IN THE HIGH COURT OF AUSTRALIA **No P62 of 2018**
PERTH REGISTRY

BETWEEN **OKS**
Appellant

AND

THE STATE OF WESTERN AUSTRALIA
Respondent

RESPONDENT'S SUBMISSIONS

PART I – Publication

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

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PART II – Concise Statement of the Issues presented by this appeal

2. As identified in the appellant's submissions, the issue presented by this appeal is whether the Court of Appeal of the Supreme Court of Western Australia erred in concluding that the appeal should be dismissed because no substantial miscarriage of justice occurred.[1]

PART III – Notice under s 78B of the *Judiciary Act 1903* (Cth)

3. It is certified that this appeal does not involve a matter arising under the Constitution or
20 involving its interpretation. Accordingly, notice under s 78B of the *Judiciary Act 1903* (Cth) is not required.

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[1] Appellant's Submissions [2.3].

Prepared by the Director of Public Prosecutions for Western Australia whose address for service is Level 1, 26 St Georges Terrace, Perth, WA 6000.
Reference No: 15/2662 Telephone No: 9425 3999 Facsimile No: 9425 3608
Filed on 10 January 2019

PART IV – Narrative Statement of Material Facts or Chronology

4. The respondent accepts that the appellant's narrative of facts as outlined in Part V of the Appellant's Submissions is accurate.

5. However, the trial record includes further material (to which the appellant has not referred) which is relevant to the determination of this appeal.

6. The State case included Facebook messages between the appellant and the complainant, exhibited as Exhibit 1 in the trial.[2] The Facebook messages were provided in tabular form to the jury as a jury aid (MFI 1).[3]

7. The State relied upon the content of the Facebook messages as demonstrating a lack of denial by the appellant of any wrongdoing, as well as containing allusions to sexual contact between the appellant and the complainant.[4] The defence case was that there was in fact a denial that anything happened in the Facebook messages[5] and the complainant was cross-examined to that effect about specific comments made by the appellant in some of his messages.[6]

8. It is important to consider the nature and content of the Facebook messages between the appellant and the complainant. The appellant's messages do not express the outrage, shock or express denial which might be expected in response to the complainant's messages. Indeed, the appellant's messages exude an overtly sexual tone, punctuated by express references to the appellant's sexual interest in the complainant (as an adult) which is difficult to reconcile with the distressed tone of the complainant's messages, particularly in relation to the alleged offending.

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[2] **AFM 285**; **RFM 3 – 43**.

[3] **AFM 286; RFM 44 – 62**.

[4] **CAB 27**.

[5] **CAB 28.**

[6] **AFM 430 – 431**.

9. The Facebook messages in Exhibit 1 included the following conversations:

9.1. The complainant repeatedly referred to the appellant's alleged sexual offending against her (with no express denial from the appellant), including: "*Why do u think I would add you? Do u have any idea what u did to me as a kid*?"[7]

9.2. On 29 August 2012, the complainant wrote to the appellant: "*the only thing we ever had in common was i was a young girl and u where a sick old man! I never wanted anything more then for more then my mum to be happy as much as u tried to get between her and her kids, she loved you! I want nor need anything from you except, i need to know that you know what u did was wrong, and that you won't ever do it to anyone agin! I was 10 for fuck sake when it started! You may have been able to minipulate your way then, but guess what i have GROWEN up! I am no longer a CHILD! Justify it how ever you feel. You have no Idea the damager you have caused!*"[8]

9.3. The appellant did not repudiate the complainant's accusations, but instead responded to the effect that he had not abandoned her, ending his message with "*[complainant's name] you are grown up now ... just between you and me ... would like to meet you for a coffee and we can both talk about what ever ... you can get what you have to say off your chest ... and I didn't abandeon any off you's... i was always there ... and still am...*"[9]

9.4. The complainant responded (in part): "*You obviously don't think what you have done is wrong. Its about time you learn how wrong it is and your stopped from doing it again*".[10]

9.5. The complainant later wrote: "*Nothing is consensual until after your 16! You are a very sick old man! And you will get what is coming to you if it's the last thing I*

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[7] **AFM 286**; **RFM 3**.

[8] **RFM 4**.

[9] **RFM 5**.

[10] **AFM 286; RFM 5**.

do I will stop you from doing it to another child!".[11] Without denial or comment upon the complainant's message, the appellant replied within a few minutes: "*Ok ... are we still going to meet on Thursday...*"[12]

9.6. The complainant expressed her wish for an apology from the appellant: "*Yes I still think your sick and all I want an apology, I need to know that you know what you did was wrong*!"[13] to which the appellant replied: "*[complainant's name]* ***i will apologise to you..i have no problem doing so...if i have cause you any grief or harm this i apologise to you***..."[14]

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9.7. After the appellant's repeated messaging asking the complainant to meet up for a coffee, the complainant messaged him: "*I didn't contact you! And it's not a threat! !!! My god you are still just as twisted and and mentally fucked up as you where then!*"[15] to which the appellant replied: "*[complainant's name] you did contact me first on here...why won't you meet me for a coffee****...are you afraid of me...or are you afraid of yourself,...just remember.. the only thing that happened is what you wanted to happen.. and what you let happen.. and what you wanted****...and thats just you...you would never ever in a million years do what you didn't want...****it would be nice to see you [complainant's name]*
20 ***and you can let all the anger out...but you won't be biting my chest this time***..."[16]

9.8. The complainant replied "*Omg I was a fucking child! I didn't want that shit! Go back to the first msg it was you!!!!*".[17] The appellant messaged "*well [complainant's name] i have tried and ask to have a coffee with you everytime i sent you a message...****so as that you can really say to me and tell me how you feel***

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[11] **RFM 9**.

[12] **RFM 9.**

[13] **AFM 307**; **RFM 21**.

[14] **AFM 308**; **RFM 21** (emphasis added).

[15] **AFM 311**; **RFM 28**.

[16] **AFM 312**; **RFM 28** (emphasis added).

[17] **AFM 312**; **RFM 28**.

***in no uncertain terms**... **and i can apologise to you face to face**...just hoping you want to do this as much as i do..*"[18]

9.9. The appellant's Facebook messages to the complainant took on a more overtly sexual tone from that point, including: "*will be here when you .."want"..me ..and what [complainant's name] wants she gets i was so blind and stupid at the beginning.. then the penny dropped.. i know what she is looking for and know want she wants... [complainant's name] you can't help yourself...you want it ...and you will let it happen as usual....i will be waiting...*"[19]

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9.10. The complainant replied: "*Please stop contacting me! Please leave me alone! Please get yourself help! You don't know me now and you didn't know me when I was a child! You can't manipulate me any more! I want you to understand the thought of you makes me feel sick! I'm begging you please leave me alone!*"[20]

9.11. The appellant continued on to write: "… *it was you who made contact with me after all these years,.. i must have been on your mind all that time,.. you were 14..15..16 years of age...you knew full well what you wanted and what you wanted done to you...."NOBODY".. can or could manipulate you to do anything you don't*
20 *want to [complainant's name]...you contacted me for a reason....and i have a pretty good idea .."WHY".. and so do you...so when you are ready text or call me [complainant's name]...and let make this happen.*"[21]

9.12. The appellant wrote further: "*so all this time i was on your mind...ok.. so we have had the name calling....and now the playing hard to get...the best part about all this is i know and.."50"..do you know what is going to happen...along time coming ...but you know it will happen.. so when ever you are ready [complainant's*

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[18] **RFM 29** (emphasis added).

[19] **AFM 315**; **RFM 30**.

[20] **RFM 30**.

[21] **RFM 31**.

name]...text or call me...have a feeling it's going to be my place,...this time you will get what you are looking for...and more....oh'. ..."[22]

9.13. Despite her requests to be left alone, the appellant further messaged the complainant that he: "*would like to meet you for a coffee. and see what happens.. maybe you are playing hard to get.. then again you maybe just want to be left alone...meet me and lets talk about it...**then again...i may have you the way you wanted me to have you...i know the way i want you now...deep down i think you want it too from me....so lets meet and see what happens** [complainant's name]...yeah*"[23]

9.14. Again, after the complainant messaged back stating "*I'm not playing anything! You make me sick! This is the last time I'm going to ask! Just leave me alone*!",[24] the appellant replied: "*when you wanted something from me.. and boy were you looking for it big time...well i didn't and wouldn't...now it's different.. i will and i want too...think you are playing hard to get...and you know there is something missing which you want forfilled.. **we started something but didn't finish**...so come to me ..[complainant's name] and give yourself to me like you wanted to before...i will take you this time... so make it happen.. ..[complainant's name] come to me...deep down you know you want too....just think what it will like ...just you and me...*"[25]

9.15. The appellant continued messaging the complainant, including writing: "*Well.. it seems you have gone off coffee,.. **figured it out you are afraid of yourself...of letting go and doing what you really want like you wanted me to do to you before....was hoping to have your naked body on my bed by this time this arvo**...not to late...text or call me...or we can make it 12.00pm tomorrow same place...sterling central...*"[26]

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[22] **RFM 32**.

[23] **AFM 315**; **RFM 32** (emphasis added).

[24] **AFM 316**; **RFM 32** (emphasis added).

[25] **AFM 316**; **RFM 32** (emphasis added).

[26] **AFM 319**; **RFM 36** (emphasis added).

9.16. The complainant replied in strong terms, writing: "*People have seen all the messages! I asked you to leave me alone! You are a sick twisted and perverted i didn't want anything to do with you when i was a child, i was stuck with you living in my home!! The only thing I've been afraid of was having to tell someone out loud what you did to me for years. I've done it now.*"[27]

9.17. The appellant sent the complainant messages on her birthday (06/03/2014), Christmas and New Year's Eve in 2014. The next Facebook message from the appellant to the complainant on 4 May 2015 referenced him ignoring phone calls from unknown or private numbers. The complainant wrote: "*Please answer*" on 5 May 2015 at 14:19.[28] After some brief messaging on 9 May 2015, the appellant initiated contact with the complainant again on 19 June 2015, writing: "*Hi,[complainant's name],..am still over the moon about you ringing me,.. i wasn't totally surprised.. knew I'd have a place at the back of your mind...and slowly you will come around,.. have to go up to Dongara tonight.. and back on Tuesday,.. would like to meet you for a coffee next week some time..* ***you can vent all you like at me there and then,.. but funny i have this feeling i know we will end up****...[complainant's name]* ***you and i have some unfinished business o get on with,.. not that it ever got started,.. but we can pick up were we should have went,.. all the way****,..*"[29]

9.18. On 29 June 2015, the complainant asked the appellant to resend his phone number and when would be a good time to call. He replied with his mobile number and the complainant wrote back "*I won't be able to Call until tomorrow morning*"[30]. This is a reference to the pretext call which occurred on 30 June 2015.

9.19. After the pretext call on 30 June 2015, there were no further messages from the complainant to the appellant. The appellant sent seven more messages to the

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[27] **AFM 319**; **RFM 37**.

[28] **RFM 39**.

[29] **AFM 323**; **RFM 40** (emphasis added).

[30] **RFM 40**.

complainant, including: "*[complainant's name],.. this could be some thing you have been waiting for a long time.. know i have,.. know you have a few things on your chest you want to get off,.. once that done...* ***we can start where we left off,..*** *[complainant's name].. don't hold back,, make this happen..*"[31]

9.20. Five days later, on 7 July 2015, the appellant messaged the complainant "***OH,,, Sorry [Complainant's name].. i forgot, "Spontanious*** **[sic]** ***Combustion"..***"[32]

10. The complainant's evidence in relation to count 1 was that it occurred in the context of the appellant telling her stories about his own childhood. This included a story about spontaneous combustion. The complainant stated that the appellant first told her this story during the offending which comprised count 1.[33]

11. It was also part of the evidence at trial that the complainant had, with the assistance of police, made a pretext call to the appellant on 30 June 2015. The appellant's voice could not be heard on the pretext call; accordingly, it was not adduced in the trial.[34]

12. However, the complainant gave unchallenged evidence that during the pretext call,[35] she had asked the appellant whether he remembered the 'first story' he told her:[36]

> *During the recorded phone call, one of the questions that I asked him was did he remember the first story he told me, lying on [my brother's] bed in the end bedroom where – this – this comment relates to the very first – first part of my statement.*

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[31] **AFM 325**; **RFM 42** (emphasis added).

[32] **AFM 325**; **RFM 43** (emphasis added).

[33] **AFM 241 – 242.**

[34] **AFM 509 – 510.**

[35] The complainant was cross-examined to the effect that the appellant had not made any admissions during the phone call **[AFM 430 – 431]** but was not cross-examined about this part of her evidence about what she had said to the appellant during the phone call.

[36] **AFM 325 – 326.**

13. It was in that context, following the pretext call on 30 June 2015, that the appellant sent the Facebook message to the complainant on 7 July 2015 in which he wrote: "*OH. Sorry, [Complainant's name]. I forgot. Spontanious* [sic] *combustion*"[37]

14. Throughout the Facebook messages, the appellant made a number of express, spontaneous remarks which, in effect, referred to prior sexual contact between himself and the complainant when she was a child:[38]

14.1. "*[J]ust remember.. the only thing that happened is what you wanted to happen.. and what you let happen.. and what you wanted*"[39]

14.2. "*[I] know what she is looking for and know want she wants... [complainant's name] you can't help yourself...you want it ...and you will let it happen as usual....i will be waiting...* "[40]

14.3. "*[W]e started something but didn't finish...so come to me ..[complainant's name] and give yourself to me like you wanted to before...i will take you this time... so make it happen.. ..[complainant's name] come to me...deep down you know you want too....just think what it will like ...just you and me...*"[41]

14.4. "*[Y]ou and i have some unfinished business to get on with,.. not that it ever got started,.. but we can pick up were we should have went,.. all the way..*"[42]

14.5. "*[W]e can start where we left off*"[43]

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[37] **AFM 325**; **RFM 43**.

[38] The respondent accepts that he also said on one occasion '*not that it ever got started*': **AFM 323**; **RFM 40**.

[39] **AFM 312**; **RFM 28**.

[40] **RFM 30**.

[41] **AFM 316**; **RFM 32**.

[42] **AFM 323**; **RFM 40**.

[43] **AFM 325**; **RFM 42**.

15. The witnesses at the trial included a male witness, KBR, who had previously been in a relationship with the complainant.[44] KBR's evidence was to the effect that, whilst in a relationship with the complainant, he had been shown Facebook messages from the appellant to the complainant.[45]

16. KBR was also present when the complainant spoke to the appellant by phone, during which the complainant put the phone on 'speaker' and KBR heard the voice of an older male.[46] The complainant said "*You've done a lot of wrong things to me*" and then asked the male to repeat his response, putting the phone on speaker phone. KBR heard the male say "*Yeah, like you say, yeah I've – yes, I did a lot of things to you and I had to stop myself because of your age*".[47]

17. Whilst KBR accepted that the man did not expressly say that he had done 'sexual things', KBR firmly maintained that the man had said that he did things to the complainant, and also that he said "*I had to stop myself because of your age*" rather than "*And I couldn't do it because of your age*", as was put to him in cross-examination.[48]

PART V – Applicable Statutes and Regulations

18. The appellant's statement of applicable statutes and regulations is accepted.

PART VI – Succinct Statement of Argument

19. The appellant does not submit that the court below failed to correctly identify the relevant principles as to the application of the proviso.

20. The appellant's challenge to dismissal under the proviso is premised upon three primary assertions:

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[44] **CAB** 93; **CA** [25].

[45] **AFM 485**.

[46] **AFM 486 - 488**.

[47] **AFM 488**.

[48] **AFM 500**.

20.1. The reasons of the Court reveal that it failed to undertake its own independent assessment of the evidence, or that it failed to give adequate reasons for reaching the conclusion that the appellant had been proved guilty of count 1 beyond reasonable doubt.[49]

20.2. The Court failed to conclude that, given the nature and effect of the erroneous direction, it was not possible for it to be satisfied that the appellant's guilt had been proven at the trial beyond reasonable doubt.[50] The appellant also submits that the Court erred in giving 'very significant weight' to the jury's verdict in its consideration of whether there was a substantial miscarriage of justice.[51]

20.3. In any event, the nature and effect of the error in the present appeal was such that it precluded the application of the proviso.[52]

Buss P's reasons for dismissal under the proviso

21. The appellant submits that the Court of Appeal erred in its approach to the 'negative proposition', with particular emphasis upon this Court's remarks in ***Weiss v The Queen***[53] (following on from the initial statement of the three fundamental propositions), that:[54]

> *The appellate court must make its own independent assessment of the evidence and determine whether, making due allowance for the "natural limitations" that exist in the case of an appellate court proceeding wholly or substantially on the record, the accused was proved beyond reasonable doubt to be guilty of the offence on which the jury returned its verdict of guilty.*

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[49] Appellant's Submissions [41].

[50] Appellant's Submissions [42].

[51] Appellant's Submissions [58].

[52] Appellant's submissions [59] – [64].

[53] ***Weiss v The Queen*** [2005] HCA 81; 224 CLR 300.

[54] ***Weiss*** [41] (footnotes omitted).

22. However, their Honours went on to qualify their remarks, noting:[55]

> *It is neither right nor useful to attempt to lay down absolute rules or singular tests that are to be applied by an appellate court where it examines the record for itself, beyond the three fundamental propositions mentioned earlier. (**The appellate court must itself decide whether a substantial miscarriage of justice has actually occurred**; the task is an objective task not materially different from other appellate tasks; the standard of proof is the criminal standard.) **It is not right to attempt to formulate other rules or tests in so far as they distract attention from the statutory test**. It is not useful to attempt that task because to do so would likely fail to take proper account of the very wide diversity of circumstances in which the proviso falls for consideration.*

23. The reiteration of the fundamental propositions reinforces the proper emphasis upon the statutory language: the appellate court's statutory task in applying the proviso is to decide whether a substantial miscarriage of justice has occurred.[56]

24. It is necessary to exercise caution in divining error in an appellate court's approach to the application of the proviso by reference to any rule or test other than the statutory task of deciding whether a substantial miscarriage of justice has occurred.

25. There is no foundation to the appellant's submission that the Court of Appeal failed to undertake its own independent assessment of the evidence (or alternatively failed to give adequate reasons). Buss P summarised the evidence in the trial, details of the State and defence cases, including detailed summaries of the closing addresses, across six full pages.[57] His Honour then comprehensively detailed the complainant's admitted or alleged lies[58] and the trial judge's directions.[59]

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[55] ***Weiss*** [42] (emphasis added).

[56] ***Weiss*** [35] (emphasis added).

[57] **CAB** 91 – 96, **CA** [10] – [35].

[58] **CAB** 99, **CA** [56] and **CAB** 118; **CA** [113] – [118].

[59] **CAB** 100 - 105, **CA** [57] – [65] and **CAB** 122; **CA** [132].

26. The trial was neither lengthy nor complex. It is of no significance that the Court of Appeal was not provided with a schedule of evidence by the State to assist them in their consideration of the applicability of the proviso.[60] The introduction of such schedules is a relatively recent practice; the function of appellate courts in making their own independent assessment of the trial record is not. In a relatively short and uncomplicated trial, it was of no consequence that there was no schedule of evidence before the Court.

27. Further, as to the 'natural limitations' argument, as Buss P also noted, and properly gave weight to, the jury had the advantage of having seen and heard the complainant (and other witnesses) give their evidence at the trial.[61] By giving significant weight to the jury's verdict in part by reference to their advantage in seeing and hearing the complainant give evidence, Buss P was in fact making due allowance for the natural limitations that exist where an appellate court proceeds on the trial record.

Nature and effect of the error and weight to be given to verdict of guilty

28. The appellant asserts that the Court of Appeal failed to conclude that, given the nature and effect of the erroneous direction, it was not possible for it to be satisfied that the appellant's guilt had been proven at the trial beyond reasonable doubt.[62] However, the appellant's argument in support of this submission reveals a fatal flaw. The appellant's submissions place undue reliance upon, and only on, the ***nature*** of the error whilst ignoring its ***effect***.

29. The appellant's submissions effectively invite this Court, when considering the application of the proviso, to treat the impugned direction (a single sentence) in isolation and out of context.

30. Whilst, as the appellant emphasises, Buss P characterised the nature of the error as impermissibly intruding on the function of the jury,[63] his Honour also found that the

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[60] Appellant's submissions [27].

[61] **CAB** 123, **CA** [135].

[62] Appellant's Submissions [42].

[63] **CAB** 120; **CA** [124], see also **CAB** 121 – 122; **CA** [131].

misdirection ***did not*** undermine or condition the other parts of the trial judge's summing up which, read as a whole,[64] required the jury to conduct 'a meticulous examination' of the complainant's evidence, including by reference to her lies (both alleged and admitted).[65]

31. The effect of the misdirection was neutralised by the balance of the trial judge's directions, not least the seven discrete parts relevant to the jury's assessment of the complainant's credibility.[66]

10 32. The jury were also instructed in accordance with ***Longman***.[67] It was in this context that Buss P properly concluded that the impugned part of the trial judge's charge, itself a single sentence, could have had 'no significance' in the jury's determination of the verdict of guilty on one count on the indictment.

33. In ***Baiada Poultry Pty Ltd v The Queen***,[68] French CJ, Gummow, Hayne and Crennan JJ stated that the appellate court, in assessing the significance to be given to the jury's verdict of guilty, must pay proper regard to the issues the jury were directed to decide in order to arrive at a verdict of guilty.[69] That is precisely what the Court of Appeal did in this case.[70]

20 34. The respondent submits that the present case is to be distinguished from ***Collins v The Queen***,[71] in which the central issue at trial was consent. The evidence at trial was such that proof of guilt was wholly dependent on the complainant's evidence. ***Collins*** is not authority for the proposition that the appellate court cannot accord ***any*** weight to a verdict of guilty where proof of guilt is wholly dependent on acceptance of the complainant and

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[64] **CAB** 122; **CA** [132].

[65] **CAB** 123, **CA** [134].

[66] **CAB** 122; **CA** [132].

[67] **CAB** 123, **CA** [135].

[68] ***Baiada Poultry Pty Ltd v The Queen*** [2012] HCA 14; (2012) 246 CLR 92.

[69] ***Baiada Poultry*** [28] (French CJ, Gummow, Hayne and Crennan JJ).

[70] **CAB** 123, **CA** [135].

[71] ***Collins v The Queen*** [2018] HCA 18.

the misdirection may have affected that acceptance; rather that the appellate court cannot accord the weight to the verdict '*which it otherwise might*'.[72]

35. In any event, in the present appeal, proof of guilt was ***not*** wholly dependent on acceptance of the complainant's evidence. Indeed, the evidence which substantially bolstered the complainant's credibility in respect of count 1 came from the appellant himself. The jury were entitled to accept the complainant's unchallenged evidence that, during the pretext call, she asked the appellant whether he remembered the first story he told her, lying on her brother's bed in the end bedroom (during count 1), a question to which he later replied via a Facebook message in which he wrote: "*OH. Sorry, [Complainant's name]. I forgot. Spontanious* [sic] *combustion*".[73]

36. The appellant's confirmation of this unique aspect of the complainant's evidence in relation to count 1 meant that the jury were not acting solely upon acceptance of the complainant's evidence in coming to their verdict of guilty for that count. This is to be contrasted with the acquittal on count 2, in respect of which proof *was* wholly dependent upon the complainant's evidence.

37. The evidence at trial also included, significantly, the evidence of KBR that he heard part of the complainant's phone conversation with the appellant, in which the appellant admitted that he 'did a lot of things' to the complainant, and had to stop himself because of the complainant's age.[74] The appellant's purported admission, if accepted by the jury, was entirely consistent with his repeated reference (in the Facebook messages) to prior sexual contact with the complainant.

38. The jury's verdicts were consistent with a conscientious and analytical jury believing the complainant to be truthful about the offending, but in the context of the complainant's contested credibility, being cautious in convicting only in respect of count 1, in respect of which there was evidence supporting at least one aspect of the complainant's evidence. As

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[72] ***Collins*** [36] (Kiefel CJ, Bell, Keane and Gordon JJ) [emphasis added].

[73] **AFM 325 – 326.**

[74] **AFM 488**.

Buss P observed,[75] the different verdicts returned by the jury indicated that they did understand and follow the trial judge's directions.

39. Considered in the full and proper context, there is no merit to the appellant's assertion that it was not open to the Court of Appeal to accord significant weight to the jury's verdict of guilty on count 1.

Did the nature and effect of the error preclude the application of the proviso?

10 40. The appellant further submits that the nature and effect of the error in the present appeal was such that it precluded the application of the proviso regardless of the Court's satisfaction beyond reasonable doubt that the evidence properly admitted at trial proved the appellant's guilt.[76]

41. In ***Weiss***, this Court cautioned that 'no single universally applicable description of what constitutes "no *substantial* miscarriage of justice" can be given'.[77]

42. It is well-established that there are cases in which it would be proper to allow an appeal even though the appellate court is satisfied that the appellant's guilt of the offence was
20 proved beyond reasonable doubt.[78] As Buss P observed:[79]

> *In **Weiss**, the High Court referred to a 'significant' denial of procedural fairness at trial as an example of a category of case where it would be proper to allow an appeal and order a new trial, even though the appellate court was satisfied beyond reasonable doubt of the accused's guilt [45]. The word 'significant' and other formulations by the High Court (for example: a 'serious' breach of the presuppositions of a criminal trial: **Weiss** [46]; such a departure from the essential requirements of the law that it goes to 'the root' of the proceedings:*

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[75] **CAB** 122, **CA** [133].

[76] Appellant's submissions [59] – [64].

[77] ***Weiss*** [44] (emphasis in the original).

[78] ***Weiss*** [45] – [46].

[79] **CAB** 112 – 113, **CA** [97].

> ***Wilde [v The Queen***[80]***]*** *(373); errors which are 'so fundamental' or involved 'such a departure' from the essential requirements of a fair trial:* ***AK*** *[23]; 'radical' error at trial:* ***AK*** *[54]; a 'grave' error by the trial judge:* ***CTM v The Queen*** *[129],*[81] *indicate that questions of degree are involved in determining whether, in the circumstances of a particular case, an appellate court considers that the nature of the error or miscarriage at trial precludes the court from being satisfied, in terms of the proviso, that no substantial miscarriage of justice has actually occurred, irrespective of the strength of the prosecution case or the appellate court's opinion as to the accused's guilt.*

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43. The thrust of the appellant's argument appears to be that where there has been an intrusion on the jury's function, in a case turning upon contested credibility, the application of the proviso is precluded. However, whilst some cases which turn upon issues of contested credibility *may* preclude the application of the proviso,[82] it is still the nature and effect of the error which is ultimately significant.[83] As Buss P remarked, questions of degree are involved in determining whether, in the circumstances of a particular case, an appellate court considers that the nature of the error or miscarriage precludes the application of the proviso irrespective of the appellate court being satisfied beyond reasonable doubt of the accused's guilt.[84]

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44. The case of ***Lane v The Queen***,[85] cited in aid by the appellant,[86] can be readily distinguished from the present appeal. In ***Lane***, the trial judge failed to direct the jury that it must be unanimous in its conclusion as to the act of the appellant which caused the death of the deceased. In the particular circumstances of the trial, in the absence of an unanimity direction, the basis of the verdict was necessarily uncertain as to the act or acts of the appellant on which it was founded. As the plurality found, the absence of the

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[80] ***Wilde v The Queen*** (1988) 164 CLR 265.

[81] ***CTM v The Queen*** [2008] HCA 25; (2008) 236 CLR 440.

[82] ***Kalbasi*** [15] citing ***Castle v The Queen*** (2016) 259 CLR 449.

[83] ***Kalbasi*** [15], ***Weiss*** [44], ***AK v The State of Western Australia*** [53]-[55].

[84] **CAB** 112 – 113, **CA** [97].

[85] ***Lane v The Queen*** [2018] HCA 28.

[86] Appellant's submissions [64]

necessary direction meant '*that it cannot be assumed that the jury discharged its function to reach a unanimous verdict as the tribunal of fact*'.[87]

45. It was in this context that the plurality observed that '*[a] misdirection that is apt to prevent the performance by the jury of its function, without more, will result in a substantial miscarriage of justice*',[88] an observation upon which the appellant relies as compelling the exclusion of the proviso in this appeal.[89]

46. The respondent submits that the nature and effect of the misdirection in the present case can not properly be characterised as having actually or potentially prevented the performance by the jury of its function. This was not a case in which it cannot be assumed that the jury discharged their function to reach a unanimous verdict (***Lane***), nor one involving an error as to the foundational platform of criminal responsibility (***Handlen and Paddison v R***).[90]

47. The present case can also be distinguished from ***Castle v The Queen***, in which evidence of an exculpatory statement by one appellant (in a joint trial) was wrongly left to the jury as evidence of admission. The remaining evidence in the trial was circumstantial; the jury's verdicts substantially turned upon its assessment of the credibility and reliability of two witnesses whose evidence could not stand together. In light of the nature and effect of the error and in the particular circumstances of ***Castle***, the natural limitations of proceeding on the record precluded a conclusion that guilt was proved beyond reasonable doubt.[91]

48. However, in the present case, the effect of the trial judge's directions, read as a whole,[92] is that the jury would have been in no doubt that the central issue for them to determine was the credibility and reliability of the complainant. The directions required the jury to

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[87] ***Lane*** [47] (Kiefel CJ, Bell, Keane and Edelman JJ).

[88] ***Lane*** [48] (Kiefel CJ, Bell, Keane and Edelman JJ).

[89] Appellant's submissions [64].

[90] ***Handlen and Paddison v R*** [2011] HCA 51; (2011) 245 CLR 282.

[91] ***Castle*** [65] and [68] (Kiefel CJ, Bell, Keane and Nettle JJ).

[92] **CAB** 122; **CA** [132].

meticulously examine the complainant's evidence, including by reference to her lies (both alleged and admitted).[93] Buss P found, correctly in the respondent's submission, that the misdirection did not undermine or condition the other parts of the trial judge's summing up.

49. It is also significant that the jury's verdict of guilty on count 1 did not depend solely on acceptance of the complainant, as outlined above at [35] to [38].

50. It cannot be said that the Court of Appeal applied the proviso as if there was a possibility that the jury had not performed its function, but the appeal could nonetheless be dismissed on the basis that the Court was satisfied of the appellant's guilt.

51. In the particular circumstances of this case, including the effect of the trial judge's directions when read as a whole and the fact that the jury's verdict of guilty on count 1 was not solely dependent on acceptance of the complainant's evidence, the misdirection as to the complainant's credibility did not prevent or interfere with the jury's performance of its function, and could not have done so, such as to preclude the proper application of the proviso.

PART VII – Estimate of length of oral argument

52. The respondent estimates it will require 1 hour for the presentation of the respondent's oral argument.

Dated: 10 January 2019

for **A. L. Forrester SC**
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[93] **CAB** 123, **CA** [134].