the Court did, for the purpose of considering whether to apply the proviso, place reliance upon the "physical evidence" ([72], AB 290 line 12). However, as acknowledged by the Court ([9], AB 264 line 34), consent was the only issue. Also acknowledged was the fact that the physical evidence did not go "to the proof or otherwise" of that issue ([72], AB 290 line 12). It ought not therefore to have been invoked as a reason for applying the proviso (appellant's outline, [34]- [37]).

8. The Court also relied upon the fact that there was consistency in the complainant's account, both before the trial – in the form of preliminary complaint evidence ([72], AB 290 line 14) – and during the trial ([72], AB 290 line 11). But no qualitative assessment of the preliminary complaint evidence could be made without arriving at a conclusion about Ms M's evidence. It had the capacity to affect any assessment of evidence about earlier complaints (appellant's outline, [39]). And assessment of both that evidence and the complainant's testimony in the trial could not adequately be performed by way of transcript perusal (appellant's outline, [33]).

(b) as to the inapplicability of the proviso in the circumstances of this case

9. The misdirection was of a kind that meant the proviso should not apply (appellant's outline, [27]). The nature of the trial meant that, realistically, the proviso could not apply (appellant's outline, [29], [30]).

Disposition

10. The limitations to the appellate process would still be there if the matter was remitted to the Court of Appeal. For that reason, the appeal should be allowed and a retrial ordered (appellant's outline, [47]).

Notice of Contention

11. No error of law is identified – the respondent makes no complaint about the manner in which the Court of Appeal analysed the authorities (respondent's outline, [30]). It might be that, before the "committal version" became part of Ms M's oral testimony there had to be something more than acknowledgement that the words were spoken. As Burns J said at paragraph 59, the committal version had to be the "preferred account". It clearly was.

12. Attention is drawn, however, to some words used by Burns J at paragraph 59 (AB 286 line 39), and specifically to what is said (respondent's outline, [41]) to be an "erroneous" finding that Ms M accepted that her early account "was true (or accurate)".

13. To the words cited, Burns J added the explanation "that is to say, that they 'represented the best recollection [she] could give to the court'" (AB 286 line 40).

14. The "court" was the Magistrates Court and the "recollection" was the one held by the witness as at the committal. His Honour had already contextualised this passage by referring (AB 286 line 34) to the relevant extract from the cross-examination of Ms M, which was reproduced at paragraph 20 of the judgment (AB 269 line 15).

15. Read in this context, it is clear that his Honour was recording the (indisputable) fact that Ms M had acknowledged that her evidence at the committal hearing was the best recollection that she could give at that time. Comparison with the observation in paragraph 61 (AB 286 line 55) confirms his Honour was saying no more than that. He was not certainly not certifying that the committal evidence had been established as "true or accurate" – or that the trial evidence was "false or inaccurate". No error is identified.

16. It would not have been relevant for his Honour and is not now relevant to so inquire. It was a jury question. And if the jury allowed, as was "more likely than not", that the relevant words had been spoken, then they ought to have been able to take them into account when assessing the complainant's credibility (appellant's reply, [6]).

Dated 22 March 2018

Name: P. J. Callaghan S.C.

Name: D. Fuller