IN THE HIGH COURT OF AUSTRALIA

BRISBANE REGISTRY No. B68 of 2017

BETWEEN: JOHN COLLINS

Appellant

and

THE QUEEN

Respondent

APPELLANT'S SUBMISSIONS

Part I:

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

Part II:

2. In *Weiss v R*[1] it was said to be necessary, when considering the application of the proviso, to keep the accusatorial character of criminal trials at the forefront of consideration.[2] In *Mraz v R*[3], Fullagar J said, "it is for the Crown to make it clear that there is no real possibility that justice has miscarried".[4]

3. In *Lindsay v The Queen*[5], however, it was allowed that a Court of Appeal could apply the proviso of its own motion.

4. If there is any prospect that the proviso might be applied, what obligations lie on the Crown and the Court?

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[1] (2005) 224 CLR 300
[2] (2005) 224 CLR 300, 317 [43] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ).
[3] (1955) 93 CLR 493
[4] (1955) 93 CLR 493, 514
[5] (2015) 255 CLR 272

Submissions filed on behalf of the appellant
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5. Specifically, in this case, was it open for the Court of Appeal to override the Crown's disavowal of the proviso, and apply it without warning the appellant that it intended to do so?

Part III:

6. The appellant considers that notice under section 78B of the *Judiciary Act* 1903 is not required.

Part IV:

7. The internet citation of the reasons for judgment of the Court of Appeal is *R v Collins* [2017] QCA 113.

Part V:

8. After a trial, the appellant was convicted on three counts of sexual assault and one count of rape.

9. The evidence is summarised in the Court of Appeal's judgment[6] between paragraphs [8] and [21].

10. Of particular significance in this appeal, it should be noted that:
    (a) there was no dispute that the appellant and the complainant had engaged in sexual activity on the appellant's yacht.
    (b) the only issue in the trial was whether this activity was consensual[7].
    (c) the complainant's evidence about lack of consent had to be considered in context. An indeterminate amount of alcohol had been consumed before sexual activity occurred[8].
    (d) after the first incident of allegedly non-consensual sexual activity, the complainant did not leave the yacht (which was moored at a marina), but showered, dressed, and went on to have "a couple of drinks" with the appellant[9].

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[6] (2017) QCA 113
[7] (2017) QCA 113 at [9], including footnote 3.
[8] (2017) QCA 113 at [13].
[9] (2017) QCA 113 at [14].

(e) following the further incidents of allegedly non-consensual sexual activity, the complainant spent the night on the yacht[10].

(f) at no stage did the appellant make any attempt to prevent the complainant from leaving, nor did he attempt to procure her silence about any of the activity that had occurred.

(g) in fact, at the request of the complainant, he went to the train station to collect the complainant's friend, Ms J, with whom she then left the yacht[11].

11. These aspects of the case do not necessarily compel a reasonable doubt about the complainant's assertion that sexual activity occurred without consent. But they support the proposition that consent was a triable issue.

12. That proposition drew strength from evidence of certain words spoken by the complainant. This evidence was given by the complainant's mother, ("Ms M")[12].

13. Specifically, there was evidence that, on the morning after the alleged offences, the complainant said to her mother that she did not remember anything after a certain time, that she did not understand why she did not remember anything, and that she "thought" she had been raped[13].

Part VI:

14. Any finding about the issue of consent depended entirely on an assessment of the complainant's credibility - there was no other evidence capable of proving this element of the offence[14]. Any assessment of her credibility - and in particular, the credibility of her evidence about lack of consent - could have been affected by Ms M's evidence. It follows that Ms M's evidence could have influenced determination of the issue which was at the root of the proceedings[15].

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[10] (2017) QCA 113 at [15].
[11] (2017) QCA 113 at [16].
[12] (2017) QCA 113 at [17]-[20].
[13] (2017) QCA 113 at [20].
[14] see paragraphs 34 to 37 below, which address the relevance of the observation made by the Court of Appeal at [72].
[15] *Wilde v The Queen* (1988) 164 CLR 365 at 372-373, Brennan, Dawson and Toohey JJ.

15. The trial judge, however, prohibited the jury from using Ms M's evidence to assess the complainant's credibility. To the extent that Ms M had given different versions of her conversations with her daughter, he told the jury that these were available only to assess Ms M's credibility.[16]

16. The Court of Appeal agreed with the appellant that it was an error for his Honour to issue this instruction,[17] that this was a misdirection, and that the features of Ms M's evidence, described at paragraph 13 above, ought to have been available to the jury to use in their assessment of the *complainant's* credibility.

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17. Having made the argument this evidence should have been so available, the appellant included, in his written submissions to the Court of Appeal, an assertion that it would be inappropriate to apply the proviso. The appellant's submission is, in effect, reproduced at [71] in the Court of Appeal's judgment.

18. No mention was made of the proviso, by anyone, during presentation to the Court of Appeal of the appellant's oral argument.

19. During presentation of the Crown's oral argument, the following exchange occurred[18]:

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> BURNS J: The only other question I had was Mr Callaghan has submitted – if his point is good, that it would be in appropriate to apply the proviso - - -
>
> MR CASH: We do not suggest the proviso would be engaged. It would be a - - -
>
> BURNS J: Right.
>
> MR CASH: - - - misdirection.

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[16] (2017) QCA 113 at [28]

[17] The Court's reasons for so holding differed from those suggested to it by the appellant. For the appellant's current purposes, nothing turns on this. The respondent has foreshadowed that a notice of contention may issue, and if necessary the appellant will address submissions in reply to that. At this point, it simply is noted that the proposition that such evidence should not be available to assess a complainant's credibility is one that offends notions of fairness and commonsense.

[18] Transcript of proceedings, 13 July 2016, T1-11.15 – T1-11.30.

BURNS J: Yes.

MR CASH: If his Honour was wrong, it was a misdirection on a matter on which counsel addressed which was of some significance.

BURNS J: Thank you.

20. Further submissions about the application of the proviso were neither heard nor sought by the Court. But the proviso was applied[19].

21. In *Lindsay v The Queen* the suggestion that a Court of Appeal should not apply the proviso of its own motion was rejected[20].

22. That much must be accepted. It is, however, respectfully submitted that when there is a prospect of the proviso's application, the effective administration of justice demands, in the first instance, at least some input from the Crown.

23. This should not be difficult. Hearings before intermediate Courts of Appeal are preceded by the exchange of written argument. This serves many purposes, one of which is to ensure that parties are in a position to assist the Court by directing it to any part of the record that might be relevant to a particular issue. In a case involving the proviso, this might involve many references to evidence, which when made by one party may prompt the other to refer to other evidence which contradicts or contextualises.

24. For such an exercise to be meaningful, it has to be planned. For reasons which derive as much from considerations of efficiency as they do from the adversarial nature of criminal proceedings it will usually be necessary, if the Crown seeks - even potentially - to rely upon the proviso for that fact to be identified. This can and should be done in writing, in advance of hearing the appeal.

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[19] (2017) QCA 113 at [70]-[73].
[20] (2015) 255 CLR 272, 288 at [44]-[46]

25. The appellant's case does not, however, depend upon acceptance of that proposition. The problem here went well beyond the fact that Crown did not invoke - and in fact disavowed - the relevance of the proviso. The approach adopted by the Court of Appeal was a stark breach of the requirements of procedural fairness. It would be impermissible in any forum. Once a Court forms a view that the proviso might be engaged, then an appellant must have the right to be heard on the issue.

26. Had submissions been invited, there was much to be said.[21]

10 27. The sole issue at the trial was consent[22]. In some cases, it may be possible to draw an inference about consent from eyewitness observations or other circumstances, such as injuries. There was no such evidence in this case. Absence of consent had to be proven by direct evidence from the complainant herself, deposing as to her own state of mind. The result of the trial turned on her credibility. This misdirection was a "serious breach of the presuppositions"[23] that had to be met if this trial was to be fair.

28. Further, the jury were in a position to make a meaningful assessment of the complainant's credibility. The Court of Appeal was not.

20 29. There are "natural limitations" that may affect the ability of an appellate court, reading the transcript, making such an evaluation.[24] As explained by Isaacs J:

> *"The mere words used by the witnesses when they appear in cold type may have a very different meaning and effect from that which they have when spoken in the witness box. A look, a gesture, a tone or emphasis, a hesitation or an undue or unusual alacrity in giving evidence, will often lead a Judge to find a signification in words actually used by a witness that cannot be attributed to them as they appear in the mere reproduction in type. And therefore some of the material, and it may be, according to the nature of the particular case, some of the most important material,*

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[21] The potential for the Court to be assisted with such submissions is another reason why, in the ordinary course, the Crown ought to identify the potential for argument about the proviso.
[22] (2017) QCA 113 at [9]
[23] (2005) 224 CLR 300, 317 at [46].
[24] *Fox v Percy* [2003] 214 CLR 118, 125 at [23].

unrecorded material but yet most valuable in helping the Judge very materially in coming to his decision, is utterly beyond the reach of the Court of Appeal." [25]

30. The Court of Appeal had only the "mere reproduction in type" of the complainant's evidence. It could not hope to share the "feeling" of the case[26]. That could, realistically, only be done by seeing the complainant in person and hearing her testimony. The Court of Appeal made passing reference to the concept of "natural limitations" [27], but did not identify what they were and, given the way in which the matter was processed, neither party was given the opportunity to point them out. If assistance had been sought, or if in any event attention had been paid to considerations of the kind explained by Isaacs J, then the impossibility of the proviso's application would have been revealed.

31. That impossibility is made clearer when regard is had to the matters that the Court *did* identify as being relevant in its application of the proviso. In essence, there were four:
    (a) that the complainant was "robust and unvarying", and "unmoved"[28];
    (b) there was physical evidence – not relevant to the issue of consent – that supported her story[29];
    (c) preliminary complaints were made to witnesses other than the complainant's mother[30];
    (d) the appellant's counsel did not, during cross examination, put to the complainant the proposition that she had said to her mother only that she "thought" she had been raped, nor that she had expressed concern about limitations to her memory[31].

"Robust... unvarying... unmoved"

32. These descriptions of the complainant's evidence were said by the Court of Appeal to support a characterisation of the Crown case as "strong" [32].

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[25] *Dearman v Dearman* [1908] 7 CLR 549, 561.
[26] *Fox v Percy* [2003] 214 CLR 118, 125 at [23].
[27] (2017) QCA 113 at [72].
[28] (2017) QCA 113 at [18] and [72], respectively.
[29] (2017) QCA 113 at [72].
[30] (2017) QCA 113 at [72].
[31] (2017) QCA 113 at [73].
[32] (2017) QCA 113 at [72].

33. Discussion under this heading sheds light on the difficulties involved in certifying, on the basis of printed words, anything at all about the strength of a Crown case. That an inspection of a transcript suggests that witnesses were "unmoved" and gave an "unvarying account" means only that they kept saying the same thing. Consistent repetition of an account in an unconvincing monotone might appear identical in print to an account that is delivered in a compelling fashion. It is fallacious to assert that because something is said more than once, in the same terms, that there is an enhanced probability that it is true. Indeed, the possibility that a script might have been committed to memory is a common enough basis on which to attack the credibility of a witness. It is not necessarily suggested that is what happened here - without seeing and hearing the complainant, there is no way of knowing. And without knowing more about the way in which the evidence was given, it is not possible to reach the requisite degree of satisfaction.

"Physical evidence... supported parts of her account"

34. It was acknowledged by the Court of Appeal that this evidence did not go to "proof or otherwise of the issue of consent"[33]. With that given, its current relevance is difficult to ascertain.

35. There were, functionally, two elements of the offences about which there had to be satisfaction beyond a reasonable doubt. One was physical – a touching in the case of the assaults, and penetration in the case of rape. The other was mental - an absence of consent. It was simply not open to use proof of one element in order to supply or support proof of the other.

36. If it was, then to take this line of reasoning to its logical conclusion, the fact that the appellant admitted intercourse would also be something that could be used in support of a conclusion as to the absence of consent.

37. It was as much of an error for the Court of Appeal to reason along such lines as it would have been to direct the jury that they could do so.

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[33] (2017) QCA 113 at [72].

"Preliminary complaints were made not only to Ms M but also to Ms J and Mr H"

38. Preliminary complaint evidence was relevant to an assessment of the complainant's credibility. For the reasons identified above, no such assessment can meaningfully be made on the face of the transcript.

39. In any case, and irrespective of how many preliminary complaints were made, the significance of preliminary complaint evidence depended entirely upon the effect of Ms M's evidence. This in turn depended on an assessment of Ms M as a witness, so the same "natural limitations"[34] restricted an appellate court from making any such findings - indeed, the Court of Appeal did not attempt one.

"...Ms M's evidence (was) not put to the complainant"

40. It is said that, in the absence of such a challenge, "the proposition that the jury were deprived of the chance to take into account what was earlier said by Ms M when assessing the complainant's credit is considerably weakened."[35]

41. It was the proposition that the jury were deprived of that chance that was the basis for the appeal. It was the same proposition that led the Court to conclude that here had been a misdirection[36]. For reasons discussed below, nothing done by counsel could have weakened that proposition – but even if it did, the appellant still succeeded on that point.

42. It is difficult then to understand what relevance this could have to the application of the proviso, which only arises for consideration because there was a misdirection.

43. And whilst it is true that Ms M's evidence was not put by defence counsel to the complainant, counsel could not have been under any obligation to do so. The inconsistency was not part of his instructions. No considerations of the kind discussed in *Browne v Dunn*[37] arose.

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[34] *Fox v Percy* [2003] 214 CLR 118, 125 at [23].
[35] (2017) QCA 113 at [73].
[36] (2017) QCA 113 at [68]-[69].
[37] *Browne v Dunn* (1893) 6 R 67

44. The relevant evidence was part of the transcript from the committal proceedings, so the Crown must have known about it and no questions of notice could arise.

45. The evidence is properly characterised as an internal inconsistency within the Crown case, and as such defence counsel was free to treat it as he liked. He might have raised it with the complainant, and met with a predictable response. Or, for sound forensic reason, he could have preferred to allow the evidence to emerge when it did.

46. But for all the discussion points that counsel's decision might provide, there is nothing about it that could enhance the status of the complainant's evidence, nor affect the way in which the Court of Appeal should have gone about the task of assessing it.

Conclusion

47. Elementary requirements of procedural fairness were breached by the Court of Appeal. It was not open for it to apply the proviso without notice – at the very least, the appeal must be allowed and the judgment of the Court of Appeal set aside. For the reasons identified, this was the type of case in which the proviso cannot be applied. A retrial should be ordered.

Part VII:

48. The applicable statutory provisions are attached in Annexure A.

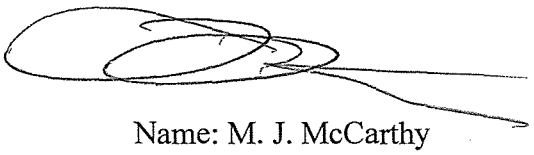
Part VIII:

49. The proposed orders are:
    (a) the appeal is allowed.
    (b) the order of the Court of Appeal of the Supreme Court of Queensland dated 2 June 2017 is set aside and the following order is made in its place:
        (i) the appeal is allowed;
        (ii) the appellant's conviction is quashed;
        (iii) the matter is remitted to the District Court of Queensland for retrial;
    (c) in the alternative to orders (b)(ii) and (iii), the matter is remitted to the Court of Appeal of the Supreme Court of Queensland for rehearing in relation to the application of the proviso.

Part IX:

50. The appellant estimates it will require 0.75 hours for the presentation of the appellant's oral argument.

Dated: 4 DECEMBER 2017



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