IN THE HIGH COURT OF AUSTRALIA

PERTH REGISTRY

No. P24 of 2018

BETWEEN:

PAUL JOSEPH RODI

Appellant

and

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THE STATE OF WESTERN AUSTRALIA

Respondent

APPELLANT'S OUTLINE OF ORAL ARGUMENT

Part I:

1. I certify that the outline of oral argument is in a form suitable for publication on the internet.

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Part II:

2. The Prior Coen Evidence (defined in *A [12]*) was not disclosed to the appellant, and did not form part of the evidence at trial.

Ground 1: Fresh Evidence

3. The applicable principle is not in doubt.
4. The appellant points to two principal, possible impacts of the Prior Coen Evidence on the trial (with the other evidence), being:

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a. the jury, having the Prior Coen Evidence, may have preferred the evidence of the appellant;
b. the opening up of lines of cross-examination of Detective Coen, some of which may be seen from the cross-examination in the Court of Appeal; and
c. causing the prosecutor to close differently.

A [20]

5. The respondent's contentions against the above impacts do not grapple fully with:
   a. the whole of the Detective's evidence being expert opinion evidence, where the evidence about the particular plant was dependent upon his typical yield evidence;
   b. the nature and course of his evidence at trial; and
   c. the way the prosecutor closed.

Ground 2 – Criminal Procedure Act 2004 (WA)

6. The Prior Coen Evidence was required to be disclosed under s.95(6) of the *Criminal Procedure Act 2004* (WA) by the "relevant authorised officer" – not by the trial prosecutor. The regime provided for that to be done by 24 August 2013; 42 days after the appellant's committal: *Rep [6].*
7. The test of relevance at that point is determined by an assessment of the full range of legal and factual issues that will or *could* arise at trial: *Hughes v State of Western Australia* (2015) 299 FLR 197 [48]: *A [48].*
8. Having regard to the purpose of disclosure and when it must be made, the "could" is important and indispensable.
9. For the purposes of s.95(6) of the *Criminal Procedure Act 2004* (WA) yield of the two plants was a matter which was a factual issue which could arise at trial: *A [48]-[50].*
10. The Prior Coen Evidence was "relevant" (in the applicable sense) before the first or second day of trial: *A [48]-[50].*
11. The finding made by the Court of Appeal as to the trial prosecutor's understandings (and when they were held) of what were the issues actually live in the trial did not go to the question of the prior assessment which the relevant authorised officer had to make.

Ground 2 – Disclosure at Common Law

12. The Prior Coen Evidence, on a sensible appraisal, was possibly relevant to an issue in the case prior to the commencement of the trial: *A [66]-[67], [72].*
13. Further, and in any event, no later than when the Detective gave his evidence at the trial, the Prior Coen Evidence was relevant and had to be disclosed. It was obviously known to the investigating agency and to a principal police witness. It also was readily available to the prosecution at trial: *A [71].*
14. The language of the *Criminal Procedure Act 2004* (WA) does not support the contention that the Act abrogates the common law: *Rep [11]-[12].*

Non-disclosure led to a miscarriage

15. If the submissions on either or both of the disclosure breaches are accepted, then the trial process will have departed from what was required and there would have been a miscarriage of justice within s.30(3)(c) of the *Criminal Appeals Act 2004* (WA): *A [76], [78].*
16. There is no notice of contention before the Court praying in aid s.30(4) of the *Criminal Appeals Act 2004* (WA): *A [80].*
17. In any event, if there had been disclosure of the Prior Coen Evidence, it cannot be said that the appellant would inevitably have been convicted and as a result this Court cannot conclude affirmatively that no substantial miscarriage of justice occurred: *A [26], [79]*

Dated: 7 August 2018

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Matthew Howard

Senior Counsel for the Appellant