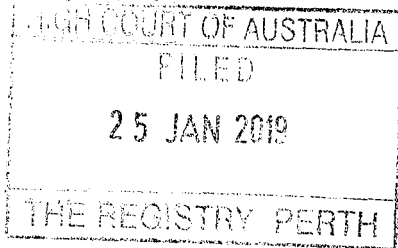


BETWEEN:

OKS

Appellant

and



THE STATE OF WESTERN AUSTRALIA

Respondent

APPELLANT'S REPLY

Part I:

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

Part II:

20 **Reply to the argument on the appeal**

Respondent's narrative statement of material facts

2. The Appellant accepts that the trial record included the material referred to in the Respondent's Submissions at [6] to [17]. Other than to briefly record that other witnesses, including KBR, gave evidence at the trial,¹ none of that material was referred to by the Court of Appeal in the judgment below.

¹ CAB 93, CA [25].

Buss P's reasons for dismissal under the proviso

3. The Respondent submits, in answer to the contention that the Court of Appeal failed to undertake its own independent assessment of the evidence, or failed to give adequate reasons for its conclusion that the Appellant was proved beyond reasonable doubt to be guilty of count 1, that Buss P summarised the evidence in the trial, and the cases of the respective parties, at **CAB 91-96, CA [10]-[35]**.
4. Apart from including a brief summary of the relationship between the parties,² most of the details of which could have been gleaned from the prosecutor's opening address,³ there is nothing in the 'six full pages' referred to by the Respondent that could properly be described as a summary of the evidence that was adduced at trial.
10
5. The 'six full pages' make no mention of the Facebook messages, to the complainant's evidence of the pretext call, or to the evidence of KBR referred to in the Respondent's submissions. Further, other than to simply identify the complainant's admitted or alleged lies, there is no analysis of her (or any other) evidence insofar as it may have been relevant to the Court of Appeal's own independent assessment of the complainant's credibility. There is also nothing to indicate whether the Court independently assessed the complainant's evidence, including by reference to the factors that were referred to by the Appellant's counsel in his closing address,⁴ or if it did undertake such an assessment, how it carried out that task.
20
6. Although Buss P did expressly record that he had made due allowance for the natural limitations that exist in the case of an appellate court proceeding on the record,⁵ it is not possible to know what those limitations were or whether sufficient regard was paid to them given the central importance of the credibility of the complainant's evidence.

² **CAB 91, CA [10]-[14]**.

³ **AFM 219-220**.

⁴ **CAB 96, CA [35]**.

⁵ **CAB 123, CA [135]**.

Nature and effect of the error

7. The Respondent's contention⁶ that the Appellant places undue reliance on the nature of the error, and invites this Court to treat the impugned direction in isolation and out of context, should not be accepted having regard to [54] to [56] of the Appellant's submissions.
8. In dealing with the nature and effect of the impugned direction the Respondent essentially submits that the effect of the erroneous direction was 'neutralised' by other directions that were given by the trial judge that were relevant to the jury's assessment of the complainant's credibility. On this basis the Respondent submits
10 that it was open to the Court of Appeal to take into account the jury's verdict of guilty on count 1 in its consideration of whether a substantial miscarriage of justice had been occasioned, and that the Court of Appeal was not otherwise precluded from applying the proviso.
9. As Buss P found, the *effect* of the impugned direction was to wrongly prohibit the jury from engaging in a process of reasoning in relation to the central issue at the Appellant's trial, namely the complainant's honesty and reliability as a witness, a process of reasoning that was favourable to the Appellant.⁷ The process of reasoning that was prohibited by the impugned direction was identified by Buss P at CA [123].⁸
10. It follows from this that the verdict of guilty that was returned in relation to count 1
20 was reached in circumstances in which a process of reasoning, that was otherwise favourable to the appellant, was excluded from the jury's consideration. In those circumstances it is not possible to give any weight to the jury's verdict.
11. Given that the jury were required to comply with the impugned direction, and (at the same time) were required to comply with all of the other directions including the 'seven discrete parts relevant to the jury's assessment of the complainant's

⁶ Respondent's submissions [28]-[29].

⁷ CAB 120, CA [123]-[124]. See also CAB 118-119, CA [119].

⁸ CAB 120.

credibility’,⁹ the Respondent’s submission to the effect of the erroneous direction was ‘neutralised’ by other directions cannot be accepted.

12. An effect of the impugned direction, properly construed, is that the jury were erroneously prohibited from concluding that any or all the lies that they found had been told by the complainant were capable of properly supporting a finding that all of her evidence was dishonest and could not be relied upon. When considered in this way the impugned direction necessarily undermined or conditioned the other directions relied on by the Respondent,¹⁰ and it was not ‘neutralised’ by those directions.
- 10 13. The Respondent submits that the nature and effect of the impugned direction cannot properly be characterized as having actually or potentially prevented the jury from performing its function. However, contrary to the Respondent’s submissions, Buss P expressly concluded that the impugned direction did amount to an impermissible intrusion by the trial judge on the function of the jury.¹¹ The Respondent has not challenged this conclusion.
14. The fact that the jury would have appreciated that the central issue for them to determine was the credibility and reliability of the complainant, or that the direction required the jury to scrutinise the complainant’s evidence with care, does not assist the Respondent. The impugned direction impermissibly interfered with the jury’s
20 function of assessing the complainant’s evidence in any manner that it saw fit, and in a manner that was favourable to the Appellant.
15. Contrary to the Respondent’s submissions at [35] to [37], proof of the Appellant’s guilt in relation to count 1 was wholly dependent on acceptance of the complainant’s evidence that the incident the subject of that count occurred as she alleged. Although the jury were entitled to take into account the other evidence referred to by the

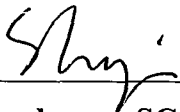
⁹ Appellant’s submissions [31]. CAB 122, CA [132].

¹⁰ CAB 122, CA [132].

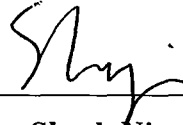
¹¹ CAB 120, CA [123]-[124].

Respondent none of that evidence was capable of independently proving the Appellant's guilt of the offence charged in count 1.¹²

Dated: 25 January 2019



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¹² It should be noted that the Appellant accepted, through his counsel in opening, that there had been an occasion on which the Appellant had outlined a story relating to spontaneous combustion: **AFM 227**.