HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

BETWEEN: MDP
Appellant

and

THE KING
Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification as to publication

1. This submission is in a form suitable for publication on the internet.

Part II: Concise statement of the issues presented by the appeal

2. Whether a direction permitting propensity reasoning in this case was an error.

3. Whether, assuming that to be so, it could still properly be said that no miscarriage of justice has occurred.

Part III: Compliance with s78B of the *Judiciary Act 1903* (Cth)

4. No notice is required in accordance with section 78B of the *Judiciary Act 1903* (Cth).

Part IV: Authorised report citation

5. The decision of the Queensland Court of Appeal is not reported. The internet citation is [2023] QCA 134.

Part V: Relevant facts found or admitted in the court below

6. The appellant was charged on indictment with four counts of rape, one count of maintaining a sexual relationship with a child, five counts of indecent treatment of a child under 16, under 12, under care, one count of attempted indecent treatment of a child under 16, under 12, under care and five counts of indecent treatment of a child under 16, under care.[1]

7. The offences were charged as having occurred between 2014 and 2019 when the complainant was aged from 7 to 12 years.[2] She was 12 when she complained to the police in 2019. The appellant was the complainant's mother's partner and lived with the family for substantial periods during that time.

The Crown case at trial

8. The complainant gave evidence by the playing of a recorded interview with the police and then pre-recorded evidence (mainly cross-examination). The discrete counts involved occasions on which she said the applicant penetrated her vulva or vagina with his finger, tongue, and on one occasion his penis, asked her to suck his penis, sucked her bottom lip and rubbed or sucked her breasts. The 'maintaining a sexual relationship' charge covered the last seven of the discrete counts, and other unparticularised occasions on which it was alleged the applicant touched, rubbed, or sucked the complainant's breasts, vagina, vulva or mouth. The complainant said those acts occurred at several houses and units in which the appellant, the complainant's mother or both of them lived.[3]

9. The complainant's mother gave evidence about the family's living and sleeping arrangements and of 'preliminary complaint'. She also described a time where she saw the applicant looking under the complainant's doona where she was lying, asleep. When challenged, he said he was looking for his watch. She kept asking him what he was doing, and he said "what, do you think I'm touching the girls?"[4] The next day, the

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[1] Core Appeal Book (**CAB**) p5, Indictment No 485 of 2020. Count 3, attempted indecent treatment of a child under 16, under 12, under care is incorrectly described on the cover sheet.
[2] An admission was made as to the complainant's date of birth.
[3] Appellant's Book of Further Materials (**ABFM**), p18-21, "Indictment charges" document, MFI-A.
[4] Transcript, 02/08/2021, p1-44.2 – p1-45.24; p1-49.5 – p1-50.45.

mother asked the complainant about it, and the complainant made a complaint of sexual offences to her. She took the complainant to the police.

10. The complainant's younger sister also gave evidence. She was 11 when she spoke to the police in 2019. She gave 'preliminary complaint' evidence of what the complainant had told her about the offences.[5] She also said she saw the appellant bending over the complainant, who was asleep in a separate bedroom, on the night before the complainant made a complaint to her mother.[6]

11. After giving evidence about that night, the complainant's sister was asked by the police "did, has anything else happened like that that you, that you've seen or nuh?"[7] The following exchange occurred:

> Sister: But he, he, he like smacks [the complainant] on the bum.
>
> Police: Smacks her? What do you mean by that?
>
> Sister: Randomly.
>
> Police: Yeah. Like if she's naughty or you know if you do, sometimes if you do the wrong thing you might get a smack?
>
> Sister: No.
>
> Police: Not like that?
>
> Sister: We weren't doing anything wrong.
>
> Police: Just like a, it's a bit weird that he smacks her. Does he smack you? Nuh? Oh, right, that is a bit weird. Um –
>
> K: And he grabs her by the arm and just, yeah.[8]

12. She was not asked about this bottom slapping evidence during her pre-recorded evidence by the prosecutor or defence counsel. The complainant gave no evidence of bottom slapping and was not asked about it by police or in her pre-recorded evidence. The bottom slapping was not included in the particulars of the maintaining count.[9]

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[5] ABFM, p8-15, Transcript of police record of interview, 01/11/2019, p4-11.
[6] ABFM, p12-13, Transcript of police record of interview, 01/11/2019, p8-9.
[7] ABFM, p13, Transcript of police record of interview, 01/11/2019, p9.
[8] ABFM, p13, Transcript of police record of interview, 01/11/2019, p9.
[9] ABFM, p18, "Indictment charges" document, MFI-A.

The defence evidence

13. The applicant gave evidence. He denied all sexual offending against the complainant.[10] He said he treated the complainant as his own child and found the prosecutor's suggestions that he had engaged in sexual activity with her disgusting and revolting.[11]

14. The applicant said he was looking under the complainant's doona on the night before she complained to her mother to try to find his digital watch, which the children often played with. He said he was collecting his things because he planned to leave the complainant's mother. He explained that he wanted to leave the relationship, and the complainant's mother had threatened that he would not see the children if he left. He asked whether she thought he was touching the girls because he understood she was accusing him of that.[12]

15. The applicant said he would smack all the children, including the complainant, on the bottom in a disciplinary way or to move them out of the way.[13]

Submissions and directions on the bottom slapping evidence

16. At trial, the Crown Prosecutor asked for a sexual interest direction about the bottom slapping evidence on the basis that the evidence showed a sexual interest and could be used to reason it was more likely that the applicant committed the offences (propensity reasoning). Defence counsel at trial acquiesced to the direction being given on the basis he wished to use it tactically in his address by using it to show the apparent desperation of the Crown case.[14] The trial judge agreed to give it, although His Honour said (presciently) that it was "pretty tenuous" during an exchange with counsel.[15]

17. The Crown prosecutor submitted the jury would not accept the appellant's evidence about the bottom slapping, saying:

> …it was more than just an innocent 'get out of the way' slap. It wasn't a disciplinary slap. Because [the complainant's sister] remembered it. [Her sister]

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[10] ABFM, p51-52, Transcript, Day 3, 04/08/2021, p3-33.44 – p3-34.12.
[11] For example, see ABFM, p60, p66,Transcript, Day 3, 04/08/2021, p3-42.26; p3-48.5.
[12] ABFM, p42-48, p73-75, Transcript, Day 3, 04/08/2021, p3-24 – 3-30; p3-55 – 3-57.
[13] ABFM, p40-41, 55, 70, Transcript, Day 3, 04/08/2021, p3-22.41 – p3-23.13, p3-37.25-30; 3-52.3-11.
[14] ABFM, p77-78, Transcript, Day 3, 04/08/2021, p3-63.41 – p3-64.25.
[15] ABFM, p78, Transcript, Day 3, 04/08/2021, p3-64.1.

> found it unusual. [Her sister] didn't say the defendant was doing this to all the other kids. It was just [the complainant].[16]

18. The Crown prosecutor submitted to the jury that the complainant's sister's evidence was unchallenged, and that it provided *independent proof* of the offences.[17]

19. The trial judge directed the jury in relation to the bottom slapping evidence by giving a conventional (in terms of the common law which applies in Queensland) propensity direction:

> The Crown relies upon this other evidence of an uncharged conduct [sic] to prove that the defendant had a sexual interest in the complainant and was prepared to act upon it. The prosecution argues that this evidence makes it more likely that the defendant committed the charged offences, as against that particular complainant. But you can only use this other evidence, if you are satisfied beyond reasonable doubt that the defendant did act as the evidence suggests, and that that conduct does demonstrate that he had a sexual interest in the complainant and was willing to pursue it.
>
> … I should say, if you are not satisfied about that smacking on the bottom, as going to a sexual interest, then you simply put that to one side. … It is not something that [the complainant] has given evidence about, but rather, her sister … So it may impact upon your assessment of [the complainant's sister's] evidence [sic]. If you do not accept that this other evidence proves to your satisfaction that the defendant had a sexual interest in the complainant, then you must not use the evidence in some other way. For example, to find that the defendant is guilty of the charged offences.
>
> If you do accept that this uncharged allegation occurred and that the conduct does demonstrate a sexual interest of the defendant and the complainant [sic], bear in mind it does not automatically follow that the defendant is guilty of any of the offences charged. …[18]

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[16] ABFM, p95, Transcript, 04/08/2021, Addresses, p17.37-41.
[17] ABFM, p95, Transcript, 04/08/2021, Addresses, p17.41-47.
[18] CAB p35.4-29, Transcript of Summing Up, 05/08/2021.

Part VI: Argument

Admission of inadmissible evidence and misdirection

20. Justice Henry, with whom Mullins P and Morrison JA agreed correctly held that the bottom slapping evidence did not meet the test identified in *Pfennig v The Queen* (1995) 182 CLR 461 for the admissibility of propensity evidence.[19]

21. Although the Crown contended at trial[20] and on appeal[21] that the evidence met the *Pfennig* test, it finally accepted in response to the appellant's special leave application that the evidence was of only slight probative value, could not exclude all reasonable, innocent inferences and so was not admissible as propensity evidence.[22]

22. The respondent also accepted in response to the special leave application that the Court of Appeal erred[23] in concluding that the bottom slapping evidence was admissible under s132B of the *Evidence Act 1977* (Qld).[24] That section permitted evidence of a domestic relationship to be admitted, but only in relation to proceedings for an offence defined in Chapters 28 to 30 of the *Criminal Code 1899* (Qld). Those chapters contained sections 291 to 346 and did not include most sexual offences in the Queensland Code, including those the applicant was charged with (under section 210, 229B and 349 of the *Code*).

23. It was argued by the respondent in the Court of Appeal (albeit faintly)[25] that the evidence was admissible as 'relationship evidence' at common law.

24. However, 'relationship evidence' is admissible in sexual offence cases only where it legitimately helps to answer questions that may arise in the jury's mind, for example why a complainant did not resist the defendant's acts, or complain earlier, or to show the offences did not come "out of the blue".[26]

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[19] CAB, p79, 80, [2023] QCA 134, [37], [42].
[20] ABFM, p77, Transcript, 04/08/2021, p3-63.41-47.
[21] ABFM, p111, Outline of Submissions on behalf of the Respondent in the Court of Appeal, undated, [35].
[22] ABFM, p116, 117, Respondent's Response, filed 17 August 2023, [3.1], [3.6].
[23] CAB, p76, [2023] QCA 134, [29].
[24] ABFM, p119, Respondent's Response, filed 17 August 2023, [3.17].
[25] ABFM, p110-112. Outline of Submissions on behalf of the Respondent in the Court of Appeal, undated, [30]-[40]. Oddly and wrongly this basis for admission was conceded by the appellant's counsel in the Court of Appeal (Outline of Submissions on behalf of the Appellant in the Court of Appeal, undated, fn 16).
[26] *HML v The Queen; SB v The Queen; OAE v The Queen* (2008) 235 CLR 334, 496-497 [498]-[499], 502 [513] (Kiefel J); *Roach v The Queen* (2011) 242 CLR 610, 624-625 [42]-[45] (French CJ, Hayne, Crennan and Kiefel JJ); *Johnson v The Queen* (2018) 266 CLR 106, 116-117 [19] ((Kiefel CJ, Bell, Gageler, Nettle and Gordon JJ).

25. The bottom slapping evidence could never have been admissible to show any aspect of the "relationship" in the present case given the extensive evidence of sexual acts given by the complainant which would answer any questions that might arise. The bottom slapping evidence added nothing to the understanding of the relationship in the context of the case. The prosecutor did not identify any aspect of the relationship which was explained by this evidence in his closing address. That is presumably why the prosecution has (up until the special leave application) consistently justified the admissibility of the bottom slapping evidence on the basis of propensity.[27]

26. The net result is that there can be no real dispute that:

(a) inadmissible evidence was admitted at the appellant's trial; and

(b) the judge misdirected the jury by permitting them to apply propensity reasoning in relation to the bottom slapping evidence to reason toward guilt.

27. The only live issue in this appeal would then be whether the Court of Appeal erred in finding that despite these errors of law, no miscarriage of justice occurred.

Miscarriage of justice

28. Section 668E of the *Criminal Code 1899* (Qld) is the Queensland version of the common form appeal provisions. It states in relation to appeals against conviction:

> **668E Determination of appeal in ordinary cases**
>
> (1) The Court on any such appeal against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or can not be supported having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal.
>
> (1A) However, the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

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[27] ABFM, p111, Outline of Submissions on behalf of the Respondent in the Court of Appeal, undated, [35].

(2) Subject to the special provisions of this chapter, the Court shall, if it allows an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered.

29. In *Weiss v The Queen* (2005) 224 CLR 300 (***Weiss***), a joint judgment of Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ held that a miscarriage of justice meant *"any departure from trial according to law, regardless of the nature or importance of that departure"*.[28]

30. This approach was confirmed by the majority (Kiefel CJ, Bell, Keane and Gordon JJ) in *Kalbasi v Western Australia* (2018) 264 CLR 62 at 69-70 [12] who said:

> *Weiss* settled the debate in an analysis that is grounded in the text of the common form provision. The apparent tension between the command to allow an appeal where the court is of the opinion that there was a miscarriage of justice, subject to the proviso that it may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred, is resolved by reference to history and legislative purpose. **Consistently with the long tradition of the criminal law, any irregularity or failure to strictly comply with the rules of procedure and evidence is a miscarriage of justice within the third limb of the common form provision** (here s 30(3)(c)). … The concepts of a "lost chance of acquittal" and its converse the "inevitability of conviction" do not serve as tests because the appellate court is not predicting the outcome of a hypothetical error-free trial, but is deciding whether, notwithstanding error, guilt was proved to the criminal standard on the admissible evidence at the trial that was had. (emphasis added, footnotes omitted)

31. That principle was reaffirmed by Kiefel CJ, Bell, Keane, Gordon and Edelman JJ in *GBF v The Queen* (2020) 271 CLR 537 (***GBF***) at 547 [24]:

> The Court of Appeal's conclusion that the appellant had not been deprived of a real chance of acquittal was expressed in terms of the test which was formerly used in deciding whether an appeal could be dismissed under the proviso. The antecedent question for determination was whether the impugned statement had occasioned a miscarriage of justice. The distinction between a miscarriage of

[28] (2005) 224 CLR 300 at 308 [18].

> justice within the third limb of the common form criminal appeal provision, proof of which lies upon the appellant, and the dismissal of an appeal under the proviso, proof of which lies on the prosecution, is as explained in *Weiss v The Queen*. **Any irregularity or failure to strictly comply with the rules of procedure and evidence is a miscarriage of justice within the third limb of the provision**. (emphasis added, footnotes omitted)

32. Notwithstanding that history, Gageler J (as his Honour then was) in *Hofer v The Queen* (2021) 274 CLR 351 (***Hofer***) held that the "miscarriage of justice" ground had within it a relatively intense materiality threshold. His Honour (at 387 [111]) justified that threshold on the basis that the entitlement referred to in *Weiss* to a *"trial according to law"* should properly be understood as a "***fair*** *trial according to law*". His Honour unpacked that concept, leading to a conclusion at 388 [115] that a miscarriage requires consideration of, and ordinarily satisfaction of, *"a significant possibility that the acts or omissions of which complaint is made affected the outcome of the trial"* or, put another way at 389 [116], that *"[a]n inconsequential error, including an inconsequential error of law, is not a miscarriage"*.

33. His Honour justified the apparent departure from the formulation in *Weiss* (at least in part) on the basis that *Weiss* was primarily concerned with the proviso and so did not "*explore the metes and bounds of the miscarriage of justice ground"* (at 386 [110]).

34. With respect to Gageler J's (as his Honour then was) reasoning, the description of a miscarriage in *Weiss* as *"any departure from trial according to law, regardless of the nature or importance of that departure"* is unequivocal and is part of the essential reasoning of the case. It should properly be seen as part of its *ratio decidendi*. As noted, it was applied in exact terms by a unanimous bench of this Court in *GBF* dealing directly with the question of miscarriage. The phrase repeated in *Kalbasi* and *GBF* that *"any irregularity or failure to strictly comply with the rules of procedure and evidence is a miscarriage"* is also compellingly clear.

35. There is, of course, force to the historical analysis conducted by Gageler J (as his Honour then was) in *Hofer* showing that the Exchequer Rule was not universally understood at the time that the proviso was enacted to be as strict as the statement in *Weiss* might suggest. But there can be no doubt that the Exchequer Rule was, at times and in some courts, understood and expressed in that strict way through the common

law world, including in Australia.[29] There can equally be no doubt that the proviso was seen as an inoculation to the effects of the Exchequer Rule understood in its strictest sense.

36. Whatever the historical position may reveal, what can be said with certainty is that the Court in *Weiss* defined the phrase "miscarriage of justice" by reference to the strictest version of the Exchequer Rule and then designed the approach to the proviso with that definition firmly in mind.

37. As influential as Gageler J's (as his Honour then was) reasons in *Hofer* have become, his Honour was writing alone. The majority at 364-365 [41] (Kiefel CJ, Keane and Gleeson JJ) cited the *Weiss* formulation, but added words that appear to have become significant:

> A miscarriage of justice to which s 6(1) of the *Criminal Appeal Act* refers includes any departure from a trial according to law ***to the prejudice of the accused.***[30] This accords with the long tradition of criminal law that a person is entitled to a trial where rules of procedure and evidence are strictly followed[31]. The larger and different question raised by the proviso, which is reserved to an appellate court, of whether there has notwithstanding that departure been no substantial miscarriage of justice, focuses upon whether the nature and effect of the error which has occurred prevents the appellate court from undertaking its assessment as to whether guilt has been proved to the requisite standard[32]. (emphasis added)

38. Writing separately in *Hofer* at 393 [130], Gordon J considered that, to find that any of the three limbs of the common form appeal provisions was not established, the court would have to find "*the mistake made at trial was one which could have had no effect on the outcome of the trial"*. This was to impose a materiality threshold, albeit a relatively modest one.

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[29] The position is Australia following the adoption of the Exchequer Rule in criminal cases in the United Kingdom in *R v Gibson* (1887) 18 QBD 537 has been described as "messy": *No substantial Miscarriage of Justice: The History and Application of the Proviso to section 385(1) of the Crimes Act 1961",* Dr Mathew Downs, Unpublished Thesis, University of Otago, September 2010, 16.
[30] *Weiss v The Queen* (2005) 224 CLR 300 at 308 [18].
[31] *Mraz v The Queen* (1955) 93 CLR 493 at 514; *Kalbasi v Western Australia* (2018) 264 CLR 62 at 69 [12].
[32] *Kalbasi v Western Australia* (2018) 264 CLR 62 at 71 [15].

39. In *Edwards v The Queen* (2021) 273 CLR 585 (***Edwards***) Edelman and Steward JJ explained at 609 [74] that a *"any departure from a trial according to law"* in the *Weiss* sense means an erroneous occurrence with '*the capacity for practical injustice"* or which is *"capable of affecting the result of the trial"*. Again, this formulation assumes the existence of a materiality threshold, albeit also a comparatively modest one. Again, it is difficult to see how the phrase *"regardless of the nature or importance of the departure"* in *Weiss* could import a materiality threshold of this or any kind.

40. Then in *HCF v The Queen* (2023) 97 ALJR 978 (***HCF***) at 981-982 [2] the majority (Gageler CJ, Gleeson and Jagot JJ), without discussion of *Weiss, Kalbasi, GBF* or *Hofer*, referred with approval to a summary of the circumstances in which a miscarriage of justice would occur given by Beech-Jones CJ at CL (as his Honour then was) in *Zhou v The Queen* [2021] NSWCCA 278 (***Zhou***) at [22], namely when the error or irregularity:

> "is properly characterised as a 'failure to observe the requirements of the criminal process in a fundamental respect' then it would follow that the conviction would not stand regardless of any assessment of its potential effect on the trial", but otherwise there is no miscarriage unless the error or irregularity is "prejudicial in the sense that there was a 'real chance' that it affected the jury's verdict ... or 'realistically [could] have affected the verdict of guilt' ... or 'had the capacity for practical injustice' or was 'capable of affecting the result of the trial'" (footnote omitted)

41. Chief Justice at Common Law Beech-Jones (as his Honour then was) in the relevant passage from *Zhou* relied significantly (although not exclusively) on Gageler J's (as his Honour then was) reasons in *Hofer* and the joint judgment of Edelman and Steward JJ in *Edwards*.

42. The test endorsed by the majority in *HCF* cannot, it is submitted, stand with *Weiss, Kalbasi* or *GBF*. Indeed, the "real chance" of affecting the verdict (that is, in effect, a lost chance of acquittal) represents an apparent return to the pre-*Weiss* approach to the proviso that was rejected as applicable to a miscarriage by this Court in *GBF* at 547 [24]. The reference to a *"failure to observe the requirements of the criminal process in a fundamental respect"* also appears to import into the miscarriage test a matter that is properly considered as part of the proviso, as was noted in *Weiss* at 317-318 [46].

43. Justices Edelman and Steward in dissent in *HCF* at 994-997 [75]-[84] surveyed much of the above recent history, including the various "verbal formulations" that have emerged.

44. While noting that reconciling those "verbal formulations" may need to wait for a bench of seven justices, their Honours convincingly explained why it is that the imposition of a materiality threshold into the miscarriage of justice test risks collapsing that test into the test for a substantial miscarriage of justice.[33] Of the addition of the words *"to the prejudice of the accused"* by the majority in *Hofer,* Edelman and Steward JJ said this at 996 [80]:

> …we do not understand Kiefel CJ, Keane and Gleeson JJ or Gageler J to have intended to collapse the test for the proviso into the test for a miscarriage of justice. That would have been a radical, ahistorical step to have taken and one that, with the appellant bearing the onus to establish a miscarriage of justice but not a substantial miscarriage of justice, could be productive of great injustice.

45. But there is a genuine risk that the formulation preferred by the majority in *HCF* represents such a step. That is, a step irreconcilable with *Weiss, Kalbasi* and *GBF* and one which risks collapsing the test for the proviso into the test for a miscarriage.

46. Justices Edelman and Steward ultimately preferred what might be described as a low threshold for materiality, namely that the error or irregularity need only have the capacity to have affected the result of the trial, *"whether or not the result might or might not have been different"* (at 996 [82]).

47. Finally, in this survey of the recent authorities reference should be made to *Huxley v The Queen* [2023] HCA 40 (***Huxley***), where Gordon, Steward and Gleeson JJ said both that the ultimate question in a case contending a misdirection caused a miscarriage of justice is whether the jury were "deflected" by the misdirection from its task of deciding whether the prosecution had proved guilt beyond reasonable doubt,[34] (suggesting a materiality threshold) and that a misdirection on a matter of law is *"always a departure from the requirements of a fair trial according to law"*, so that

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[33] *HCF v The Queen* (2023) 97 ALJR 978, 995 [76], 996 [79]-[82].
[34] *Huxley v The Queen* [2023] HCA 40, [41].

the question is always whether there has been a substantial miscarriage of justice (suggesting materiality is to be dealt with as part of the proviso).[35]

48. Given the developments essayed above, the basic question of what amounts to a miscarriage of justice under the third limb of the common form provisions remains live, notwithstanding the time that has passed since the question appeared to have been authoritatively determined in *Weiss*, *Kalbasi* and *GBF*. More specifically, the question is whether there is a materiality threshold within the miscarriage test, and if so of what intensity.

49. Given that the above analysis of recent authorities shows that every current member of this Court has expressed the test for miscarriage with some form of materiality threshold, it may be thought brave to submit to the contrary.

50. But there is, at the very least, a credible argument that there is no such materiality threshold once an error or irregularity has been identified.[36]

51. **Firstly**, that is what this Court held in *Weiss* and affirmed in *Kalbasi* and *GBF*. *Weiss* is the seminal modern case on the architecture of the common form provisions and the reasoning in it seeks to explain the relationship between a miscarriage of justice and the application of the proviso. The approach taken to the meaning of miscarriage cannot be easily cleaved from the approach to the proviso without doing violence to that relationship as described in *Weiss*.

52. **Secondly**, the mischief that a materiality threshold may be thought to guard against may not really be a mischief. The mischief is an inadvertent return to the strictures of the Exchequer Rule by setting the hurdle for miscarriage too low. But the Court in *Weiss* appears to have contemplated that it was the *proviso* which would provide prophylaxis, rather than the miscarriage test. That is why at 316 [42] the *Weiss* Court emphasised that there is no singular test for determining when *"a substantial miscarriage of justice has actually occurred"*.

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[35] *Huxley v The Queen* [2023] HCA 40, [43]-[44].
[36] As is discussed later, where a miscarriage is founded on an irregularity rather than an error of law there will often be a materiality element to the assessment of whether what happened amounts to an irregularity, but that is different to the question whether or not there is a materiality threshold after a finding of error or irregularity has been made.

53. Further, at 317 [43] of *Weiss* it was said that *"there are cases in which it would be possible to conclude that the error made at trial would, or at least should, have had no significance in determining the verdict that was returned by the trial jury"*. And at 317-318 [45]-[46] *Weiss* contemplates that a breach of the presuppositions of a criminal trial and denials of procedural fairness can all be dealt with within the proviso rather than (at least by implication) within the antecedent miscarriage decision. If so, then there is no need to build into the miscarriage of the kind of tests referred to by the majority in *HCF* at 981-982 [2], or indeed any materiality criterion at all.

54. One passage of *Weiss* appears not to sit easily with the suggestion that materiality reasoning can occur within the proviso. That is the *"negative proposition"* at 317 [44] that *"it cannot be said that no substantial miscarriage of justice has actually occurred unless the appellate court is 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 of guilty"*. There will be many cases in which the exercise required by the negative proposition cannot be undertaken by an intermediate appellate court because of the limitations of review on the record. In such a case, it might be thought that an inconsequential error could pass the miscarriage stage and then be immune from the application of the proviso and so compel the appeal to be allowed.

55. This possible problem was resolved in *Kalbasi* (at 71 [15]) where the majority of Kiefel CJ, Bell, Keane and Gordon JJ held that: *"Weiss requires the appellate court to consider the nature and effect of the error in every case*". Similarly, Justice Nettle explained at 105-106 [125] that the *'process of an appellate court deciding whether it is satisfied beyond reasonable doubt that the accused was proved guilty of the offence charged must begin with the identification of the error"*. That is, the nature of the factual assessment that an intermediate appellate court makes is built around the nature of the error that has enlivened its jurisdiction to do so. It is by this means that the expectation in *Weiss* that materiality can be considered, in an appropriate case, as part of the proviso can be realised notwithstanding the design of the "negative proposition". The example referred to in *Kalbasi* at 70 [14] (put forward by Gleeson CJ in oral argument in *Weiss*) makes good the point. The example is of a case where evidence is wrongly admitted against an accused person who subsequently admits the same fact. Such a situation was thought by the majority in *Kalbasi* to be perfectly capable of resolution within the application of the proviso because the question of whether the

accused was proved guilty on the record was easily answered given that nothing happened which would cause the jury's verdict to be second guessed.

56. **Thirdly**, having no materiality criterion is consistent with the proper approach to second limb appeals where there is a "wrong decision on a question of law". There is no warrant in the language of that limb to imply a materiality requirement. And the proviso is capable of sifting out those cases where such an error was truly immaterial.

57. This case concerns claimed miscarriages that are constituted by a legal error, here a misdirection of law to a jury or the use of inadmissible evidence. With respect to what might loosely but conveniently be called 'irregularities' there will often have already been an assessment of the capacity of the claimed irregularity to have affected the trial, simply because, without such an effect, it is not possible to describe whatever occurred as an 'irregularity' at all. For example, it is difficult to see how an intermediate appellate court could ever assess whether an incident of claimed incompetence of defence counsel or of prosecutorial misconduct amounted to an irregularity without asking – as part of that task – whether whatever happened can have made a practical difference in the trial. No *additional* materiality threshold is required to allow an irregularity of those kinds to qualify as a miscarriage of justice under the third limb.

58. Having made the case for no materiality threshold at the miscarriage stage it must be acknowledged that the case for a low materiality threshold in the miscarriage test can also be well made, although it carries implications for the approach to the proviso.

59. **Firstly**, notwithstanding the history of the Exchequer Rule, the ordinary meaning of the phrase "miscarriage of justice" may be thought to carry with it an implication of materiality. Indeed, even before the adoption of the Exchequer Rule to criminal cases in the United Kingdom, and during the process of adoption, and since, courts have often deployed the language of materiality and inconsequentiality in the context of a miscarriage when deciding criminal appeals.

60. **Secondly,** it is reasonable to ask whether the wrongful admission of a piece of truly innocuous evidence (or even say a piece of exculpatory evidence) should ever be called a "miscarriage of justice". That is a legitimate question even if such an appeal is ultimately dismissed by application of the proviso in the way suggested above.

61. **Thirdly,** such an approach avoids an intermediate appellate court having to review the whole of the trial record to answer the "negative proposition" in *Weiss* in cases where a legal error in a trial is obviously innocuous.

62. Ultimately, there can be no sensible dispute that (subject to what have been called 'errors of a fundamental kind') a proper reason for dismissing an appeal against conviction based on an error or irregularity is if the error or irregularity is truly innocuous. The question, in truth, seems to be at what point in the process of reasoning under the common form provisions that option should be available. The appellant submits for reasons of precedent and coherence that the materiality issues should be resolved, as *Weiss* intended, within the proviso.

63. Regardless of where in the process materiality is considered, it is critical that it should be set at an intensity that respects the *"long tradition of criminal law that a person is entitled to a trial where rules of procedure and evidence are strictly followed"*.[37] If any consideration of materiality is to occur at the miscarriage of justice stage, it should also avoid any risk of collapsing the proviso into the miscarriage test by taking as little out of the ambit of the proviso as is possible.

64. Those considerations commend a test that requires, as Edelman and Steward JJ proposed in *HCF* at 996 [82] (and consistent in our submission with the tenor of the approach taken by Gordon J in *Hofer* at 393 [130]) that the error or irregularity need only have the capacity to have affected the result of the trial *"whether the result might, or might not, have been different"*.

Miscarriage in the present case

65. No matter the test, the present case is a classic case of miscarriage.

66. Justice Henry held that there was no miscarriage of justice because the jury could not have concluded the bottom slapping evidence showed a sexual interest by the appellant in the complainant beyond reasonable doubt, and defence counsel sought to gain a forensic advantage from the admission of the evidence.[38] That reasoning was in error because:

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[37] *Hofer v The Queen* (2021) 274 CLR 351, 364-365 [41].
[38] CAB 80-81, [2023] QCA 134, [42]-[48].

(a) the test for a miscarriage of justice does not require proof that the jury would actually have wrongly used the evidence; and

(b) in any case, that conclusion is unsustainable in the present case.

67. The Court of Appeal erred in not concluding that a miscarriage of justice occurred in the present case. If the test for a miscarriage of justice has no materiality threshold, then it is obviously satisfied. A direction specifically permitting the jury to reason in an impermissible way about inadmissible evidence was given. That was a departure from the requirements of a trial according to law.

68. If, contrary to the appellant's submissions, there is a materiality threshold then, no matter how expressed or wherever in the process it is applied, this error would meet it because:

(a) this Court has held that the risk of a jury engaging in impermissible propensity reasoning is "peculiarly strong" in sexual offence cases;[39]

(b) that "peculiarly strong" risk means that in many cases, a warning against propensity reasoning is required when evidence may be used as propensity evidence, even if the prosecution does not rely on it for that purpose;[40] and

(c) Chief Justice Gibbs in *De Jesus v The Queen* (1986) 61 ALJR 1 at 3 and Justice Hayne in *HML v The Queen; SB v The Queen; OAE v The Queen* (2008) 235 CLR 334 at 384 [113] said that judicial instruction may not be sufficient to guard against the risk. Justice Hayne explained *"[t]he foundation for the rule excluding evidence of other discreditable acts of an accused is that, despite judicial instruction to the contrary, there is a risk that the evidence will be used by the jury in ways that give undue weight to the other acts that are proved*."

69. In that sense the wrongful direction here has the capacity for "practical injustice".

70. If, contrary to the appellant's submissions, the test requires a determination that it might have affected the jury's verdict, it is relevant (in addition to the points above) that:

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[39] *De Jesus v The Queen* (1986) 61 ALJR 1, 3 (Gibbs CJ); *Hamilton (a pseudonym) v The Queen* (2021) 274 CLR 531 at 553-554 [43] (Kiefel CJ, Keane and Steward JJ), 558-559 [62] (Edelman and Gleeson JJ).
[40] *HML v The Queen; SB v The Queen; OAE v The Queen* (2008) 235 CLR 334, 384 [113] (Hayne J), 499 [503], 502 [513] (Kiefel J); *Hamilton (a pseudonym) v The Queen* (2021) 274 CLR 531, 553-554 [43] (Kiefel CJ, Keane and Steward JJ); *PRS v The State of Western Australia* [2023] WASCA 106, [89].

(a) the judge's direction gave a judicial imprimatur to propensity reasoning, and to a finding that the bottom slapping evidence demonstrated the appellant's sexual interest in the complainant beyond reasonable doubt;

(b) the prosecutor relied on the bottom slapping evidence as *independent* proof of the appellant's alleged sexual interest in the complainant,[41] placing it in a different category to other evidence which related only to credit (for example, the 'preliminary complaint' evidence); and

(c) there was no other use of the bottom slapping evidence proposed to the jury by the judge or the prosecutor; the only potential use provided was as propensity evidence.

71. It is wrong to reason, as Henry J did, that the jury would not have reasoned in that way because the inference that the Crown sought to have drawn was so weak.

72. The jury are the sole judges of facts in our system.[42] Having been told by the judge that they *could* find the bottom slapping evidence showed a sexual interest, and that they *should* do so, by the Crown, it was wrong to conclude that they did not or even that they were not likely to.

73. If required, the appellant submits the only rational conclusion is that the admission of the inadmissible evidence and wrong direction could well have had, and was at least capable of having, an effect on the verdict.

74. In this case the appellant's trial counsel did not object to the evidence being led and acquiesced to the direction sought by the Crown.

75. While parties are ordinarily bound by the conduct of their counsel, decisions made by counsel are not determinative of the question of a miscarriage of justice. Deliberate choices by defence counsel do not relieve the trial judge from their obligation to direct the jury correctly on the law.[43]

76. It has been held in the context of appeals based explicitly on the competence of defence counsel that where the potential forensic advantage to be gained by a decision is slight compared to the importance of the defect or irregularity, or where counsel makes a

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[41] ABFM, p95, Transcript, 04/08/2021, Addresses, p17.45-47.
[42] *The Queen v Baden-Clay* (2016) 258 CLR 308, 329 [65] (French CJ, Kiefel, Bell, Keane and Gordon JJ).
[43] *Hamilton (a pseudonym) v The Queen* (2021) 274 CLR 531, 563 [76] (Edelman and Gleeson JJ).

legal error on a fundamental point, it will not preclude a conclusion that there was a miscarriage: see *TKWJ v The Queen* (2002) 212 CLR 124, 128 [8] (Gleeson CJ), 133-134 [26]-[32] (Gaudron J), 149-152 [79]-[85] (McHugh J).

77. However, as discussed above, a claim of miscarriage based on incompetence of counsel will almost always have a contextual or evaluative component. In such a case it will often not be possible to avoid assessing the potential effect of the impugned conduct on the trial for the purpose of determining whether there has been an irregularity at all.

78. But where, as here, the alleged error is one of law, but that error was acquiesced to by counsel, it is not the conduct of counsel that creates the miscarriage, but rather the error of law. The conduct of counsel in such a case is best dealt with, for the reasons already discussed above, as part of the proviso following a finding of miscarriage.

79. However, regardless of whether the conduct of counsel is considered as part of the miscarriage test or as part of the application of the proviso, the appellant submits that defence counsel's acquiescence to the direction in this case, and the decision to instead deal with the evidence in his address was no doubt well-intentioned but, with respect, obviously flawed. A mild attack on the Crown for overreaching was not worth the risk of propensity reasoning from the evidence of a witness said by the Crown to provide independent support to the complainant's evidence in a 'word on word' case.

Conclusion

80. The giving of the propensity direction in relation to evidence which was inadmissible as propensity evidence occasioned a miscarriage of justice. This was not an appropriate case for the application of the proviso by an assessment of the record of trial, because without the sister's evidence, this was essentially a single witness case, with its outcome dependent on the credit of the complainant.[44]

Part VII: Orders sought by the appellant

81. The appellant seeks the following orders:

    (a) Appeal allowed.

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[44] *Kalbasi v Western Australia* (2018) 264 CLR 62, 71 [15] (Kiefel CJ, Bell, Keane and Gordon JJ).

(b) Order of the Court of Appeal dismissing the appeal against conviction is set aside.

(c) In lieu, an order that the appeal to the Court of Appeal is allowed, the applicant's convictions are set aside and a new trial ordered.

Part VIII: Estimate of oral argument

82. The appellant estimates the presentation of its oral argument will take two hours.

Dated: 25 January 2024

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Annexure – List of constitutional and legislative provisions referred to in Appellant's submissions

1. *Evidence Act 1977* (Qld), s132B (Reprint current from 5 July 2021)
2. *Criminal Code 1899* (Qld), s210 (Reprint current from 1 December 2014)
3. *Criminal Code 1899* (Qld), s229B (Reprint current from 9 December 2018)
4. *Criminal Code 1899* (Qld), 349 (Reprint current from 5 September 2014)
5. *Criminal Code 1899* (Qld), s668E (Reprint current from 22 March 2023)